the doj&cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

The State Attorney
Die Staatsprokureur
iGqweta likaRhulumente

4th FLOOR / 4de VERDIEPING
22 Long Street
Langstraat 22
CAPE TOWN/KAAPSTAD
8001

Postal address/Posadres
Private Bag
Privaatsak X 9001
CAPE TOWN
KAAPSTAD
8000

Docex: 156

TEL: (021) 441- 9200 / 9228
FAX: (021) 421-9364
EMAIL: RNaidoo@justice.gov.za

OUR REF: 3488/23/P17 **YOUR REF: Case Number: CCT 144/23**

Wednesday, 26 July 2023

THE REGISTRAR
Constitutional Court
BRAAMFONTEIN

Email: generaloffice@concourt.org.za

Dear Stephen Cindi

INDEPENDENT CANDIDATES ASSOCIATION SOUTH AFRICA NPC / PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & FIVE OTHERS: CASE NUMBER: CCT 144/23

1. I refer to the Directions dated 11 July 2023 that were issued in respect of case number CCT 144/23 ("**the Directions**").

2. In terms of the Directions, the opposing parties who wish to file answering affidavits were required to do so by Tuesday, 25 July 2023.

3. I placed myself on record as the State Attorney, Cape Town on behalf of the Second and Third Respondents ("**Parliament**") and filed a notice of intention to oppose on 20th June 2023. This notwithstanding, I did not receive the Directions.

4. The first time that I became aware of the Directions was on the afternoon of 25 July 2023 when one of the Counsel on my team forwarded it to me. She had received it from Counsel for one of the other Respondents on the afternoon of 25 July 2023 who has also just received the Directions. Accordingly, the first time that Parliament and its legal team became aware of the Directions was on the afternoon of 25 July 2023.

5. In light of the aforegoing, Parliament was not in a position to file its answering affidavit Case number CCT144/23 by 25 July 2023.

6. Parliament does however intend filing answering affidavits in this matter. While its legal team is working hard on Parliament's answering affidavit, the issues raised in the application are complex and carry far reaching consequences. This, of necessity requires a reasonable time in which to file the answering affidavits.

7. Parliament therefore seeks an indulgence from this Court to file its answering affidavit by no later than **Tuesday, 8 August 2023** which will be accompanied by an application for condonation. This timeframe will afford Parliament no more time than this Court considered to have been reasonable in its Directions (i.e. two weeks).

Kind regards

Naido

MS. R. NAIDOO
for STATE ATTORNEY

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC (Registration Number: 2021/616521/08)	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITCAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

---

NOTICE OF INTENTION TO OPPOSE

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

BE PLEASED TO TAKE NOTICE THAT that the Second and Third Respondents hereby give notice of their intention to Oppose the Applicant's Application and has appointed the Office of the State Attorney, 4th Floor, Long Street, Cape Town at which they will accept service of all documents in these proceedings.

DATED AT CAPE TOWN ON THIS 9TH DAY OF JUNE 2023

STATE ATTORNEY

Per: Naidoo

R. NAIDOO

2nd & 3rd Respondents' Attorney

4th Floor

22 Long Street

Cape Town

(REF: Ramona Naidoo/23/P17)

TO: **THE REGISTRAR**

CONSTITUTIONAL COURT OF SOUTH AFRICA

1 Hospital Street

Constitutional Hill

BRAAMFONTEIN

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

AND TO: **STRAUSS DALY INCORPORATED**

Applicant's Attorneys

9th Floor, Strauss Daly Place

41 Richefond Circle

Ridgeside Office Park

UMHLANGA

Ref: IND119/0001/AK/DD/CP

Email: ddeeplal@straussdaly.co.za

Copy: cphillips@straussdaly.co.za

CARE OF: **STRAUSS DALY INCORPORATED**

Unit 801, 8th Floor

Illovo Point

68 Melville Road, Illovo

JOHANNESBURG

Ref: Dinesha Deeplal / Chad Phillips

Email: ahiralall@straussdaly.co.za

AND TO: **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

First Respondent

CARE OF: **OFFICE OF THE STATE ATTORNEY, PRETORIA**

316 Thabo Sehume Street

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

PRETORIA

Email: malebo@presidency.gov.za

Copy: presidentrsa@presidency.gov.za

vincentm@presidency.gov.za

AND TO: **MINISTER OF HOME AFFAIRS**

Fourth Respondent

CARE OF: **OFFICE OF THE STATE ATTORNEY, PRETORIA**

316 Thabo Sehume Street

PRETORIA

Email: mamokolo.sethosa@dha.gov.za

Copy: phuti.rammutla@dha.gov.za

Siyamthanda.skota@dha.gov.za

nadasen@dha.gov.za

AND TO: **INDEPENDENT ELECTORAL COMMISSION**

Fifth Respondent

Election House

Riverside Office Park

1303 Heuwel Avenue

Centurion

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

JOHANNESBURG

Email: kunenev@elections.org.za

Copy: rambaum@elections.org.za

AND TO: **ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY**

Sixth Respondent

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

Cedras Ilse

From: Cedras Ilse
Sent: Friday, 09 June 2023 15:37
To: 'ddeeplal@straussdaly.co.za'; 'cphillips@straussdaly.co.za'; 'ahiralall@straussdaly.co.za'; 'malebo@presidency.gov.za'; 'presidentrsa@presidency.gov.za'; 'vincentm@presidency.gov.za'; 'mamokolo.sethosa@dha.gov.za'; 'phuti.rammutla@dha.gov.za'; 'siyamthanda.skota@dha.gov.za'; 'nadasen@dha.gov.za'; 'kunenev@elections.org.za'; 'rambaum@elections.org.za'
Cc: Naidoo Ramona
Subject: INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPS // SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS - CASE NO: CCT 144/23
Attachments: INDEPENDENT CANDIDATE ASSOCIATION - Notice to Oppose (scnd).pdf

Tracking:

Recipient	Delivery
'ddeeplal@straussdaly.co.za'	
'cphillips@straussdaly.co.za'	
'ahiralall@straussdaly.co.za'	
'malebo@presidency.gov.za'	
'presidentrsa@presidency.gov.za'	
'vincentm@presidency.gov.za'	
'mamokolo.sethosa@dha.gov.za'	
'phuti.rammutla@dha.gov.za'	
'siyamthanda.skota@dha.gov.za'	
'nadasen@dha.gov.za'	
'kunenev@elections.org.za'	
'rambaum@elections.org.za'	
Naidoo Ramona	Delivered: 2023/06/09 15:37

Dear Sir/Madam

We refer to the abovementioned matter.

Please find herewith, by way of service, the Second & Third Respondents' Notice to Oppose

Kindly acknowledge receipt hereof.

Kind regards

Ilse Cedras
Obo Ms. R. Naidoo
Office of the State Attorney
021 – 441 9200

Cedras Ilse

From: Cedras Ilse
Sent: Tuesday, 20 June 2023 15:01
To: generaloffice@concourt.org.za
Cc: Naidoo Ramona
Subject: INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPS // SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS - CASE NO: CCT 144/23
Attachments: INDEPENDENT CANDIDATE ASSOCIATION - Notice to Oppose (scnd).pdf

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generaloffice@concourt.org.za	
Naidoo Ramona	Delivered: 2023/06/20 15:01

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Obo Ms. R. Naidoo
Office of the State Attorney
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To: 'ddeeplal@straussdaly.co.za' <ddeeplal@straussdaly.co.za>; 'cphillips@straussdaly.co.za' <cphillips@straussdaly.co.za>; 'ahiralall@straussdaly.co.za' <ahiralall@straussdaly.co.za>; 'malebo@presidency.gov.za' <malebo@presidency.gov.za>; 'presidentrsa@presidency.gov.za' <presidentrsa@presidency.gov.za>; 'vincentm@presidency.gov.za' <vincentm@presidency.gov.za>; 'mamokolo.sethosa@dha.gov.za' <mamokolo.sethosa@dha.gov.za>; 'phuti.rammutla@dha.gov.za' <phuti.rammutla@dha.gov.za>; 'siyamthanda.skota@dha.gov.za' <siyamthanda.skota@dha.gov.za>; 'nadasen@dha.gov.za' <nadasen@dha.gov.za>; 'kunenev@elections.org.za' <kunenev@elections.org.za>; 'rambaum@elections.org.za' <rambaum@elections.org.za>
Cc: Naidoo Ramona <RNaidoo@justice.gov.za>
Subject: INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPS // SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS - CASE NO: CCT 144/23

Dear Sir/Madam

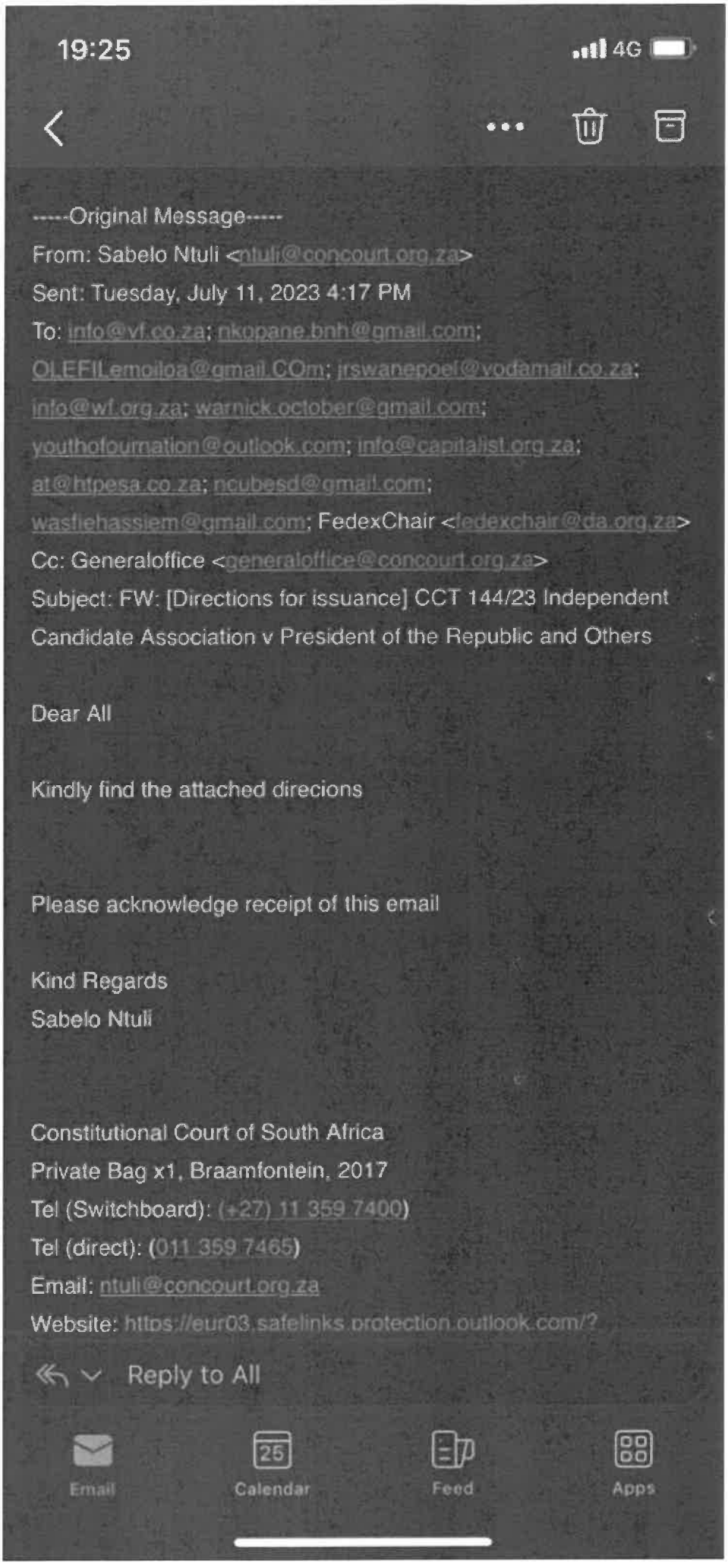
We refer to the abovementioned matter.

Please find herewith, by way of service, the Second & Third Respondents' Notice to Oppose

Kindly acknowledge receipt hereof.

Kind regards

Ilse Cedras


19:25
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-----Original Message-----
From: Sabelo Ntuli <ntuli@concourt.org.za>
Sent: Tuesday, July 11, 2023 4:17 PM
To: info@vf.co.za; nkopane.bnh@gmail.com;
OLEFILemoiloa@gmail.COm; jrswanepoel@vodamail.co.za;
info@wf.org.za; warnick.october@gmail.com;
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Cc: Generaloffice <generaloffice@concourt.org.za>
Subject: FW: [Directions for issuance] CCT 144/23 Independent
Candidate Association v President of the Republic and Others
Dear All
Kindly find the attached direcions
Please acknowledge receipt of this email
Kind Regards
Sabelo Ntuli
Constitutional Court of South Africa
Private Bag x1, Braamfontein, 2017
Tel (Switchboard): (+27) 11 359 7400)
Tel (direct): (011 359 7465)
Email: ntuli@concourt.org.za
Website: https://eur03.safelinks.protection.outlook.com/?
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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC (Registration Number: 2021/616521/08)	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITCAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

---

NOTICE OF INTENTION TO OPPOSE

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9226
Email: RNaidoo@justice.gov.za

BE PLEASED TO TAKE NOTICE THAT that the Second and Third Respondents hereby give notice of their intention to Oppose the Applicant's Application and has appointed the Office of the State Attorney, 4th Floor, Long Street, Cape Town at which they will accept service of all documents in these proceedings.

DATED AT CAPE TOWN ON THIS 9TH DAY OF JUNE 2023

STATE ATTORNEY

Per: Naidoo

R. NAIDOO

2nd & 3rd Respondents' Attorney

4th Floor

22 Long Street

Cape Town

(REF: Ramona Naidoo/23/P17)

TO: **THE REGISTRAR**

CONSTITUTIONAL COURT OF SOUTH AFRICA

1 Hospital Street

Constitutional Hill

BRAAMFONTEIN

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

AND TO: **STRAUSS DALY INCORPORATED**

Applicant's Attorneys

9th Floor, Strauss Daly Place

41 Richefond Circle

Ridgeside Office Park

UMHLANGA

Ref: IND119/0001/AK/DD/CP

Email: ddeeplal@straussdaly.co.za

Copy: cphillips@straussdaly.co.za

CARE OF: **STRAUSS DALY INCORPORATED**

Unit 801, 8th Floor

Illovo Point

68 Melville Road, Illovo

JOHANNESBURG

Ref: Dinesha Deeplal / Chad Phillips

Email: ahiralall@straussdaly.co.za

AND TO: **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

First Respondent

CARE OF: **OFFICE OF THE STATE ATTORNEY, PRETORIA**

316 Thabo Sehume Street

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

PRETORIA

Email: malebo@presidency.gov.za

Copy: presidentrsa@presidency.gov.za

vincentm@presidency.gov.za

AND TO: **MINISTER OF HOME AFFAIRS**

Fourth Respondent

CARE OF: **OFFICE OF THE STATE ATTORNEY, PRETORIA**

316 Thabo Sehume Street

PRETORIA

Email: mamokolo.sethosa@dha.gov.za

Copy: phuti.rammutla@dha.gov.za

Siyamthanda.skota@dha.gov.za

nadasen@dha.gov.za

AND TO: **INDEPENDENT ELECTORAL COMMISSION**

Fifth Respondent

Election House

Riverside Office Park

1303 Heuwel Avenue

Centurion

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

JOHANNESBURG

Email: kunenev@elections.org.za

Copy: rambaum@elections.org.za

AND TO: ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY

Sixth Respondent

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

---

ANSWERING AFFIDAVIT ON BEHALF OF SECOND AND THIRD RESPONDENTS

CONTENTS

MS WB

I, the undersigned,

MOSA STEVE CHABANE

do hereby make oath and state:

A. INTRODUCTION

1. I am an adult male and the elected Chairperson of the Portfolio Committee on Home Affairs, a committee of the National Assembly of the Parliament of the RSA. I am duly authorised to depose to this affidavit on behalf of the Second and Third Respondents ("**Parliament**").

2. The contents hereof are true and correct in every respect and fall within my personal knowledge, unless expressly stated to the contrary or is otherwise evident from the context hereof. Where I make submissions of a legal nature, I do so on the advice of Parliament's legal representatives.

3. The following persons will depose to confirmatory affidavits:

    3.1. The second respondent, the Speaker of the National Assembly ("**the Speaker**"), cited in her official capacity as the senior parliamentary official responsible for the business of the National Assembly.

    3.2. The third respondent, the Chairperson of the National Council of Provinces ("**NCOP Chair**"), cited in his official capacity as the senior parliamentary official responsible for the business of the National Council of Provinces ("**NCOP**").

MSC

4. This application follows from the judgment of this Court in **New Nation Movement NPC and Others v President of the Republic of South Africa and Others** (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020) ("**New Nation Movement**"). In **New Nation Movement**, this Court:

4.1. Found that insofar as the Electoral Act 73 of 1998 ("**the Electoral Act**") made it impossible for candidates to stand for political office without being members of a political party, it limited the section 19(3)(b) of the Constitution of the RSA, 1996 ("**the Constitution**").

4.2. Found that the State Respondents, on whom the onus rested, failed to proffer a justification for the limitation as envisaged in section 36(1) of the Constitution.

4.3. Ordered *inter alia* that the Electoral Act is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties. This Court limited the aforesaid declaration to being prospective with effect from the date of the Court Order and suspended its operation for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.

5. Attendant on the above Order, complex policy choices were made in respect of the amendments that would have to be adopted to give effect to independent candidates' right to contest elections. There were a range of measures that could have been adopted so as to give effect to this Court's Order in **New Nation Movement**.

MSC

WB

6. Ultimately, the amendments to the Electoral Act sought to balance a number of competing considerations, including adopting a system that resulted, in general, in proportional representation for the election of the National Assembly and provincial seats in accordance with sections 46(1)(d) and 105(1)(d) of the Constitution, while providing for independent candidates to be elected to the National Assembly. This process culminated in the amendments to the Electoral Act having been signed into law on 17 April 2023 by the first respondent ("**the President**") by way of Act No 1 of 2023.

7. At the heart of this application lies a challenge as to how Parliament sought to balance the competing considerations and give effect to this Court's Order in **New Nation Movement**. The Independent Candidate Association of South Africa ("**ICA**") argues that the State failed to meet the requisite constitutional threshold, while Parliament contends that it manifestly did so.

8. The ICA (by way of an application for direct access to this Court) challenges the constitutionality of Item 1 of Schedule 1A to the Electoral Act to the extent that it permits independent candidates to compete only for the 200 regional seats.

9. Parliament abides the outcome of the application for direct access to this Court. It does however oppose the merits of the application.

10. I state at the outset that the Independent Electoral Commission ("**the IEC**") provided technical analysis to assist Parliament in the amendment of the Electoral Act to accommodate independent candidates. This was done in accordance with the IEC's functions under section 5(1) of the Electoral Commission Act 51 of 1996. Although Parliament carefully considered every single one of the amendments, in so doing, it was guided by the technical expertise of the IEC.

MSC

WB

11. I also make clear that I do not respond on a paragraph by paragraph basis to the Report compiled by Mr Atkins (MJ1). I do however distill on a thematic basis, the broad issues in the Report of Mr Atkins that Parliament takes issue with. In short, Parliament does not agree with certain aspects of Mr Atkins' Report and more specifically the key conclusions that he reaches.

12. As a point of departure, there are significant differences between the position of independent candidates and political parties in contesting an election. These differences straddle both policy and law and include the following:

    12.1. First, irrespective of how many votes an independent candidate receives, such candidate is restricted to a maximum of a single seat. A political party, on the other hand, receives (broadly speaking) the number of seats that are commensurate with the number of votes obtained (in accordance with the quotas as applied).

    12.2. Second, when individuals choose to contest the elections as independent candidates (rather than forming a political party), they do so in the full knowledge that they can only be elected to a maximum of one seat. In voting for an independent candidate, a voter too accepts that an independent candidate may only be elected to a maximum of one seat. As a matter of fact and logic, nothing more is possible.

13. Notwithstanding the aforementioned fundamental differences between independent candidates on the one hand and political parties on the other and the complex balancing exercise that had to be performed, the ICA seeks to obtain full parity in outcome between independent candidates and political parties. This is not possible in light of the above-

mentioned differences and more particularly, the constitutional imperative that the electoral system must, in general, result in proportional representation for the election of the National Assembly.

14. As regards the framework for the number and allocation of seats in the National Assembly:

14.1. The seats in the National Assembly are as determined in terms of section 46 of the Constitution and Item 1 of Schedule 1A of the Electoral Act (as amended by Act 1 of 2023). Importantly, section 46 (1) of the Constitution provides that the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that: (a) is prescribed by national legislation; (b) is based on the national common voter's roll; (c) provides for a minimum voting age of 18 years; and (d) results, in general, in proportional representation. Section 46(2) of the Constitution provides that an Act of Parliament must provide a formula for determining the number of members of the National Assembly.

14.2. Half of the seats are filled by independent candidates and candidates from lists of parties contesting the nine regions and these are referred to as regional seats (Item 1, Schedule 1A). "Region" is defined in section 1 of the Electoral Act as the territorial area of a province.

14.3. Half of the seats are filled by candidates from lists of candidates of parties and these are referred to as compensatory seats (Item 1, Schedule 1A).

14.4. The IEC must determine a fixed number of seats reserved for each region for every election of the National Assembly, taking into account available scientifically based data in respect of voters and representations by interested parties (Item 4, Schedule 1A).

14.5. Regional seats are to be allocated in accordance with a formula prescribed in Schedule 1A (Item 5, Schedule 1A).

14.6. Compensatory seats are to be allocated in accordance with a formula prescribed in Schedule 1A (Item 6, Schedule 1A).

15. The ICA accepts (as it must) that: (a) there are 400 seats in total; and (b) that independent candidates are limited to the regional seats and may not compete for the compensatory seats.

16. But, according to the ICA:

16.1. The effect of Items 1(a) and 1(b) of Schedule 1A of the Electoral Act is that independent candidates compete only for 200 seats in the National Assembly as compared to political parties which compete for 400 seats in the National Assembly.

16.2. The result of the aforegoing is that it drastically increases the quota for independent candidates to gain seats as compared to the quota that would apply to parties.

MSC

WB

16.3. The consequence is that the 200/200 split is: (a) irrational and inconsistent with the Rule of Law; (b) violates section 3(2)(a), 9(1), 19(3) and section 46(1)(d) of the Constitution.

17. As will be explained more fully elsewhere in this affidavit: (a) the split between 200 regional and 200 compensatory seats; and (b) giving independent candidates the right to compete only in respect of the 200 regional seats, is a pre-eminently rational choice. In summary, this is so because it achieves the constitutional imperative of an electoral system that, in general, results in proportional representation. The following is of relevance in this regard:

17.1. First, proportional representation systems are subject to distortions, particularly when the participation of independent candidates is infused into the system. The system as adopted pursuant to the amendments, is, in large measure aimed at minimising the extent of the distortions.

17.2. Second, there is only one way by which independent candidates may be included in the current two tier compensatory system, *viz*, to allow them to obtain the seats they win and regard that as a component, with proportionality in respect of the remaining seats applying to the parties that gain representation. This will grant representation to independents and maintain inter-party proportionality.

17.3. Third, while it is correct that the amended electoral formula contains a predisposition towards political parties with larger vote shares, it is a predisposition that is inherited from the original electoral formula (as I am advised the IEC will explain), it must be emphasised that a key benefit of the

MSC

WB

200/200 seat allocation is the achievement of proportional representation between the represented political parties at a national level, without any risk of "overhang". As explained in the founding affidavit, "overhang" occurs when the application of the system results in a party being allocated too many regional seats and proportionality cannot be restored by way of the allocation of compensatory seats to other parties (FA, par 41.3). Should an overhang occur, it will not be possible to allocate political parties the seats that they are entitled to in the National Assembly. On the model proposed by Mr Atkins (350/50 split between regional and compensatory seats), there is a significant risk of overhang which threatens the system of proportional representation in a manner that is entirely avoidable – that is precisely what the 200/200 split in the seat allocation has sought to achieve. Indeed, even on the calculations done by Mr Atkins, he accepts that on a 200/200 split, there is no overhang.

18. The remainder of this affidavit is structured as follows:

18.1. In Part B, I locate Parliament's obligations in the context of the **New Nation Movement** judgment.

18.2. In Part C, I provide an overview of the process that was followed consequent on this Court's Order in the **New Nation Movement**.

18.3. In Part D, I explain the scheme of the Electoral Act as adopted in respect of the 200 split.

18.4. In Part E, I explain the reasons for giving independent candidates the right to compete only in respect of the 200 regional seats.

MSC

WB

18.5. In Part F, I address the question of remedy.

18.6. In Part G, I answer seriatim to the founding affidavit.

18.7. In Part H, I address the issue of condonation.

B. THE NEW NATION MOVEMENT JUDGMENT

19. Having identified the deficiencies in the Electoral Act, the judgment in **New Nation Movement** showed a clear appreciation for the complexity of the task of remedying the Electoral Act.

20. This Court found that *"[t]he pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system. This Court's concern is whether the chosen system is compliant with the Constitution."*[1]

21. I am advised that there are several important principles that flow from this Court's decision in **New Nation Movement**:

21.1. First, this Court acknowledged that remedying the unconstitutionality identified in its judgment and choosing an electoral system involves complex policy choices. This Court thus found that weighing up of the pros and cons and the details of the electoral system to be adopted would be best left to Parliament. These factors, I respectfully say, call for deference to be shown to Parliament in this regard.

---

[1] **New Nation Movement** at par 15.

MSC

21.2. Second, it is clear from the judgment that the outcome of the amendments had to respond to the following:

21.2.1. make it possible for every adult citizen who so desires *"to stand for public office and, if elected, to hold office"*[2] and not only as members of political parties (section 19(3)(b) of the Constitution);

21.2.2. result, in general, in proportional representation for the election of the National Assembly and provincial seats in accordance with sections 46(1)(d) and 105(1)(d) of the Constitution.

21.3. Third, this Court also recognised that proportional representation may come in different forms and is possible where there is a combination of representation – independent candidates as well as candidates drawn from party lists of political parties.[3]

22. It is clear from the aforegoing that in **New Nation Movement**, this Court did not prescribe the means and mechanisms by which Parliament should address the identified unconstitutionality in the Electoral Act. Indeed, the objective of the remedy was to ensure that adult citizens may be elected to the National Assembly and Provincial Legislatures not only through their membership of political parties but, also as independent candidates. This outcome has been achieved by the amendments to the Electoral Act.

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2 Constitution section 19(3)(b).

3 **New Nation Movement** para 79.

MSC

108

23. The ICA however argues that the amendment in respect of the election of independent candidates is neither rational nor constitutionally compliant.

C. THE PROCESS FOLLOWED IN AMENDING THE ELECTORAL ACT

24. The purpose of this section of my affidavit is three-fold, *viz*: (a) to demonstrate the extremely thorough and expansive process pursuant to which the amendments to the Electoral Act were adopted; (b) to demonstrate the complexity and breadth of the issues that emerged in the course of the amendment process; and (c) to explain the considerations that Parliament had regard to.

25. On 25 June 2020, soon after the **New Nation Movement** judgment was handed down, the Portfolio Committee on Home Affairs ("**the Portfolio Committee**") held a meeting to discuss the consequences of the judgment.[4] The Minister of Home Affairs ("**the Minister**") and the IEC were invited to attend this meeting.

26. At this meeting:

26.1. The Minister briefed the Portfolio Committee.

26.2. The IEC made a presentation on the meaning and impact of the judgment, as well as the high-level operational implications that the changes would have on the IEC's preparation for the 2024 national and provincial elections.

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[4] The Parliamentary Monitoring Group ('PMG') summary of the meeting, along with any presentations made, is available at: https://pmg.org.za/committee-meeting/30545/.

MSC

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27. On 18 August 2020, a joint meeting of the Portfolio Committee and the NCOP Select Committee on Justice and Security ("**the Select Committee**") took place.

28. On 1 March 2021, the Minister informed the Chairperson of the Portfolio Committee that Cabinet had established the Ministerial Advisory Committee ("**the MAC**") to investigate and report on electoral reform. The MAC was chaired by Mr Valli Moosa and consisted of seven other members with skill and expertise in a range of areas, including electoral systems and the law.

29. On 16 March 2021, the Portfolio Committee and the Select Committee convened a Joint Electoral Reform Workshop which was attended by the Minister and Deputy Minister of Home Affairs, as well as the Chair of the MAC. Submissions were received from various stakeholders and experts on electoral matters and issues were debated by the political parties represented in Parliament.

30. The MAC provided its report to the Minister on 9 June 2021, a copy of which is attached as "**PA1**" ("**the MAC Report**").

31. The MAC Report set out the following two options for electoral reform which would permit independent candidates to run for national and provincial elections:

    31.1. *"Option 1: The slightly modified multi-member constituency (MMC) which accommodates independents but requires relatively minimal changes to the legislation. This option favours inserting independents into the existing electoral system, enabling independents to compete with political parties for votes.*

MSC

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31.2. *Option 2: The mixed-member model incorporating single-member constituencies: This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system resembling the current local government electoral system, albeit with some improvements. This option involves electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency."*[5]

32. After considering these options, the Minister determined that Option 1 ("**the minimalist option**") was most appropriate. According to the MAC Report:

32.1. This option advocates for the retention of the electoral system while accommodating the inclusion of independent candidates (printed page 18, par 5.1.1).

32.2. It seeks to achieve the above outcomes in the simplest possible way while ensuring fairness to independent candidates (printed page 18, par 5.1.1).

32.3. Under this option, the current composition of seats in the National Assembly and provincial legislatures would remain unchanged. The National Assembly would comprise 200 regional seats and 200 compensatory seats. The 200 regional members (through political parties and/or independent candidates) are elected in the nine regions (printed page 19, par 5.1.2).

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[5] Minister of Home Affairs letter to the Speaker of the National Assembly (29 Nov 2021) para 5. Available at: https://pmg.org.za/committee-meeting/34026/.

MSC

13

32.4. The votes cast for parties in each region determines the allocation of seats per party on a proportional basis. In essence, each region constitutes a separate election and votes cast in one region cannot be considered in any other region. As turnout varies in the different regions, the quota for determining the results in each region would also vary, resulting in a deviation from overall proportionality when the results of all nine regions are combined. In the 2019 election, this deviation came to 3.4% (printed page 19, par 5.1.2).

32.5. The 200 compensatory seats serve to restore overall proportionality where the votes for parties in the nine regions are added together to determine the share of each party in the overall vote. This ensures the constitutional requirement for proportionality in general (printed page 19, par 5.1.2).

32.6. The allocation of seats for the independent candidates would be similar to allocating seats in municipal elections. In addition, the allocation of seats after the proportional allocation would no longer be based on the largest remainder but would be based on the highest average number of votes per seat already awarded – this was considered to be the fairest for independent candidates. Using the largest remainder would result in inequities when some smaller parties are elected to the National Assembly and provincial legislatures with far fewer votes than the larger parties. This goes against the principle that there should be one person, one vote, one value (printed page 20, par 5.1.2).

32.7. This option does not envisage many changes to what obtains regarding the proportionality of the current electoral system. It suggests that independent candidates would be elected if they meet the quota, and once they have secured

MSC

WB

their seat, their votes would be discarded for the determination of a new quota for the determination of representation by other parties with PR lists (printed page 20, par 5.1.3).

33. One of the consequences of the policy choice to adopt the minimalist option was that the 400 seats in the National Assembly would continue to be divided into two: 200 from the nine provinces (regional seats) and 200 compensatory seats.

34. A team of four independent counsel were briefed to prepare an initial draft of the Amendment Bill and to advise on the constitutional implications of the Amendment Bill. The legal team provided the Minister with a draft of the Amendment Bill and prepared a memorandum that simplified the Bill.

35. On 23 November 2021, the Director-General of Home Affairs advised Parliament's Legal Services that a Draft Electoral Amendment Bill had been drafted by its teams of Advocates and that it would be presented to Cabinet on 24 November 2021 and that, if approved, there would be further consultations before the Bill was introduced in Parliament.

36. A Cabinet meeting was held on 24 November 2021, during which Cabinet approved the following documents for submission to Parliament for further processing and public consultations: (a) the MAC Report; (b) a memorandum on the draft Electoral Bill prepared by Counsel; and (c) the draft Electoral Amendment Bill. I attach the briefing letter from the Minister to the Speaker (*sans* annexures) dated 29 November 2021 as "**PA2**".

MSC

WB

37. A copy of the memorandum from Counsel dated 25 November 2021 is attached as "**PA3**" ("**the November 2021 memorandum**") and a copy of the draft Electoral Bill is attached as "**PA4**". Both these documents were attached to the Minister's briefing letter dated 29 November 2021.

38. According to the November 2021 memorandum:

38.1. The Minister had instructed Counsel to draft an Electoral Amendment Bill to give effect to the minimalist option as set out in the MAC Report (par 5).

38.2. Sections 46(1)(d) and 105(1)(d) of the Constitution require the adoption of an electoral system (as prescribed by national legislation) that "*results, in general, in proportional representation*" for the election of the National Assembly and provincial legislatures (par 9).

38.3. Counsel's understanding of the **New Nation Movement** judgment is that the Constitution requires the electoral system to balance various objectives, which include: the need to have a system which generally results in proportionality; while also making provision for adult citizens to stand as independent candidates, and not as members of political parties (par 10).

38.4. The Constitutional Court did not specify how the electoral system must achieve these objectives and requirements, but the majority judgment emphasised that those decisions are left to Parliament (par 11).

38.5. The Constitutional Court nonetheless expressly recognised that proportional representation is possible where there is a combination of representation

MSC

through party lists and representation by individuals who are not attached to political parties (par 12).

38.6. While the details of the electoral system are left to Parliament (subject to what this Court found), any electoral system must satisfy a minimal threshold of constitutional rationality, which requires a rational connection between a scheme adopted by Parliament and the achievement of a legitimate government purpose (par 13).

38.7. The minimalist option (as described in the MAC Report) intends retaining the current composition of seats in the National Assembly and provincial legislatures, while making provision for independent candidates to contest the elections for those bodies (par 16).

38.8. The 400 seats in the National Assembly will continue to be divided in two: (a) 200 seats will be elected from the nine provinces or regions (the 200 regional seats); and (b) 200 compensatory seats.

38.9. In respect of the 200 regional seats:

38.9.1. These seats will be allocated across the nine provinces / regions on a proportional basis taking into account the number of registered voters for each province / region (par 18.1).

38.9.2. These seats will be contested by parties (through closed lists) and independent candidates (par 18.2).

MSC

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38.9.3. Each independent candidate will only be entitled to contest seats in one province / region (par 18.3).

38.9.4. Because there will be different independent candidates running in each province / region, there will be different ballot papers for each province/region (par 18.4).

38.9.5. If an independent candidate meets the relevant quota for a seat, they will be elected to the National Assembly. Once an independent candidate has secured a seat, any additional votes that they receive will be discarded and a new quota will be used to determine the proportional representation of the political parties, and the allocation of seats to them (par 18.5).

38.10. In respect of the 200 compensatory seats:

38.10.1. The votes for only the parties in the nine regions (from the same ballots used for the 200 regional seats) will be added together to determine the share of each party in an overall vote (par 19.1).

38.10.2. Parties will be allocated seats in accordance with their proportional share of the overall vote (par 19.2).

38.10.3. Independent candidates will not get to contest the 200 compensatory seats (par 19.3).

39. On 7 December 2021, the Minister advised the Portfolio Committee that the MAC had developed two models for an electoral system that allowed citizens to stand for political

MSC

WB

office independently of political parties. The Minister further advised that the MAC explored a variety of options and heard from a range of public stakeholders in the course of its deliberations, but ultimately it was not able to reach consensus on the electoral system to be chosen. The MAC had however narrowed down the choices to two options, formulated as a Minority and Majority Report:

39.1. The Minority Report proposed a slightly modified multi-member constituency which would accommodate independents, but which required relatively minimal changes to the electoral system. It did so by inserting independents into the existing electoral system and enabling them to compete with political parties for votes;

39.2. The Majority Report proposed introducing single-member constituencies, with proportionality secured via party lists. In this case independents would stand as individuals in constituencies and compete together with associates for the party-list votes.

40. In the same correspondence, the Minister advised the Portfolio Committee that the Executive favoured the system proposed in the Minority Report and that a Bill would be introduced in accordance with this view. The Minister also presented a memorandum drawn up by the drafters of the Bill.

41. On 31 December 2021, a Notice of Intention to Introduce was published in Government Gazette No 45716 of 31 December 2021, and the formal parliamentary process began.

42. On 10 January 2022 the Electoral Amendment Bill (B1-2022) was introduced in Parliament.

MSC

WB

43. On 8 February 2022, the Minister advised the Portfolio Committee that the Bill could not be introduced until the Office of the Chief State Law Advisor certified that the Bill was constitutionally compliant and could be introduced in the National Assembly. The Minister confirmed that once this was done, the Bill was published in the Government Gazette on 31 December 2021 and thereafter introduced in the National Assembly on 10 January 2022. The Minister made a detailed presentation on the Bill as introduced.

44. On 1 and 2 March 2022, the Portfolio Committee heard oral submissions from 20 civil organisations and individuals. This was followed by extensive public hearings across the country from 9 to 23 March 2022. The Portfolio Committee split up into two groups to ensure maximum reach for public consultation.

45. In a Submission made by the IEC to the Portfolio Committee (attached as "**PA5**"):

    45.1. The IEC explained that none of the proportional representation systems actually achieve complete proportionality. The list system of PR incorporates its own distortions to proportionality. In the existing legislative scheme, our PR system uses subnational constituencies, or regions, which do not create a perfect reflection of overall proportionality because of the inevitable distorting effects of all electoral formulae (par 14).

    45.2. The IEC recommended the simplification of the three round allocation system by adopting a single round allocation using a Droop quota and a highest remainder method. It was of the view that by simply including independents in the current calculation of regional seats, more proportional results would be produced, with smaller parties (and independent candidates) standing a better chance of gaining seats. A Droop quota moderates the potential bias in favour

MSC

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of smaller parties resulting from the largest remainder system by providing for a lower quota (as opposed to the Hare system). In addition, independent candidates would benefit from highest remainder allocations, which in the (then) current Bill would not be the case (par 16).

45.3. The following explanation was given as regards the Commission's proposal:

45.3.1. A quota of votes per seat must be determined in respect of each region by dividing the total number of votes cast in a region by the number of seats, plus one, reserved for such region (par 17.1).

45.3.2. The result plus one, disregarding fractions, is the quota of votes per seat in respect of a particular region (par 17.2).

45.3.3. The number of seats to be awarded in respect of such region to a party or independent candidate is determined by dividing the total number of votes cast in favour of such party or candidate in a region by the quota of votes per seat for that region. Each independent candidate who meets the quota is allocated a seat and does not take any further part in the allocation process (par 17.3).

45.3.4. Where the result of the calculation yields a surplus of seats not absorbed by the number awarded to a party or independent candidate, these seats are allocated to parties and independent candidates who have not already been allocated seats on the basis of the largest remaining votes in descending order (par 17.4).

MSC

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45.4. The IEC suggested that the (then) current scheme of the Bill using 400 seats is adapted so that the national quota is determined by dividing the total valid party votes by 400 plus 1 minus independent seats allocated. The result, plus 1, disregarding fractions is the national proportional quota (par 24.1).

46. I attach as "**PA6**" a summary of the report on the public hearings from the Portfolio Committee (including the response by the Minister). As is apparent from pages 8 to 12 of this document:

46.1. That there were two conflicting views expressed as to the allocation of seats in the National Assembly and Provincial Legislatures between independent candidates and political parties, *viz*: (a) support for the 50/50 allocation of seats in the provincial and national legislatures which, it was contended, is the most suitable given that it allows for a continuation of the system of proportional representation; (b) a rejection of the 50/50 allocation of seats because it is biased towards political parties. According to the latter view, all 400 seats in the National Assembly should be equally contested by both independent candidates and candidates of political parties and there should be no reservations of seats for contestation by political parties only (pages 8 and 9).

46.2. The concern was that the Bill proposed 9 regions which would require 82 000 or 5.5% of votes for each independent candidate seat compared to 40 000 in the last elections and that this was unfair when small political parties could get a seat with less than 1% of the vote. An alternative proposal for the calculations of regional seats was also proposed (pages 10 and 11).

46.3. The response from the Minister of Home Affairs was that there could be no complaint of prejudice or unfairness by independent candidates or voters for the following reasons: (a) independent candidates are not political parties given that a single candidate cannot hold more than one seat – there is accordingly no practical system which would avoid "*wasted votes*"; (b) an independent candidate chooses to run as an independent candidate rather than forming his or her own political party – in so doing, he/she accepts that he/she can only be elected to a maximum of one seat; (c) a voter voting for an independent candidate chooses to vote for the independent candidate rather than a political party and in so doing, accepts, that that candidate can only be elected to a maximum of one seat. The Minister also reasoned that 200 of the 400 seats in the National Assembly are elected from the nine provinces or regions and that the remaining 200 compensatory seats are designed to achieve proportional representation which must be achieved in accordance with section 46(1)(d) of the Constitution.

47. On 26 April 2022, Parliament applied to this Court for a six-month extension of the deadline for the finalisation of the amendment of the Electoral Act. The extension was granted on 10 June 2022, shifting the deadline to 10 December 2022.

48. On 12 May 2022, a further opinion was obtained from Counsel in respect of the Parliamentary questions that were raised ("**the May 2022 memorandum**"). The May 2022 memorandum did not address the issues that are the subject of this application. I accordingly do not address its content.

MSC

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49. Between 10 June and 20 October 2022, the Portfolio Committee discussed and considered various aspects of the Bill. This was done during 16 meetings held at least once a week (and in some instances more). In these meetings, the Portfolio Committee received input and advice from various stakeholders and parties, including the Minister and his Department, the IEC and the various legal advisors and Counsel.

50. On 8 July 2022, Counsel provided a further opinion to the Minister in response to the public comments received on the Electoral Amendment Bill [B1-2022] and questions raised by the Portfolio Committee ("**the July 2022 memorandum**"), a copy of which I attach as "**PA7**". According to the July 2022 memorandum:

50.1. The Bill had proposed a three stage system to allocate seats. However, a primary concern raised was that independent candidates, under the three-stage system would have to obtain a higher quota of votes in order to obtain a seat than political parties would (par 15).

50.2. Counsel had been alive to this problem and had therefore proposed a three round system, in terms of which independent candidates would have two rounds to obtain a seat (par 17).

50.3. Another criticism raised against the three round system was its complexity (at three levels, *viz*, voters understanding the system, persons who were contesting the elections and the implementation of such a system by the IEC) (par 18).

50.4. Having considered the public comments and possible alternatives, Counsel expressed the view that there is a more straightforward allocation system that

MSC

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could be used that did not result in political parties obtaining seats with a lower quota than all independent candidates (par 19).

50.5. The suggested alternative was proposed by the IEC which Counsel had embraced and developed (par 20). According to the alternative system, instead of having separate rounds for allocating seats to independent candidates and political parties, the system currently used in Schedule 1A of the Electoral Act would be retained, save that that independent candidates would be inserted into the system (par 22).

50.6. The droop formula would be used (as was previously the case), to determine the quota for seats. For both political parties and independent candidates, regional seats in the National Assembly or seats in the provincial legislatures would be allocated by dividing the total number of votes for the party or candidate by the quota as the Schedule 1A of the Act provided (par 23).

50.7. The following two main advantages of the alternative system were identified (par 26):

50.7.1. It is far simpler and more straightforward than the three stage allocation system.

50.7.2. Political parties and independent candidates would compete on a level playing field in that: (a) in order to obtain seats, they need to receive votes to satisfy the same quota; and (b) where an independent candidate receives votes which exceed the multiple quota and therefore forfeits those seats, all parties and independent

MSC

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candidates will be entitled to contest those forfeited seats with a reduced quota.

50.8. Criticisms were levelled against the Bill insofar as a vote for a political party for the National Assembly is counted twice, once for the regional seats and once for the compensatory seats; whereas a vote for an independent candidate is counted only once for the regional seats (par 37).

50.9. A similar approach to that followed in local government elections should be adopted whereby there are two ballots for the National Assembly: (a) a regional ballot for each region on which all political parties and independent candidates contesting the region will appear; and (b) a compensatory ballot on which only political parties will appear (par 39).

50.10. The advantages of a two ballot system are:

50.10.1. That voters will vote twice: once for regional seats and once for compensatory seats. In this way, voters will not be forced to choose between a false dichotomy between a political party and an independent candidate, but may for example vote for an independent candidate for their region and for a political party for the compensatory seats (par 40 and 41).

50.10.2. It will aid in satisfying the requirement in section 46(1)(d) of the Constitution of adopting a system which "*results, in general, in proportional representation*" (par 42).

MSC

50.10.3. It strikes a balance between permitting independent candidates to contest the election, while at the same time ensuring proportionality (par 48).

50.11. In response to the Bill's division of the number of seats in the National Assembly equally between regional and compensatory seats, various comments were submitted that it may be more appropriate for the compensatory seats to represent a smaller proportion of the total number, leaving the remaining seats as regional seats for independent candidates and parties to contest (par 84 and 85). According to Counsel, this was ultimately a policy decision and the Bill follows the proposal in the minimalist option presented by the MAC (par 86).

51. A further memorandum from the Department's Counsel dated 21 July 2022 ("**the 21 July 2022 memorandum**") was obtained in order to address the signature eligibility requirement and allowing independent candidates to contest more than one region. Given that it is of no relevance to the subject matter of the current challenge, I do not address the 21 July 2022 memorandum.

52. A further opinion was obtained from Counsel dated 26 September 2022 ("**the September 2022 memorandum**"). Given that it is also of no relevance to the subject matter of the current challenge, I do not address the September 2022 memorandum.

53. The Bill was passed by the National Assembly on 20 October 2022 and referred to the NCOP for its consideration.

54. On receiving the Bill as passed by the National Assembly, the Select Committee called for written submissions from the public. The Select Committee deliberated on the Bill,

MSC

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received input from the Minister, the Department, the IEC and the various legal advisors of the Department and Parliament during the course of eight meetings held between 2 November 2022 and 25 November 2022.

55. Pursuant to the public engagement process, in late November 2022, the Select Committee proposed various amendments to the Electoral Bill. This resulted in the Bill having to be referred back to the National Assembly in terms of standard parliamentary processes and resulted in further public consultation on the proposed amendments by the Portfolio Committee.

56. On 13 November 2022, a further opinion was provided by Counsel in response to the public comments received from the Select Committee ("**the November 2022 memorandum**"), attached as "**PA8**". According to the November 2022 memorandum:

56.1. Reserving half of the seats in the National Assembly for political parties – for the purposes of achieving overall proportionality in general – is not unfair and will likely be found to be constitutionally permissible (par 5).

56.2. This is so because:

56.2.1. Section 157(2) and (3) of the Constitution expressly contemplate an electoral system at local government level that balances participation of independent candidates and proportional party representation in similar fashion (par 6).

56.2.2. In **New Nation Movement**, Justice Madlanga recognised that proportional representation is quite possible where there is a

combination of representation through party lists and representation by individuals who need not be attached to political parties (par 7).

56.2.3. Thus, the Constitution recognises that a mixed system - of political party – and independent candidate – representation – can still satisfy the requirements that an electoral system must generally result in proportional representation (par 8).

56.2.4. Independent candidates by their nature have the potential to skew proportionality in the system (as they can only ever obtain a single seat no matter how large or small their proportional support is amongst the voters). It is therefore entirely appropriate for the system to take measures to ensure proportionality can be achieved. Political parties are the prime bodies through which proportionality is achieved in any electoral system. The Constitution recognises the role of political parties in our political and electoral system (par 15).

56.2.5. The exact proportion of how many seats should be used to achieve overall proportionality (the compensatory seats), and how many should be available to be contested by independent candidates and political parties (the regional seats) is something that is pre-eminently what Parliament must decide. While extreme skewing may be found to be irrational, reserving half the seats as compensatory seats is rational (par 16).

57. In the Summary of the Portfolio Committee Report on the Public Hearings (which included a response from the Minister) (made in response to legal issues raised in submissions made to the NCOP) (attached as "**PA9**"):

57.1. Submissions were made that: (a) by giving parties an additional 200 seats, they are afforded an advantage over independent candidates; (b) the quota to obtain seats for parties uses the full 400 seats in the National Assembly whereas the quota for independent candidates uses only 200 regional seats; (c) proposes 300 regional seats and 100 compensatory seats (Slide 15).

57.2. The response given to the submission may be summarised as follows: (a) the purpose behind the compensatory seat allocation system is to correct disproportionality in representation in the results of an election; (b) section 46(1) of the Constitution (without providing a detailed mechanism) provides that the electoral system must result in general proportional representation; (c) it is practically difficult to provide for proportional representation with independent candidates holding one seat even though they may receive more votes than a party; (d) allowing independent candidates to contest compensatory proportional representation seats would distort the proportional representation requirement and also run the risk of National Assembly seats being unfilled; and (e) the Department had received a detailed opinion from Counsel who had indicated that reserving half the seats as compensatory seats is constitutionally permissible and rational (slide 16).

58. The NCOP amended and passed the Bill on 29 November 2022, returning it to the National Assembly for concurrence of the Select Committee on the proposed additional amendments.

59. In December 2022, Parliament instituted a further urgent application to this Court requesting a further extension to finalise the Bill. The extension was granted on 23 January 2023, shifting the deadline to 28 February 2023.

60. On 1 February 2023 Counsel provided a further opinion in response to further public comments received by the Portfolio Committee in response to the Bill as amended by the NCOP ("**the February 2023 memorandum**"). Given that the February 2023 memorandum does not address issues that are germane to this application I do not engage with it further.

61. On 10 February 2023, the Portfolio Committee adopted the Electoral Amendment Bill and recommended that the Bill be passed by the National Assembly.

62. On 23 February 2023, the National Assembly passed the Bill and referred it to the President for assent.

63. The President signed the Bill into law as Act 1 of 2023 on 13 April 2023. It was published in Government Gazette No 48465 on 17 April 2023, with a commencement date of 19 June 2023.

D. THE SCHEME OF THE ELECTORAL ACT IN RESPECT OF THE ELECTION OF THE NATIONAL ASSEMBLY REPRESENTATIVES

64. There are 400 seats in the National Assembly.

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65. According to Schedule 1A to the Electoral Act, the seats in the National Assembly will be divided in equal halves: the first 200 seats are referred to as regional seats and the other half as compensatory seats. Schedule 1A reads as follows:

> *"1. The seats in the National Assembly are as determined in terms of section 46 of the Constitution and item 1 of Schedule 3 and are allocated as follows:*
>
> *(a) Half the seats are filled by independent candidates and candidates from the lists of candidates from parties contesting the nine regions and these shall be referred to as the regional seats; and*
>
> *(b) Half the seats are filled by candidates from lists of candidates of parties and shall be referred to as compensatory seats.*

66. The election of the National Assembly representatives is divided into nine "Regions". Regional boundaries coincide with provincial boundaries:

66.1. A voter will receive a ballot paper specific to his or her region and on that ballot paper will be a mixture of independent candidates and political parties.

66.2. A voter can either vote for an independent candidate or a political party on the regional seat ballot.

66.3. All votes cast in each region will first be used to determine the allocation of Regional seats to both independent candidates and political parties. If an independent candidate meets the relevant quota for a seat, they will be elected to the National Assembly. However, once allocated a seat, all additional votes received by the independent candidate will be discarded and a new quota will be used to determine the proportional representation of political parties

MSC

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discarding the votes for that candidate and the seat they obtained.[6] The discarding of the additional votes for the independent candidate is inevitable because an independent candidate is one member and cannot be allocated more than one seat therefore a recalculation would be required.

67. Schedule 1(b) makes provision for compensatory seats:

67.1. In a mixed-member proportional system, compensatory seat allocation is where seats are allocated in two sets: (a) the first is where seats are allocated using plurality of majoritarian methods; (b) the remaining seats are allocated based on proportional allocation. The purpose behind the compensatory seat allocation system is to correct disproportionality in representation in the results of an election.

67.2. Section 46(1) of the Constitution does not prescribe how the electoral system of South Africa must be constructed to achieve, in general, proportional representation.

67.3. Proportional representation systems are, in general, subject to distortions with the introduction of independent candidates.

67.4. The only way to include independents in a two-tier compensatory system is to allow them to retain the seats they win and then obtain proportionality only regarding the remaining seats applying to the parties that gain representation.

[6] Schedule 1A item 7(b).

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67.5. This grants representation to independents and maintains inter-party proportionality.

67.6. Thus, in terms of the Electoral Act, the compensatory seats are reserved for political parties only. Once an independent candidate has secured their seat, their votes are discarded for determination of a new quota for representation by other parties on the proportional representation list.

67.7. The compensatory seats comprise the second tier of seat allocation – the top-up from the lists of candidates of political parties. It is required in order to meet the constitutional requirement of proportionality.

68. Thus, the Electoral Act contemplates that in voting for representation in the National Assembly, a voter will vote twice, once for regional seats and once for a political party for the compensatory seat. As the IEC has explained, the second ballot does not elect compensatory representatives directly. It serves the purpose of determining, together with the outcomes of the first ballot, the overall support of political parties fairly. This ensures that the allocation of compensatory representatives can be proportional to a greater extent than a one-ballot system would permit.

69. The result of the above scheme is that:

69.1. Members of the public have a right to vote for political parties or independent candidates in the National Assembly.

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69.2. Independent candidates have a right (based on the number of votes received) to serve on the National Assembly on the basis of being independent candidates and *sans* party affiliation.

E. THE REASONS FOR GIVING INDEPENDENT CANDIDATES THE RIGHT TO COMPETE ONLY IN RESPECT OF THE 200 REGIONAL SEATS

70. I respectfully say that Item 1 of Schedule 1A is eminently reasonable, rational and constitutionally compliant when regard is had to the following:

70.1. First, independent candidates may only obtain a single seat (provided they meet the quota), irrespective of how many votes they receive. This is a crucial point that Mr Atkins fails to have regard to. It follows that votes received that are in excess of the requisite quota are to be dealt with. Unless properly managed, this has the potential to result in an electoral system that does not, in general, result in proportional representation, thereby yielding a result that is inconsistent with section 46(1)(d) of the Constitution. It follows from this that it is with good reason that independent candidates may compete only for the 200 regional seats in the National Assembly. Simply put, the independent candidate him/her – self cannot derive any further benefit beyond acquiring a single seat.

70.2. Second, the criteria for obtaining a regional seats applies to independent candidates and political parties alike – they must meet the same quota to be elected to the National Assembly. So too, votes tendered in support of an independent candidate carries equal weight to that of a party. There is no differentiation in this regard.

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70.3. Third, independent candidates may not obtain compensatory seats because: (a) its purpose is to correct disproportionality in representation in the results of an election; (b) it is impossible to provide for absolute or pure proportional representation whereas it is still possible to achieve inter party proportionality which is what the compensatory seats aim to achieve; (c) allowing independent candidates to contest compensatory proportional representation seats (or decreasing compensatory seats) would distort the proportional representation requirement and also run the risk of National Assembly seats being unfilled. Mr Atkins himself recognises that: (a) compensatory seats perform a proportional balancing function in the same manner that proportional representation seats do in local government elections (par 59); (b) the purpose of compensatory seats is to ensure that overall totals of seats awarded are proportional to the support of contestant (par 60); (c) this is necessary as constituency elections clearly have the possibility of producing disproportional outcomes (par 60); and (d) a given balance between compensatory seats and regional seats serves the purpose of compensatory seats if no party ever gains more seats in the regional elections than it would be allocated in the proportional representation calculations (par 74). Mr Atkins however, takes issue with the number of compensatory seats.

70.4. Fourth, a key objective that is served by the 200/200 split is: (a) to ensure that the votes of all regions (consisting of both parties and independent candidates) are represented in the National Assembly; and (b) given that proportionality may be distorted in the regional seats, the compensatory seats correct any such distortion of proportionality. As stated, the compensatory seats do not serve to elect compensatory representatives directly; instead, its purpose is to facilitate proportional representation.

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70.5. Fifth, guided by the views of the IEC, Parliament ultimately determined that the 200/200 seat allocation achieves proportional representation of represented political parties at national level without any risk of overhang. This fact, even Mr Atkins accepts as is apparent from his report (par 83). As regards the very important issue of overhang, the following warrants explanation:

70.5.1. This is a very important issue that has the potential to fundamentally skew proportional representation.

70.5.2. If an overhang does occur, it seriously jeopardises a system of proportional representation (in general).

70.6. Sixth, according to the Atkins Report, lowering the threshold required for independent candidates to secure election in the regional elections will "*clearly tend to increase the number of seats won by independent candidates*" (par 90). Mr Atkins explains that the extent to which this number increases will be related to the overall level of support for independent candidates in any election and the distribution of support for such candidates. An even spread of support among a small number of independent candidates will result in more seats being awarded whereas support being skewed towards one or two candidates with high excess votes would result in little change (par 90). While the extent of the impact of this aspect of the Atkins model is unknown, the following scenario is not an unlikely one: (a) decreasing the threshold for the election of independent candidates to the National Assembly, will result in an increase in the number of independent candidates elected to the National Assembly; (b) an increase in the number of independent candidates results in a deviation from overall

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proportionality. This result is compounded by the commensurate decrease in the number of compensatory seats.

70.7. Seventh, the Atkins model carries the risk of overhang. Mr Atkins seeks to downplay this risk by stating, *inter alia*: (a) that parties with strong regionally biased support "*may have a risk of overhang but that the circumstances where this happens are limited, and overhang is limited to a single seat*" (par 89); and (b) at 50 compensatory seats, there is a low to moderate risk of overhang of no more than one seat whereas there is a zero or negligible risk of overhang amounting to more than one seat (par 19). This is not correct. The facts are these: (a) for reasons explained, an overhang may occur; (b) if an overhang does occur, there is no system of remediation; (c) even if an overhang occurs in respect of a single seat, it has serious consequences for the affected party, and more importantly for the system of proportional representation in general.

70.8. Eighth, the IEC explained through expert input that it had received:

70.8.1. The amended electoral formula does not introduce additional disproportionality – the deviation from absolute proportionality is the same for both electoral formula.

70.8.2. The deviation from absolute proportionality never exceeds one seat (meaning that no party ever loses or gains more than one seat to which they are entitled as a result of the vote).

70.8.3. The deviation from perfect proportionality can be attributed to rounding error, with the unavoidable use of whole numbers in the

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calculation of votes and rounding off of fractions in determining outcomes.

70.8.4. Although the amended electoral formula contains a predisposition towards political parties with larger vote shares, it is a predisposition that is inherited from the original electoral formula.

70.9. Ninth, electoral formula which contains a predisposition towards political parties with larger vote shares serves a legitimate government objective, *viz*, to ensure a proportional representation electoral system, in general.

70.10. Tenth, section 22 of the Local Government: Municipal Structures Act No 117 of 1998 ("**the Structures Act**") follows a similar approach in respect of the election of councillors to metropolitan and local municipalities. The current model adopted for the National Assembly is therefore by no means novel. I am advised that the legal import of this will be addressed in argument.

70.11. Eleventh, there is no perfect system that would perfectly align with the imperatives of this Court's judgment in **New Nation Movement** as well as the constitutional imperative of section 46(1)(d) of the Constitution. Trade offs and balancing have to be made as a matter of necessity. This is precisely what the amendments to the Electoral Act did.

70.12. Finally, as regards the assumptions underpinning the Atkins model and the consequences of those assumptions, I should explain that this issue was pertinently considered by Parliament prior to the adoption of the Electoral Amendment Act. Indeed, the IEC made submissions to the Select Committee

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specifically in response to this issue ("**the IEC Submission**"). I attach a copy of the IEC Submission as "**PA10**". The justification and explanation provided in the IEC Submission was as follows:

70.12.1. It provided a model which included votes attributed to independents and based on the 2019 provincial legislature election in Gauteng. It yielded the same outcome (par 5.1).

70.12.2. The number of parties represented in Provincial Legislatures is far less than the case of the National Assembly. Party representation in Provincial Legislatures varies between 4 and 7, with five legislatures having only four represented parties. Thus far, smaller parties seem to have played a lesser role in provincial elections despite the quotas mostly being lower and even substantially lower than at the national level. It is only in Gauteng and the Western Cape that substantial quotas have been used in the past (par 5.2).

70.12.3. The scenarios constructed in submissions to the Portfolio Committee and the NCOP about provincial elections are based on hypothetical data and assume great support for independent candidates. From a mathematical perspective, the conclusions reached in the scenarios are correct. However, they contain assumptions for an independent winning a seat in more than one region and a provincial legislature with significant consequential effects on perceptions of proportionality (par 5.2).

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70.12.4. In rejecting the merits of the Atkins model, the IEC Submission explains:

(a) The Atkins Submission proceeds from the premise that for the Bill to be fair and constitutionally compliant, it should result in broadly the same outcome as in 2019 if the same dataset is used for calculation purposes (par 6.2).

(b) This is logically and mathematically not possible because if independent candidates are (finally) awarded the seats they win in regional elections and you exclude both those seats and the votes for independents from further calculations, then inevitably, the quota would be lower than it was in 2019 based on all the votes cast (par 6.2).

(c) Different quotas cannot produce the same results. While the lower quota benefits parties, this is not because parties are given an advantage but rather because of the practical consequences of introducing independents (par 6.2).

F. REMEDY

71. In the first instance, I respectfully say that no case has been made out for the relief sought and that the application falls to be dismissed.

72. However, if this Court is to find otherwise, the proposed remedy, which is a combination of striking down and reading-in, is inappropriate. Ultimately, it is Parliament's sole mandate to determine an appropriate electoral system that results, in general, in proportional representation. The proposed reading-in relief in the primary and alternative relief is invasive and would, I am advised, breach the separation of powers. In the unlikely event that this Court is to determine that the 200/200 split is unconstitutional, it would be appropriate to leave the issue of rectifying the constitutional defect to Parliament. It would be appropriate to grant an order suspending the declaration of invalidity for 36 months to enable Parliament to address the defects.

G. SERIATIM ANSWER TO THE FOUNDING AFFIDAVIT

Ad paragraphs 1 to 4

73. Save to deny the truth and correctness of all the allegations in the affidavit under answer, I note the content hereof.

Ad "Introduction"

Ad paragraph 5

74. The content hereof is noted.

Ad paragraphs 6 to 8

75. I admit that:

75.1. The amendment has made it possible for independent candidates to compete in national and provincial elections in accordance with this Court's order in **New Nation Movement**.

75.2. Independent candidates can compete for the regional seats (Item 1(a), Schedule 1A) and not the compensatory seats (Item 1(b), Schedule 1A). The effect of this is that independent candidates can compete for 200 of the 400 seats in the National Assembly.

76. I deny the remaining content and more particularly the following allegations:

76.1. That there is no justification for the 200/200 split between regional and compensatory seats. The ICA frankly concedes in its founding affidavit that there may be *"a need for compensatory seats"*. (para 46) At issue is whether the number of compensatory seats allocated is the best possible way of ensuring proportional representation – this is, in essence, the ICA's complaint, thinly disguised as a constitutional challenge.

76.2. That the playing fields are "not level" in that an independent candidate must gain many more votes than a political party to gain a seat in the National Assembly. The correct state of matters (as I have explained) is that: (a) the amended electoral formula contains a predisposition towards political parties with larger vote shares, this is because it is based on a pre-eminently reasonable criteria – vote share; (b) the key benefit that this yields is that of proportional representation between the represented political parties at a national level, without any risk of "overhang"; (c) the alternative presented by the Atkins model does not cater for the risk of overhang, and thereby jeopardises the

MSC

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constitutional threshold of an electoral system that results, in general, in proportional representation. Furthermore, as explained there is good reason for limiting independent candidates to competing only in respect of the regional seats. I reiterate, it is beyond dispute that independent candidates may only occupy a single seat, irrespective of the number of votes that they obtain.

76.3. That the compensatory seats can be reduced from 200 to 50 "*without affecting the overall proportionality of the outcome*". As explained, given the risk of overhang, this is manifestly not the case.

Ad paragraph 9

77. For the reasons set out above, I deny the content hereof.

78. I specifically deny that the 200/200 split is irrational and inconsistent with the rule of law. I further deny that there has been a violation of the rights of independent candidates and those who vote for them to the right to equality, a free and fair election and/or the right to citizenship. Contrary to the ICA's assertions, the electoral system enacted by Parliament gives effect to the constitutional injunction to have an electoral system that would result, in general, in proportional representation.

Ad paragraph 10

79. I note that the electoral system for provincial legislatures is not challenged. I admit there are no regional and compensatory seats at the provincial level. The reason for this is that there is no need to balance general proportionality across the whole country in respect of

the provincial legislatures. In this paragraph, the ICA fails to appreciate the difference between the provincial legislatures and the National Assembly.

80. In any event, the conclusion in this paragraph that *"compensatory seats are not a necessary feature of the electoral system"* is inconsistent with the remainder of the ICA affidavit where it frankly concedes that *"there may be a legitimate objective in having compensatory seats..."*(para 48).

Ad paragraph 11

81. I note the structure of the affidavit as set out in this paragraph.

Ad "Parties"

Ad paragraphs 12 to 13

82. I note the citation of the ICA and the explanation of the participation of the ICA and its members in the legislative amendment process.

83. I note that the ICA asserts standing on a number of bases under section 38 of the Constitution. I do not take issue with the ICA's standing.

Ad paragraphs 14 to 19

84. I note the citation of the respondents.

Ad paragraph 20

85. I note the content hereof.

Ad "Factual Background"

Ad paragraphs 21 to 26

86. I note the factual background to the extent that it is consistent with what I have set out above in paragraphs 13 to 63 and in the **New Nation Movement** judgment. Save as aforesaid, I deny the allegations in these paragraphs.

Ad paragraph 27

87. It is correct that several versions of the Bill were published for public comment. Based on the comments received, earlier versions of the Bill were refined and revised.

Ad paragraph 28

88. I admit that Parliament sought two extensions to the suspension of the order of constitutional invalidity which this Court granted on 10 June 2022 and 20 January 2023. I refer to what I have stated in this regard.

Ad paragraphs 29 to 31

89. Save to deny knowledge of the ICA's petition to the President, I admit that both houses passed the Bill on 23 February 2023 and that the President signed it into law on 17 April 2023.

Ad "The Constitutional issue and the mathematical basis for the ICA's argument."

Ad paragraphs 32 to 34

MSC 108

90. I admit these paragraphs. I refer to what I have stated as regards the 200/200 split and that independent candidates are eligible only to compete for the 200 regional seats.

Ad paragraph 35

91. The content hereof is denied. As stated, the 200/200 split avoids an overhang, ensures proportional representation, in general and facilitates the constitutional rights in section 19.

Ad paragraph 36

92. I deny this paragraph. I specifically deny that the 200/200 split distorts proportionality. On the contrary, it facilitates a system of proportional representation by avoiding an overhang.

Ad paragraphs 37 and 38

93. I deny the content hereof.

94. For reasons explained, I do not accept that the adjustment as proposed (increasing the number of regional elections to 350 and the corresponding reduction of compensatory seats to 50) will go some way in ensuring overall proportionality. For reasons explained, it will have quite the opposite effect in light of the difficulties resulting from an overhang.

Ad paragraphs 39 to 40

95. I note that the ICA relies on the mathematical calculations of Mr Atkins. I have no knowledge of the expertise of Messrs Atkins, Human and Mulaudzi. I further note their

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confirmatory affidavits. I address Parliament's primary difficulties with the Atkins model elsewhere in this affidavit.

Ad paragraph 41

96. I deny this paragraph for the following reasons:

96.1. The number of seats in the National Assembly is pre-determined by the Constitution. Section 46(1) stipulates that the National Assembly must have at least 350 and at most 400 members.

96.2. In a mixed-member proportional system, where a voter votes for a specific candidate and a second ballot for political parties, there is the risk of overhang where there are more surplus candidates than seats available.

96.3. In the National Assembly, there is no way to increase the seats to accommodate the surplus candidates, unlike in Municipal elections, where the problem of overhang is dealt with by increasing the number of seats in a municipal council.

96.4. The reduction of the compensatory seats from 200 to 50 will substantially increase the risk of overhang for reasons explained, which will, in turn, result in an electoral system that does not meet the constitutional threshold.

Ad paragraph 42

97. I note this paragraph.

Ad "Constitutional rights and principles infringed"

Ad paragraphs 43 and 44

98. The Electoral Act has given effect to this Court's judgment in **New Nation Movement**. The system designed accommodates independent candidates whilst ensuring that the constitutional requirement of proportionality is met. I respectfully say that the 200 split is for a pre-eminently good reason: it avoids an overhang.

Ad paragraphs 45

99. I deny the "strict scrutiny" and/or "fairness" tests that the ICA seeks to impose in this paragraph. It is unclear what is meant by *"[t]here is no room for deference here or any "counter-majoritarian" dilemma."* The Electoral Act will be subject to a rationality enquiry in accordance with this Court's jurisprudence. The applicable test is whether the means Parliament chose to address the constitutional defect identified in this Court's judgment in **New Nation Movement** bears a rational connection to the ends sought to be achieved. As is evident from this affidavit, the means chosen by Parliament are pre-eminently rational.

100. I deny any constitutional infringement. I submit that a complex balancing exercise has been carried out by Parliament – it is pre-eminently the type of decision that calls for deference.

Ad paragraph 46

101. I deny that the 200/200 split is arbitrary and contrary to the rule of law. I note the ICA's concession that there may be a need for compensatory seats. I deny that the selection of

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200 has been improperly undermining the prospects of independents getting elected. Moreover, the detailed background given above of the steps that Parliament took over a very long period to give effect to this Court's judgment in **New Nation Movement** puts paid to these vaguely made allegations of an ulterior purpose.

Ad paragraph 47

102. I deny that the 200/200 split violates section 3(2)(a) of the Constitution.

Ad paragraph 48

103. I deny that the 200/200 split violates the right to equality and results in an arbitrary differentiation. The ICA concedes that there may be a legitimate objective in having compensatory seats. I submit that there is undoubtedly a legitimate government objective – it avoids an overhang and an unconstitutionality.

Ad paragraph 49

104. I deny that the 200/200 split violates the right to vote and a vote that has equal weight.

Ad paragraph 50

105. I deny that the 200/200 split will undermine the freeness and fairness of the elections.

Ad paragraph 51

106. I deny that the 200/200 split violates section 46(1)(d) of the Constitution. In fact, it does the opposite in ensuring that the National Assembly has, in general, proportional representation.

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Ad "Remedy"

Ad paragraph 52

107. I deny that the 200/200 split is unconstitutional or that the ICA has demonstrated any basis for this Court to declare it unconstitutional and invalid.

Ad paragraph 53

108. I deny that the proposed remedy, which is a combination of striking down and reading in is appropriate. Ultimately, it is Parliament's sole mandate to determine an appropriate electoral system that results, in general, in proportional representation. The proposed relief is invasive and would, I am advised, breach the separation of powers. In the unlikely event that this Court was to determine that the 200/200 split is unconstitutional, the alternative relief proposed by the ICA would be appropriate as it would (appropriately) leave the issue of rectifying the constitutional defect to Parliament.

Ad paragraphs 55 and 56

109. I deny that the ICA is entitled to the relief sought; however, in the unlikely event that the ICA was to succeed in its application, it is Parliament's view that the appropriate remedy is to suspend the declaration of invalidity for 36 months to enable Parliament to address the defects.

Ad "Direct Access"

Ad paragraph 57 to 63

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110. I abide by this Court's decision in respect of the ICA's application for direct access. However, for reasons addressed I do not accept the allegations of unconstitutionality.

Ad "Conclusion"

Ad paragraph 64

111. I deny that the ICA has made a proper case and is entitled to the relief sought.

H. CONDONATION

112. This affidavit is being filed later than this Court's Directions provided for, being 25 July 2023.

113. The reason for the delay is that the Court's Registrar did not send the Chief Justice's directions (which were issued on 11 July 2023), to Parliament's attorneys.

114. Parliament's attorneys became aware of the Directions for the first time on the afternoon of 25 July 2023, when Parliament's Counsel received a copy of them from Counsel representing the Minister. Parliament's attorneys advised the Registrar of the omission and requested an extension for the filing of this answer. I attach a copy of that letter marked "**PA11**". Subsequently, Directions were issued by this Court, directing that answering affidavits were to be filed by 8 August 2023 and that condonation be sought in respect thereof. Condonation on behalf of Parliament is hereby sought.

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MOSA STEVE CHABANE

I CERTIFY THAT:

1. The Deponent has acknowledged to me that:

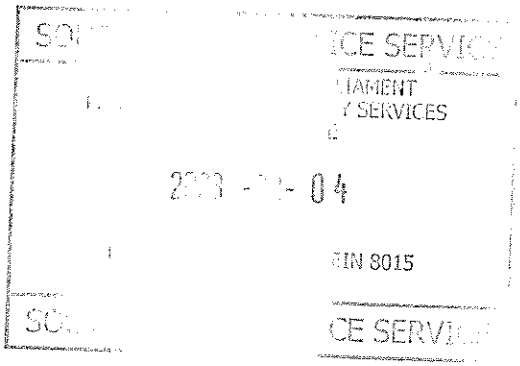
   1.1 He knows and understands the contents of this declaration;

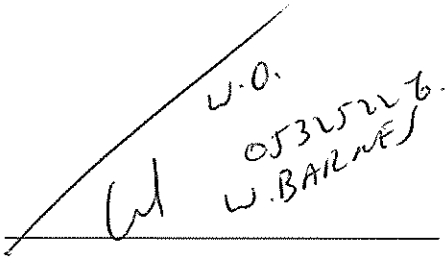
   1.2 He has no objection to taking the prescribed oath;

   1.3 He considers the prescribed oath to be binding on his conscience;

2. The Deponent thereafter uttered the words: *"I swear that the contents of this declaration are true, so help me God"*. The Deponent signed this declaration in my presence at the address set out hereunder on this 04 day of August **2023**.

12:40





COMMISSIONER OF OATHS

"PA1"

REPORT OF THE MINISTERIAL ADVISORY COMMITTEE ON ELECTORAL SYSTEM REFORM

Presented to the Honourable Minister of Home Affairs

By

The Ministerial Advisory Committee on Electoral Reform

9 June 2021

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CONTENTS

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ACRONYMS

ACDP	African Christian Democratic Party
AMS	Additional Member System
ANC	African National Congress
ASRI	Auwal Socio Economic Research Institute
ATM	African Transformation Movement
AV	Alternative Voting
BUSA	Business Unity South Africa
COPE	Congress of the People
COSATU	Congress of South African Trade Unions
CSOs	Civil Society Organisations
DA	Democratic Alliance
EC	Eastern Cape Province
EFF	Economic Freedom Fighters
ETT	Electoral Task Team
FF+	Freedom Front Plus
FS	Free State Province
HSF	Helen Suzman Foundation
IEC	Electoral Commission of South Africa
IFNASA	Indigenous First Nation Advocacy South Africa
ISI	Inclusivity Society Institute
FPTP	First Past the Post
HLP	High Level Panel
MAC	Ministerial Advisory Committee
MDB	Municipal Demarcation Board
MMC	Multi member constituency
MMP	Mixed Member Proportional
MPs	Members of Parliament
MPLs	Member of Provincial Services
PR	Proportional Representation
NC	Northern Cape Province
NCOP	National Council of Provinces

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NNM	New Nation Movement
NPE	National and Provincial elections
SACC	South African Council of Churches
SAFTU	South African Federation of Trade Unions
SMC	Single Member Constituency
SNTV	Single Non-transferable Votes
STV	Single Transferable Votes
UJ	University of Johannesburg
UKZN	University of Kwazulu Natal
WC	Western Cape Province

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EXECUTIVE SUMMARY

Pursuant to the Constitutional Court judgement and subsequent consultations between the NA and the Executive, the Honourable Minister of Home Affairs Dr Aaron Motsoaledi established the Ministerial Advisory Committee (MAC) to help develop policy options on the electoral system that address the defects of the Electoral Act 1998. The former Minister of Constitutional Affairs, Mr Valli Moosa, was appointed as the MAC Chairperson. Members of the Committee are:

- Advocate Pansy Tlakula - the former Chairperson of the Electoral Commission of South Africa (IEC).
- Advocate Vincent Maleka - a Senior Counsel.
- Dr Michael Sutcliffe - former member of the Municipal Demarcation Board (MDB) and former Ethekwini Municipal Manager.
- Dr Nomsa Masuku - Commissioner of the Electoral Commission of South Africa (IEC).
- Dr Sithembile Mbete - Senior Lecturer at the University of Pretoria.
- Mr Norman du Plessis - former IEC Deputy Chief Elections Officer.
- Prof Daryl Glaser - Head of Department: Political Studies at Wits University.

In pursuit of its mandate, the MAC carried out its business through regular meetings, comprehensive review and analysis of existing literature and documents submitted by think tanks and other stakeholders on South Africa's electoral system and electoral systems on the African continent and beyond. It adopted the fairness, inclusiveness, simplicity, accountability, gender equality, proportionality, effective participation of independents, genuine choice, effectiveness, and legitimacy principles.

The MAC review of written submissions by electoral stakeholders, including civil society organisations (CSOs), think tanks, political parties, organised labour, and business, revealed that stakeholders welcomed the Constitutional Court judgement. Still, a few worried that a proliferation of independents would make matters worse, for example, by exacerbating patronage politics. While many expressed a desire for greater individual and local representation and accountability of members of Parliament (MPs) through the introduction of constituencies, a few questioned whether the electoral system lay at the root of the current dissatisfaction with government and worried that these changes would make little difference to democratic quality. Those supporting change in the electoral system expressed various views about preferred electoral system alternatives, with some favouring multi-member and others single-member constituencies. There were also other MMC proposals, such as the local rather than regional multi-member constituencies.

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The MAC explored various options and heard from a range of public stakeholders in the course of its deliberations. But, first, it had to determine whether it should seek to satisfy the Constitutional Court requirement with little disruption to the existing electoral system or address public aspirations for an electoral system that includes a significant element of local and representation and individual accountability voters.

In the end, the MAC members could not reach a consensus on a single option but succeed in narrowing down the options to a fairly stark choice on a minority and majority split of 3:4 of the Committee members. One member of the Committee chose not to state a preferred option. These options are:

Option 1 (Minority report): The slightly modified multi-member constituency (MMC), which stakeholders referred to as the minimalist option.

This option entails modifying the existing multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation. Those in favour of this option believe that it does not interfere with the constitutionally required general proportionality and is the best option for ensuring inclusiveness, gender representation, simplicity and fairness for independents.

Option 2 (Majority report): The mixed-member model incorporating single-member constituencies

This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system resembling the current local government electoral system, albeit with some improvements. It involves electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency. Thus, voters would vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing for closed party lists (their second vote). Those in favour of this option believe that it does not interfere with the constitutionally required general proportionality and is the best option for ensuring inclusiveness, gender representation, simplicity and fairness for independents.

1. INTRODUCTION

The Bill of Rights in the Constitution of the Republic of South Africa 1996 assures peoples freedoms, including the freedom to partake in political and electoral processes directly or through freely chosen representatives. The country has organised five national and provincial elections (NPE) since the country's first and epoch-making 1994 elections that ushered in a democratic dispensation. It has also successfully conducted

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five municipal elections since the collapse of Apartheid in 1994. Both the NPE and municipal elections follow a five-year cycle. The polls have, over the years, presented lessons and opportunities for the consolidation of electoral democracy in South Africa. While the frequency of the NPE and municipal elections is assured, there is always an increased demand on the Electoral Commission of South Africa (IEC), political parties, government, and all electoral stakeholders to ensure the integrity and quality of the electoral processes. In June 2020, the Constitutional Court released a judgement declaring the electoral law as unconstitutional.

1.1 Constitutional Court Judgement on Electoral Act

On 11 June 2020, the Constitutional Court declared that "the Electoral Act 73 of 1998 is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly (NA) and Provincial Legislatures (PLs) only through their membership of political parties". The Constitutional Court directed Parliament to rectify the defective sections of the Electoral law within a period of 24 months.

The Constitutional Court decision followed a challenge by the New Nation Movement (NNM), Ms Chantal Dawn Revell, GRO and Indigenous First Nation Advocacy South Africa (IFNASA). They contested the Electoral Act limiting of independent candidates' participation in the NPE.

Section 57A of the Electoral Act provides for the political party-based candidate lists to represent the NA and PLs. In addition, clauses 1,2 and 3, as well as clauses 11 and 12, specifically provide for the nomination of candidates by political parties contesting the NA and PLs elections, respectively.

The Constitutional Court judgement has effectively triggered the electoral system reform process ahead of the 2024 NPE. This process entails several albeit related multi-stakeholder activities. Key among these are the NA and the Executive-driven processes in response to the Constitutional Court Judgement. In addition, the Portfolio Committee on Home Affairs and the Select Committee on Security and Justice have, together with the Ministerial Advisory Committee (MAC), carried out comprehensive stakeholder consultations regarding the electoral system review.

1.2 Establishment of the Ministerial Advisory Committee

The Honourable Minister of Home Affairs, Dr Aaron Motsoaledi, established the Ministerial Advisory Committee to identify the extent of the constitutional provisions affected by the constitutional court ruling, develop policy options on the electoral system that address the defects of the Electoral Act 1998 based on a body of research that underpins policy options, and recommend possible options to be considered in the

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South African setting, consult with stakeholders in the development of the options. In addition, outline clear values against which to assess each of the options, take into caccount the electoral implications such a policy may introduce.

The former Minister of Constitutional Affairs, Mr Valli Moosa, was appointed as the MAC Chairperson. Members of the Committee are:

- Advocate Pansy Tlakula - the former Chairperson of the IEC.
- Advocate Vincent Maleka - a Senior Counsel.
- Dr Michael Sutcliffe - former member of the Municipal Demarcation Board (MDB) and former Ethekwini Municipal Manager.
- Dr Nomsa Masuku - Commissioner of the IEC.
- Dr Sithembile Mbete - Senior Lecturer at the University of Pretoria.
- Mr Norman du Plessis - former IEC Deputy Chief Elections Officer.
- Prof Daryl Glaser - Head of Department: Political Studies at Wits University.

The Committee was administratively supported by the Home Affairs Department Secretariat led by the Chief Director, Mr Cecil Sols and technically by Dr Victor Shale, seconded to the Home Affairs Secretariat by IEC South Africa.

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2. SOUTH AFRICA ELECTORAL SYSTEM OVERVIEW

2.1 National and Provincial Elections

The electoral system for the NPE elections is PR provided for under Section 46 of the Constitution for the NA election and Section 105 of the Constitution for the PLs election. The system was adopted at the advent of democracy as an ideal consociational instrument at the country's critical political transition. Thanks to a high level of proportionality and the absence of an artificial threshold for representation, the system has ensured the inclusion of minorities in South Africa's electoral politics since the dawn of democracy.

South Africa's PR system divides the country into nine multi-member constituencies that follow the lines of South Africa's nine provinces. Voters are offered competing ranked closed party lists, and voters cast one ballot for a party list of their choice. Their vote is first used to determine parties share of votes in their constituency. They are then combined nationally to determine overall proportionality, with deviations from proportionality corrected from national and/or provincial party lists. For provincial elections, a single-tier or straight proportional system applies, and in this case, a province is treated as a single constituency.

Given that the national and provincial elections are held simultaneously; the PR follows a two-tier compensatory closed party list format. A quota of the total valid number of votes per party is used in the seat calculation procedure. This means that participating parties are allocated seats in a legislature in proportion to the number of votes secured (IEC 2019 Election Report). Political parties contesting the NPE submit candidate lists for the 400-member National Assembly and provincial legislatures. The list categories are:

- A National Assembly list or national to national list comprising 200 candidates.
- A National Assembly list or province to national list comprising 200 candidates.
- Nine provincial lists or provincial to province lists comprising candidates equivalent to the number of seats available in each provincial legislature.

The IEC predetermines the number of representatives for each region for every election in accordance with the number of registered voters. The proportional allocation of members of political parties for a region from closed party lists is determined by the votes cast in a region. In that sense, each region has a separate election, and votes are not transferable between regions to determine regional outcomes. After allocating regional members of the NA the votes for all parties in all regions are aggregated to

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determine each party's allocation of representatives from closed national lists to ensure overall proportionality.

The electoral system was appraised for the first time in 2002 because the Constitution did not provide the electoral system to be used beyond the 1999 NPE. Accordingly, an Electoral Task Team (ETT) was established by Cabinet in March 2002 to formulate the parameters of new electoral legislation and draft it to prepare for the NPE of 2004. The ETT report contained two recommendations. Its majority recommendation was that "...constituency representation should be built into the system", while the minority recommendation was that the electoral system existed up to 1999 should be retained unchanged. Notwithstanding the two opposing recommendations, the ETT was unanimous that:

- The core values of fairness, inclusiveness, simplicity and accountability should reflect in the electoral system.
- Preoccupation with accountability should not jeopardise the values of fairness, inclusiveness and simplicity.
- The electoral system should not be replaced or radically altered.
- The electoral system enjoyed considerable support and served South Africa well through two sets of national and provincial elections and significantly contributed towards transitional stability.

The electoral system was not changed and has since been used for 2004, 2009, 2014 and 2019 elections.

In 2017 a High-Level Panel (HLP) led by the former President of the Republic of South Africa Kgalema Motlanthe was established by Speakers' Forum to "assess the content and implementation of legislation passed since 1994 concerning its effectiveness and possible unintended consequences". Focusing on three thematic areas; (i) poverty, unemployment, and the equitable distribution of wealth, (ii) land reform: restitution, redistribution, and security of tenure; and (iii) social cohesion and nation-building, the HLP assessed implementation, identified gaps and proposed action on laws that require strengthening, amending or change.

Whilst not a central feature of their investigation, the HLP underscored the need to strengthen parliament accountability to the public through more direct linkages between Members of Parliament (MPs) and their constituencies. To achieve this, the HLP recommended the amendment of the Electoral Act to provide for an electoral system that makes MPs accountable to defined constituencies in a PR and constituency system for national elections.

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2.2 Local government elections

The electoral system for local government elections must comply with Section 157 of the Constitution, allowing for either a purely PR system or a mixed-member system. However, the system must result in general proportionality.

The existing local government system defined in national legislation is a mixed-member proportional system (MMP). It is a combination of the first-past-the-post (FPTP) electoral system for Ward Councillors standing in single-member constituencies and Proportional Representation (PR) electoral system for (PR Councillors) elected from closed party lists. Voters cast separate ballots for PR and Ward Councillors. Overall proportionality is determined by parties' shares of the Ward and PR votes combined.

The system is regulated in at least four different statutes, the Electoral Act 73 of 1998, the Local Government: Municipal Structures Act 117 of 1998, the Local Government: Municipal Electoral Act 27 of 2000 and the Local Government: Municipal Systems Act 32 of 2000. The electoral system determines seat distribution for the different municipal spheres in South Africa, namely, the Category A (Metropolitan) councils, Category B (Local municipalities), and category C (District municipalities). Currently, there are eight metropolitan councils, 205 local municipalities, and 44 district municipalities.

3. THE MINISTERIAL ADVISORY COMMITTEE METHODOLOGY AND PROCESSES

In pursuit of its mandate, the MAC carried out its business through regular meetings, review of existing literature on South Africa's electoral system, and electoral systems on the African continent and beyond. It also conducted public consultations with key electoral stakeholders.

3.1 Principles

The MAC adopted the following principles to guide the assessment and choice of the electoral system.

- **Inclusiveness (national unity):** This is one of the central values enshrined in the South African Constitution. South Africa's electoral system should yield a broad representation of the South African population's demographic, ethnic, racial, and religious diversity. This remains a significant value, 27 years after Apartheid. The demarcation of constituencies must not reinforce Apartheid spatial patterns.

- **Fairness:** The system must provide for one person one vote of equal value.

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- **Simplicity:** A balloting procedure that must be understandable and reduce incidents of spoilt ballots and also contribute to the credibility of the elections.

- **Accountability:** Accountability can be defined as 'the obligation of those with power or authority to explain their performance or justify their decisions. Accountability is linked to responsiveness, that government officials will listen to the grievance of the people and respond effectively. It is an essential aspect of the social contract between the people and their representatives. Essentially an accountable government is one that fully expresses the will of the people and has built-in mechanisms to prevent attempts to usurp the will of the people. Over the years, one of the prime criticisms of South Africa's ruling elite is that they are not accountable to citizens.

- **Gender Equality:** Section 1 of the Constitution enshrines equality and non-sexism as two of the founding values of the Republic. Section 9 of the Constitution enshrines the right to equality. The MAC should avoid selecting a system that will result in a reversal in gender equality.

- **Proportionality:** Whatever system is chosen must 'result, in general, in proportional representation (section 46(1)(d) and 105(1)(d) of the Constitution).

- **Effective participation of independents:** In the New Nation judgement, the Constitutional Court ruled that the Electoral Act should be amended to enable adult citizens to exercise their constitutional rights to stand for public office in national and provincial elections *without* joining a political party. Any system recommended by the MAC must enable the substantive participation of independent candidates.

- **Genuine choice:** Pursuant to the spirit of the Constitutional Court judgement, the electoral system should provide the voters with the chance to select not only among political parties and lists but also among individual candidates.

- **Effectiveness:** Given the likelihood of a high number of independent candidates both for the national and provincial levels, the electoral system should have the ability to generate a manageable number of candidates through an in-build threshold for candidate nomination.

- **Legitimacy:** the electoral system should reflect (much as the Constitution) genuine national consensus and not be seen by significant sectors of the population as flawed and unfair.

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3.2 Review of relevant documents

In terms of the terms of reference (TORs), the Honourable Minister requested the Committee to specifically review and analyse the following documents in developing their advice:

- SA Constitution.pdf
- Presentation - Home Affairs Committee, Parliament (1) (1).pdf
- Private Members Bill - [B34-2020] (The Electoral Laws Second Amendment Bill (2020) (Cope Bill).
- Judgment - New Nation v President of SA and Others - Constitutional Court-4
- Electoral Task Team Report - Slabbert Report
- The 2017 Report of the High-Level Panel on the assessment of key legislation and the acceleration of fundamental change.
- Home Affairs submission on the electoral system and reform.

The MAC not only reviewed and analysed these documents but it also believes that its advice must be framed within the existing Constitutional architecture. In addition, the MAC also reviewed several reports and documents submitted by different organisations on the electoral system. These include:

- The Council for the Advancement of South African Constitution (CASAC) 2021 Proposal for Electoral Reform.
- The Helen Suzman Foundation (HSF) 2020 proposed National Assembly electoral reform document.
- The Inclusivity Institute (ISI) 2021 proposed electoral model for South Africa.
- The 70s Group May 2021 electoral system submission document.

These submissions were comprehensively reviewed and analysed.

3.3 Public Consultations

The MAC consulted with key stakeholders who will be directly and indirectly affected by the outcome of the exercise. A detailed list of stakeholders who made submissions to the MAC is attached as annexure 2 to this report.

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4. OVERVIEW OF THE EMERGING ELECTORAL SYSTEMS OPTIONS

4.1 Stakeholder perspectives

The interpretations of what the 11 June 2020 Constitutional Court Judgement requires are as diverse as the consulted documents and electoral stakeholders CSOs, think tanks, political parties, organised labour and business. Such interpretations shaped several proposals that the MAC considered. A number of stakeholders welcomed the Constitutional Court judgement, but a few worried that a proliferation of independents would make matters worse, for example, by exacerbating patronage politics.

While many expressed a desire for greater individual and local representation and accountability of MPs through the introduction of constituencies, a few questioned whether the electoral system lay at the root of the current dissatisfaction with government and worried that these changes would make little difference to democratic quality.

Those supporting change in the electoral system expressed various views about preferred electoral system alternatives, with some favouring multi-member and others single-member constituencies.

There were also other MMC proposals by stakeholders. For example, one of the proposals was the local rather than regional multi-member constituencies. These proposals can be considered variants of the Van Zyl Slabbert model. These variants would incorporate independents (as they are required by the Constitutional Court) in various ways.

In some, independent individuals compete with other party-affiliated individuals. In other cases, where independents compete with parties, some manner is determined for rendering independents functionally interchangeable with or equivalent to parties so that they can seamlessly fit into a system based on party voting.

They propose constituencies based on the existing metropolitan or district boundaries and favour the restoration/enhancement of proportionality from national lists of candidates, whether drawn from closed party lists or standing as individuals.

On voting, some favour a situation where voters vote for individuals in the local MMCs while others prefer that the voters vote for parties. In addition, there are those that would have local-MMC votes distributed proportionately and those that would have them selected in order of how many votes they get.

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Regarding proportionality, there are those who fancy a separate vote to restore national proportionality and those who think that national proportionality would be restored by aggregating a single vote across MMCs.

None of the proponents of Slabbert-inspired local-MMC variants favour a typical continental European style open party ballot, but they all prefer compensatory top-up to restore proportionality.

4.2 Multi-Member Constituency variations

The MAC acknowledges that there are too many MMC system variations, both theoretically and in practice, to be fully covered in this report. A broad but not exhaustive categorisation, would however, include systems with the following characteristics:

4.2.1 Parallel systems

Where a number of representatives are elected from multi-member constituencies and where a number are elected on a proportional basis for which a separate ballot is used. The two ballots lead to separate outcomes independent of each other. Such a system does not lead to overall proportionality and thus does not meet the requirements of our Constitution.

4.2.2 Compensatory systems

Where a number of representatives are elected from multi-member constituencies and where a number of compensatory seats are subsequently allocated in accordance with the support of each successful party to ensure proportionality. Such systems are categorised as two-tier compensatory systems, and they meet the requirements of our Constitution. Such systems fall into two broad categories.

a) The systems where boundaries are adjusted according to the number of representatives to be elected. There are two alternatives of the first category of systems where boundaries are adjusted. A widely used option has a defined number of representatives, for example, 5 per constituency.

These systems require the demarcation of constituency boundaries to ensure that each contain an approximately equal number of voters. There are, however alternatives where the number of representatives varies between set parameters, for example, between 3 and 7 representatives per constituency. Such systems also require demarcation of constituency boundaries but offer greater opportunities to keep to at least some existing legal or administrative boundaries.

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b) The systems where existing boundaries as constituency boundaries are fixed and the number of representatives to be elected are adjusted in accordance with the number of registered voters. These systems raise few or no demarcation issues.

The submissions to the Committee on multi-member constituency systems included many variations, often without defining details, and a common theme did not emerge.

A potential two-tier compensatory system with fixed boundaries is illustrated hereafter. The particular option is chosen for illustration purposes only as it expands on the current electoral system that functions on the same basis, where 200 representatives are elected from 9 multi-member constituencies with provincial boundaries as fixed boundaries. The allocation of an additional 200 compensatory seats taking overall voter support for each successful party into account ensures a proportional outcome.

The example is based on the same core principles with municipal district council and metro council boundaries as electoral boundaries and expands the current 9 multi-member constituencies to 52 constituencies. That would consequently align electoral boundaries at all three levels of government.

All two-tier compensatory systems lead to an outcome of proportional representation, in general, and the choice of which to favour would not fundamentally favour or disadvantage political parties regarding the total number of seats they attain.

5. PREFERRED OPTIONS

Guided by the 2020 Constitutional Court judgement that citizens enjoyed the right to stand for political office independently of political parties, this MAC set about finding a model for an electoral system that could accommodate independents while preserving benefits of the existing electoral system, notably the constitutional requirement of general proportionality of representation.

The MAC explored a variety of options and heard from a range of public stakeholders in the course of its deliberations. One question that confronted the MAC early on was whether the Committee should seek to satisfy the Constitutional Court requirement with as little disruption to the existing electoral system as possible, or whether it should use the occasion to attempt to address public aspirations for an electoral system that includes a greater element of local and representation and individual accountability to voters.

In the end the MAC members were not able to reach a consensus on a single option, but the Committee did succeed in narrowing down the options to a fairly stark choice on a minority and majority split of 3:4 of the Committee members. One member of the Committee chose not to state a preferred option. These options are:

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- **Option 1 (Minority Report):** The slightly modified multi-member constituency (MMC) which accommodates independents but requires relatively minimal changes to the constitution. This option favours inserting independents into the existing electoral system, enabling independents to compete with political parties for votes.

- **Option 2 (Majority Report):** The single-member constituency (SMC) option: This Option favours introducing single-member constituencies, with proportionality secured via party lists. Here independents would stand as individuals in constituencies and compete together with associates for the party-list vote.

We hope that in simplifying the options to a stark choice, the MAC will have succeeded in equipping the Minister and others to choose the future electoral system.

The preferred options are discussed below regarding what they are, how the national and provincial legislatures are composed, proportionality, candidate qualification requirements, demarcation of boundaries, number of ballot papers, vacancies, and whether the option satisfies the principles adopted by the MAC. The option advocates for retaining the electoral system as provided for in sections 46 and 105 of the Constitution.

5.1 OPTION 1: A MODIFIED MULTI-MEMBER CONSTITUENCY (MMC) SYSTEM TO ACCOMMODATE INDEPENDENT CANDIDATES

This option entails modifying the existing multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation, including not interfering with the constitutionally required general proportionality.

5.1.1 Description of the option

The option advocates for the retention of the electoral system. To accommodate independent candidates as per the Constitutional Court ruling, this option focusses primarily on the Constitutional Court judgement that independent candidates should be included in the electoral system. This should is the primary objective of any changes to the electoral system. This option states that this must also be done in the simplest possible way and be fair to independent candidates wishing to stand for elections.

Such changes would include amending the current definition of "party" in the Electoral Commission Act No 51 of 1996 such that 'party' refers to a registered political party and includes an independent candidate contesting elections, any organisation or movement

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of a political nature which publicly supports or opposes the policy, candidates, or cause of any registered party, or which propagates non-participation in any election.

The option recommends that the existing system of an MMC for the NA and a straight proportional vote for the PLs should remain as that would be fairest for independent candidates. It would, for example, allow that independent candidates wishing to stand for either national or provincial are then able to gain support for their candidacy from the largest possible area (in this case, the province in which they reside). This means that:

- The province remains a "Constituency" for independents and other parties contesting for 200 seats in the NA elections, and
- The province in which the independent candidates resides becomes the "Constituency" for independents contesting the PLs elections. Those favouring this option are of the view that demarcation of possible "constituencies" below the provincial level would go against some of the MAC principles given the existing spatial inequalities in South Africa, including economic, ethnic and other disparities. These inequities would make any demarcation process always subject to complaints of gerrymandering. It must be stressed that the greater the number of constituencies, the greater is the complexity and cost in running such elections.

5.1.2 Composition of the National Assembly and the Provincial Legislatures

Under this option, the current composition of seats in the NA and PLs would remain unchanged. The NA would comprise the 200 regional seats and 200 compensatory seats (closed lists). The 200 regional MPs are elected in the nine regions (provinces/multi-member constituencies), and independent candidates would also be elected from these nine regions. The IEC determines the number of representatives for each region before an election on a proportional basis in relation to the number of registered voters in each region.

The votes cast for parties in each region determines the allocation of seats per party on a proportional basis. In essence, each region constitutes a separate election and votes cast in one region cannot be considered in any other region. As turnout varies in the different regions, the quota for determining the results in each region would also vary, resulting in a deviation from overall proportionality when the results of all nine regions are combined. In the 2019 election, this deviation came to 3,5 per cent.

The 200 Compensatory seats serve to restore overall proportionality where the votes for parties in the 9 regions are added together to determine the share of each party in the overall vote. This ensures the constitutional requirement for proportionality in general.

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The allocation of seats for the independent candidates would be similar to allocating seats in municipal elections. In addition, the allocation of seats after the provisional allocation would no longer be based on the largest remainder but based on the highest average number of votes per seat already awarded. This would be fairest for independent candidates. Using the largest remainder would result in inequities when some smaller parties are elected to the NA and PLs with far fewer votes than the larger parties. This goes against the principle that there should be one person, one vote, one value.

In the case of PLs, the single ballot, including all parties (political, movement, independent), is a straight proportional election.

5.1.3 Proportionality

This option does not envisage many changes to what obtains regarding the proportionality of the current electoral system. It suggests that independent candidates would be elected if they meet the quota, and once they have secured their seat, their votes would be discarded for the determination of a new quota for the determination of representation by other parties with PR lists.

5.1.4 Candidate qualification requirements under this option

This option suggests the following qualification criterion for the NA and PL elections.

(a) A residential qualification requirement for all candidates (independent and other parties) to restrict them to compete in more than one region.
(b) A proof of sufficient voter support requirement for independent and unrepresented political/movement parties to manage the risk of too many names of parties on the ballots.
(c) Satisfaction of the legal requirements for registration and proof of sufficient voter support requirement for political parties not already elected to the legislatures.

In light of the above qualifications, Parliament may have to determine whether independent candidates will pay election fees and whether they are entitled to funding be subjected to consider the issue of election fees and the funding of independent candidates once elected.

5.1.5 Demarcation of boundaries

Under this approach, the provincial boundaries are contiguous to constituency boundaries and, therefore no need for demarcation in the case of the National Assembly. In the case of the PL, there would be no "constituencies" as this is the fairest for contesting independent candidates.

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As indicated above, demarcation of possible constituencies below the provincial level carries the serious risk of complaints of gerrymandering.

5.1.6 number of ballot papers

The option proposes no changes in the current number of ballot papers where a single ballot paper is used to elect political parties and independent candidates to the NA and PLs. The votes cast for parties (including independents) in each province would determine the allocation of seats per party on a proportional basis.

5.1.7 Vacancies

Vacancies under this option will be as follows:

a) In the case of independents, vacancies for the NA and PLs would be filled by recalculating the result of the election disregarding the votes for the independent candidate.
b) In the case of vacancies in elected party representatives, the next person on the party list of the person who vacated the seat would replace the vacancy (process that happens now).

5.1.8 Evaluation of the option in terms of the key principles adopted by the MAC

Principle	Detail
Inclusiveness (national unity)	Retaining a PR system with an MMC component for the NA vote will continue the existing inclusiveness of the electoral system, yielding a broad representation of the demographic, ethnic, racial, and religious diversity of the population. In addition, using the province as the basis for "constituency" (for NA) and the PL is the fairest to allow independents the greatest chance of gaining support within and across these potential divides.
Fairness	The option allows for independents to have a fair opportunity to enter their names onto the NA and PLs ballots.
Simplicity	Poling and seat allocation procedures are simple, and stakeholders are familiar with them, and they will be far more cost-effective than systems requiring many more se[parate elections and/or an additional demarcation process.
Accountability	Accountability is a post-elections issue, and Parliament should ensure that mechanisms are in place to ensure elected representatives are accountable to citizens.
Gender Equality	This option has the potential to generate the highest levels of gender representation due to it being closest to a pure PR component.
Proportionality	This option satisfies the constitutional requirement of general system proportionality.

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Effective participation of independents	This option ensures the fairest chance of representation of independent candidates in NA and PLs.
Genuine choice	This option allows for the voters to have a chance to select not only among political/movement parties and lists but also among independent candidates.
Effectiveness	Introduction of minimum candidature requirements, including the proof of sufficient voter support, ensures a manageable number of candidates through an in-built threshold for candidate nomination, whether or not it is an independent or party candidate
Legitimacy	The support provided by voters through their turnout in the improvement of the already widely supported electoral system by registered voters augments its legitimacy.

5.2 OPTION 2: THE MIXED-MEMBER MODEL INCORPORATING SINGLE-MEMBER CONSTITUENCIES

This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system resembling the current local government electoral system, albeit with some improvements.

5.2.1 Description of the option

This option can be understood as a member of the family of Mixed-Member Proportional (MMP) systems and as part of the sub-family of Additional Member Systems (AMS) found, for example, in Germany, New Zealand and the Scottish Parliament.

It involves electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency. Voters would vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing closed party lists (their second vote).

Single-member constituency vote (200 constituencies)

Two possibilities were suggested for conducting the single-member constituency elections (the first vote):

- **First-past-the-post (plurality)** - As in the local government system, the candidate that wins the most votes in a constituency wins the election.
- **Instant run-off or Alternative Vote (AV) (majority)- Voters select first and second preference candidates in their constituency.** If first preference votes

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fail to yield a 50 per cent plus one majority, second preference votes will be counted. This would ensure that MPs command the support of a majority in their constituencies and that constituencies are not won by unpopular minority parties. It would also ensure that a majority of voters in a constituency have an MP they can relate to, offsetting one disadvantage of single-member constituencies relative to MMCs.

The independent candidates standing in constituencies would stand in just one constituency.

National Multi-member constituency vote (PR top-up)

In the second vote, parties compile closed lists of candidates and voters vote for the party. Seats are distributed according to the number of votes each party wins. Only the national multi-member constituency, would count towards determining overall proportionality in Parliament. Seats won outright by a party in the single-member constituencies would be subtracted from their overall seat entitlement as determined by the second vote.

Independents would be able to compete with parties as free-standing individuals in the case of the single-member constituencies and together with associates (to receive excess votes) in the single national multi-member constituency. Some system of excess vote transfer is needed on the second ballot to ensure overall proportionality in the possibility that an independent will win enough votes to justify many seats but only be able to fill one of them.

A party candidate would be able to stand simultaneously in both a constituency and on the national list. If they win a constituency, any seat they win on the national list goes to the next person down on the party list. This ensures that parties can maximise the chances that their top leaders will be elected.

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5.2.2 Composition of the National Assembly and the Provincial Legislatures

National Assembly

200 MPs would be elected from single-member constituencies, and the remaining 200 from a single national multi-member constituency. A 50:50 split seems the best way of combining meaningful local constituency representation with the assurance of proportionality and options for maximising gender equity. Fewer constituencies would be too large for meaningful local representation. Our research suggests that there could be up to 265 seats without serious risk of overhang. However, it is safer to keep the number to 200, both to reduce as close as possible to zero the risk of overhang and to ensure that party leaders who favour gender equity have the option of securing it thanks to a sufficiently large number of MPs coming from closed party lists (which can be more easily gender-balanced than constituencies). The experience of local government suggests that the employment of a 50:50 ratio in South African conditions is compatible with high levels of gender equity.

Voters will vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing closed party lists (their second vote). This is a system familiar to voters from the local government.

Only the second vote in the national multi-member constituency will count towards determining overall proportionality in Parliament. Seats won outright by a party in the single-member constituencies would be subtracted from their overall seat entitlement as determined solely by the second vote.

Provincial legislatures

A single set of constituencies would be simultaneously employed in elections for both the National Assembly and Provincial legislature. The balance of seats in each provincial legislature would be composed of closed party-list candidates. In the Northern Cape, where there would be too few such constituencies to balance the party vote, constituencies could be subdivided for provincial elections.

There will thus be inter-provincially varied ratios of constituency to list MLAs.

This system would enable national and provincial elections to be synchronised, as at present. It would also reduce the scale of the demarcation challenge.

5.2.3 Proportionality

The second vote in the national MMC to determine overall proportionality in Parliament represents this option's decisive break from the current local government model, where 'all votes count. Seats won outright by a party in the single-member constituencies

MSC 28

would be subtracted from their overall seat entitlement as determined solely by the second vote.

The logic behind this is clear and twofold.

First and most importantly, it allows for an appropriate division of voting incentives. When voting for a constituency MP, voters will be choosing the person they want representing their constituency, irrespective of party affiliation. When casting the second vote, voters will be deciding which party they want to run the country (or to have a stronger voice in Parliament). Voters might choose to split their vote, voting for one party locally and another nationally. Voters would not need to worry that voting for one party locally will decrease the chances of their nationally preferred party winning overall.

Second, if 'all votes count', independents and small parties would have a much-reduced chance of winning seats as they would have to fight multiple separate constituency elections to accumulate enough votes. If the second ballot alone determines overall proportionality, independents and small parties have two routes to election: they can win a seat if they win a plurality or majority in a constituency-based on geographically concentrated local support, or they could win seats by contesting the second ballot in what amounts to a single national MMC. In that case, they would be able to gather support from across the country.

5.2.4 Candidate qualification requirements under this option

This single member option minimum candidate qualification requirements include:

a) A proof of sufficient voter support requirement for independent and unrepresented political/movement parties to manage the risk of too many names of parties on the ballots.
b) Satisfaction of the legal requirements for registration and proof of sufficient voter support requirement for political parties not already elected to the legislatures.
c) The NA will decide if residency requirements could be a condition.

5.2.5 Demarcation of boundaries

Constituencies will be demarcated by combining local government wards. In order to facilitate cooperative government, they should not cross metro, district or provincial boundaries. Slight variations in numbers of voters or population per constituency would be offset by the second proportional vote.

A given candidate will be able to stand simultaneously in both a constituency and on the national list. If they win a constituency, any seat they win on the national list

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goes to the next person down on the party list. We do not think it a good idea to impose constituency residency requirements at this stage. However, if such requirements are imposed, it might be better for national party leaders to take up their list seat, triggering a by election for their constituency seat.

All constituency MPs should have well-staffed constituency offices in those constituencies and regular surgeries there. A party may decide to assign a list MP to a constituency where they do not have an elected constituency MP, to provide party supporters there with additional representational options.

5.2.6 number of ballot papers

This option envisages the use of two ballot papers for the NA elections where voters would vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing for closed party lists (their second vote).

The same will apply for PL elections.

Voters would be invited to cast four votes overall on election day - two for the National Assembly and two for the Provincial Legislature

5.2.7 Vacancies

Vacancies under this option could occur in the following manner:

a) Death
b) Resignation from the legislature
c) Defection/expulsion from a party
d) Recall of a constituency MP/MPL by a designated proportion of registered voters in their constituency.

Vacancies under this option would be addressed in the following manner:

a) In the case of constituencies, vacancies for the NA and PLs would be filled through by-elections in the respective constituency for that seat.
b) In the case of vacancies in elected party-list representatives, the next person on the party list of the person who vacated the seat would replace the vacancy (a process that happens now).

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5.2.8 Evaluation of the option in terms of the fundamental principles adopted by the MAC

Principle	Detail
Inclusiveness (national unity)	The principle of proportionality is retained in the national multi-member constituency election, which accurately reflects the views of the electorate nationally and provincially. The demarcation of constituencies by combining local government wards can be done in a way that does not reinforce apartheid spatial patterns.
Fairness and Simplicity	It is a relatively simple voting system, familiar to voters from local government. Voters cast two votes, one for a constituency representative and one for a party (at both national and provincial level).
Accountability	The option involves individual representation and accountability. Voters determine which particular candidate is elected in constituencies and pass judgement on candidate choices made by parties. Voters retrospectively hold candidates accountable at subsequent elections. The option also involves direct constituency representation, where voters have a 'local' MP they can approach and represent their interests. The option also involves direct constituency representation, where voters have a 'local' MP they can approach and represent their interests. All constituency MPs should have well-staffed constituency offices in those constituencies and regular surgeries there. A party may decide to assign a list MP to a constituency where they do not have an elected constituency MP, to provide party supporters there with additional representational options. If the recall option is introduced, there is a still further accountability mechanism.
Gender Equality	The options 50:50 split seems to combine meaningful local constituency representation with the assurance of proportionality and options for maximising gender equity. The experience of local government suggests that the employment of a 50:50 ratio in South African conditions is compatible with high levels of gender equity.

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Proportionality	The system is proportional to a significant degree due to the compensatory top-up from party lists to correct inter-party proportionality imbalances generated by constituency elections.
Effective participation of independents	The option accommodates independent candidates more naturally than many MMC models, including the closed party list model. Independents can simply stand as free-standing individuals in the local constituencies (as well as, with associates, nationally). It also accommodates independents substantively, because they have two separate routes to winning seats.
Genuine choice	Voters will have a wide range of parties and independents to choose between.
Effectiveness	The model would entail some challenge in demarcating constituencies, but these can be ameliorated by combining existing wards.
Legitimacy	The system should command a wider legitimacy insofar as it meets a variety of public demands (e.g. for individual and local representation) while satisfying constitutional requirements of proportionality. It involves direct constituency representation, where voters have a 'local' MP who they can approach and who can represent their interests. It also provides two routes for independents to win seats. There is some potential complication in the possible politicisation of constituency demarcation, but this will be ameliorated by the assurance that overall proportionality will be retained.

6. CONCLUSION

We would like to express our gratitude to the many stakeholders who took the trouble to provide us with verbal and written advice. We would also like to express our gratitude to the Minister for having afforded us the privilege to serve in this Committee and to make recommendations on a matter of national importance.

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7. ANNEXURE 1: Consulted Stakeholders

Stakeholder category	organisations
Political parties	African Christian Democratic Party (ACDP) African National Congress (ANC) African Transformation Movement (ATM) Congress of the People (COPE) Democratic Alliance (DA) Freedom Front Plus (FF+) Economic Freedom Fighters (EFF)
Civil Society Organisations	Activate Change Drivers Corruption Watch My Vote Counts One South Africa Movement Youth Lab The 70's Group iTrends
Organised Business	Business Unity South Africa (BUSA)
Organised Labour	Congress of South African Trade Unions (COSATU) South African Council of Churches (SACC) South African Federation of Trade Unions (SAFTU)
Academia (Local and external)	University of Kwazulu Natal (UKZ) University of Johannesburg (UJ)
Research Outfits and Think Tanks (Local and external)	Helen Suzman Foundation (HSF) Inclusivity Society Institute (ISI) Auwal Socio Economic Research Institute (ASRI)
Faith Based Organisations	South African Council of Churches (SACC)

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MINISTER
HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA

Private Bag X741, Pretoria, 0001, Tel: (012) 432 6635 Fax: (012) 432 6675
Private Bag X9102, Cape Town, 8000, Tel: (021) 469 6507, Fax: (021) 461 4191

Hon. N.N. Mapisa-Nqakula
Speaker of the National Assembly
PO Box 15
CAPE TOWN
8000

Dear Madam Speaker

NEW NATION MOVEMENT NPC AND OTHERS V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS [2020] ZACC 11 ("NEW NATION JUDGMENT")

1. This letter has reference to the Constitutional Court decision that "declared the Electoral Act 73 of 1998 unconstitutional to the extent that it requires that adult citizens may only be elected to the National Assembly (NA) and Provincial Legislatures (PLs) only through their membership of political parties".

2. Further, the Constitutional Court directed Parliament to rectify the defective sections of the Electoral law within a period of 24 months; that is, from June 2020 to June 2022.

3. In response to the Constitutional Court judgement, I established the Ministerial Advisory Committee (MAC) to identify the extent of the constitutional provisions affected by the Constitutional Court's judgement; develop policy options on the electoral system that address the defects of the Electoral Act; recommend possible options to be considered; and consult with stakeholders in the development of the options.

4. The Committee comprised of eminent academics, legal practitioners, a former member of Cabinet and former Commissioners and Officers of the Independent Electoral Commission. The members were:

    4.1.1. Mr Valli Moosa, Chairperson

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4.1.2. Adv Pansy Tlakula
4.1.3. Dr Sithembile Mbete
4.1.4. Mr Norman Du Plessis
4.1.5. Dr Michael Sutcliffe
4.1.6. Adv Vincent Maleka SC
4.1.7. Prof Daryl Glaser
4.1.8. Dr Nomsa Masuku

5. The Committee provided me with a report on 09 June 2021. The MAC explored a variety of options and heard from the range of stakeholders. In the end, the MAC members were not able to reach a consensus on a single option, but did succeed in narrowing down the options to a fairly stark choice of two options, namely:

5.1. **Option 1:** The slightly modified multi-member constituency (MMC) which accommodates independents but requires relatively minimal changes to the legislation. This option favours inserting independents into the existing electoral system, enabling independents to compete with political parties for votes.

5.2. **Option 2:** The mixed-member model incorporating single-member constituencies: This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system resembling the current local government electoral system, albeit with some improvements. This option involves electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency.

6. After considering these options, I then appointed a team of counsel to draft the Amendment Bill and to advise on the Constitutional implications of the Amendment Bill. The team consists of:

6.1.1. Adv Steven Budlender SC
6.1.2. Adv Salome Manganye
6.1.3. Adv Mitchell De Beer
6.1.4. Adv Mfundo Salukazana

7. The legal team has provided me with a draft of Amendment Bill and prepared a memorandum that simplifies the Bill.

8. At the Cabinet meeting held on 24 November 2021, Cabinet considered and approved the following documents for submission to Parliament for further

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processing and public consultations due to the looming Constitutional Court deadline:

8.1. Report by the Ministerial Advisory Committee.
8.2. Memorandum on the draft Electoral Amendment Bill prepared by Adv. Steven Budlender, SC; and
8.3. The draft Electoral Amendment Bill.

9. Kindly find attached the above mentioned documents as directed by Cabinet.

Yours sincerely

DR PA MOTSOALEDI, MP
MINISTER OF HOME AFFAIRS
DATE: 29/11/2021

CC: Mr M Chabane, MP
Chairperson of the Portfolio Committee on Home Affairs

Mr C Frolick, MP
House Chairperson

Adv L Louw
Office of the Speaker

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MEMORANDUM

for

MINISTER OF HOME AFFAIRS

on

ELECTORAL AMENDMENT BILL

STEVEN BUDLENDER SC
SALOME MANGANYE
MITCHELL DE BEER
MFUNDO SALUKAZANA

Chambers, Sandton & Cape Town
25 November 2021

TABLE OF CONTENTS

MSC

63

OVERVIEW

1 We are instructed by the Minister of Home Affairs.

2 In June 2020, in *New Nation Movement NPC v President of the Republic of South Africa*,[1] the Constitutional Court declared the Electoral Act 73 of 1998 unconstitutional and invalid to the extent that it requires that adult citizens may only be elected to the National Assembly and Provincial Legislatures through their membership of political parties.

3 The Court suspended the declaration of invalidity for 24 months to give Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.

4 In response to the Constitutional Court's judgment, the Minister of Home Affairs established a Ministerial Advisory Committee (**MAC**) to investigate and report on electoral reform.

4.1 The MAC was tasked with: identifying the extent of the constitutional provisions affected by the Constitutional Court's judgment; developing policy options on the electoral system that address the defects of the Electoral Act; recommending possible options to be considered; and consulting with stakeholders in the development of the options.

[1] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC).

MSC

128

4.2 The MAC produced a report setting out two options for electoral reform, which would permit independent candidates to run for national and provincial elections.

5 The Minister instructed us to draft an Electoral Amendment Bill to give effect to the "minimalist option" set out in the MAC's report and have done so.

6 This memorandum is intended to provide context for the Bill. It deals with the following issues in turn:

6.1 what the Constitution requires of the electoral system in light of the Constitutional Court's *New Nation Movement* judgment;

6.2 our understanding of the minimalist option and what is sought to be achieved by amending the Electoral Act;

6.3 how the system set out in the Bill would work in practice with reference to a hypothetical election;

6.4 qualifications to run as an independent candidate;

6.5 whether it is necessary to make provision for independent candidates in the National Council of Provinces; and

6.6 consequential amendments to the Political Party Funding Act 6 of 2018.

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THE ELECTORAL SYSTEM AND THE *NEW NATION MOVEMENT* JUDGMENT

7 At present, the Electoral Act provides for a proportional representation system for the National Assembly and provincial legislatures, through the use of party lists. A citizen cannot contest national and provincial elections if they are not a member of a political party.

8 In *New Nation Movement*, the Constitutional Court held that section 19(3)(b)[2] of the Constitution, read together with section 19(1)[3] and the right to freely associate (section 18), requires that independent candidates must be permitted to contest the national and provincial elections.[4] For this reason, the Court declared the Electoral Act unconstitutional.

9 Importantly, sections 46(1)(d) and 105(1)(d) of the Constitution require the adoption of an electoral system (as prescribed by national legislation) that "*results, in general, in proportional representation*" for the election of the National Assembly and provincial legislatures.

10 Our understanding of the judgment is that the Constitution requires the electoral system to balance various objectives, which include: the need to have a system

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[2] Section 19(3)(b) provides that: *"Every adult citizen has the right to stand for public office and, if elected, to hold office."*

[3] Section 19(1) reads:

> *"Every citizen is free to make political choices, which includes the right—*
>
> *(a) to form a political party;*
>
> *(b) to participate in the activities of, or recruit members for, a political party; and*
>
> *(c) to campaign for a political party or cause."*

[4] *New Nation Movement* at paras 17-19, 48-49 and 59.

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which generally results in proportionality; while also making provision for adult citizens to stand as independent candidates, and not as members of political parties.

11 The Court, however, did not specify how the electoral system must achieve these objectives and requirements. Madlanga J, who wrote the majority judgment for the Court, emphasised that those decisions are left to Parliament:[5]

> "[L]et me mention that a lot was said about which electoral system is better, which system better affords the electorate accountability, etc. That is territory this judgment will not venture into. The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system. This Court's concern is whether the chosen system is compliant with the Constitution."

12 The Court nonetheless expressly recognised that proportional representation is possible where there is a combination of representation through party lists and representation by individuals who are not attached to political parties. In this regard, the Court approvingly pointed to section 157(2)(b) of the Constitution, which provides – at local government level – for members of Municipal Councils to be elected from party lists and ward representation (which may include independent candidates).[6]

13 We should also emphasise that while the details of the electoral system are left to Parliament,[7] in addition to the requirements mentioned above, any electoral

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5 *New National Party v Government of the Republic of South Africa* at para 15.

6 *New National Party v Government of the Republic of South Africa* at para 79.

7 *New National Party v Government of the Republic of South Africa* at para 14.

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system must satisfy a minimum threshold of constitutional rationality.[8] That requires a rational connection between a scheme adopted by Parliament and the achievement of a legitimate government purpose.

14 Having sketched out these principles, next we summarise our understanding of the minimalist option.

THE MINIMALIST OPTION FOR ALLOWING INDEPENDENT CANDIDATES

15 The MAC report describes the minimalist option as follows:

> "This option entails modifying the existing multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation, including not interfering with the constitutionally required general proportionality."[9]

16 As we understand the report, the minimalist option intends retaining the current composition of seats in the National Assembly and provincial legislatures, while making provision for independent candidates to contest the elections for those bodies.

17 The 400 seats in National Assembly will continue to be divided in two:

17.1 Two hundred seats will be elected from the nine provinces or regions – the "200 regional seats". (These are the seats using what are sometimes called the "province to national lists".)

[8] *New Nation Movement* at para 75, cited *New National Party* at paras 19-20.

[9] MAC report para 5.1.

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17.2 The other 200 seats will be "200 compensatory seats". (These are the seats using what are sometimes called the "national to national lists".)

18 In respect of the *200 regional seats*:

18.1 These seats will be allocated across the nine provinces / regions on a proportional basis taking into account the number of registered voters for each province / region. (That is the way the system currently works.)

18.2 These seats will be contested by parties (through closed lists) and independent candidates.

18.3 Each independent candidate will only be entitled to contest seats in one province / region.

18.4 Because there will be different independent candidates running in each province / region, there will be different ballot papers for each province / region. The ballot paper used in each province / region will include all the parties involved in the election for the National Assembly and the independent candidates for that province / region.

18.5 If an independent meets the relevant quota for a seat, they will be elected to the National Assembly. Once an independent candidate has secured a seat, any additional votes they receive will be discarded and a new quota will be used to determine the proportional representation of the political parties, and the allocation of seats to them.

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19 In respect of the *200 compensatory seats*:

19.1 The votes for only the parties in the nine regions (from the same ballots used for the 200 regional seats) will be added together to determine the share of each party in an overall vote.

19.2 Parties will be allocated seats in accordance with their proportional share of the overall vote.

19.3 To be clear, independents will not get to contest the 200 compensatory seats.

20 For the provincial legislatures:

20.1 Seats will be allocated based on a single ballot for that province, which will include all parties and independent candidates. This will be a straight proportional election.

20.2 As with the 200 regional seats for the National Assembly, an independent candidate will be elected if they meet the relevant quota for a seat. Once an independent candidate has secured a seat, any additional votes they receive will be discarded and a new quota will be used to determine the proportional representation of the parties, and the allocation of seats to them.

21 In the Bill, we have designed a system which adopts this approach.

22 We note that in virtually any system of this sort, there is always the occurrence of what might be termed "wasted" votes.

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22.1 If Candidate X stands as an independent and receives 50 000 votes, whereas the quota for a seat is only 40 000 votes, there is nowhere else for these excess 10 000 votes to go. Some might say that they are then "wasted".

22.2 In our view, however, this does not render the system impermissible or unconstitutional.

22.3 While it is not currently part of South Africa's current system of national and provincial elections, "wasted" or "lost" votes are a common feature of many other election systems, including single member constituency systems.

22.4 Moreover, the reality is that the votes cannot truly be said to be "wasted" or "lost". If Independent Candidate X runs for the National Assembly as an independent and is elected, then both Independent Candidate X and her voters have achieved their objective. The mere fact that she could also have been elected with fewer votes (40 000) does not change that.

22.5 And, of course, if Candidate X considers that she will get so many votes that they will cover two more seats, then she has the right to form her own political party to run for multiple seats, rather than running for a single seat as an independent.

23 Nevertheless, in order to reduce the extent of "wasted votes", we have specified that when the ballots for the 200 regional seats in National Assembly and the seats provincial legislatures are counted, seats will be allocated in three rounds.

MSC 108

23.1 In the first and second rounds, independent candidates will have an opportunity to gain a seat if they meet the quota of votes per seat.

23.2 In the first round, any independent candidate who satisfies the quota for a seat will be allocated a seat.

23.3 In the second round, any independent candidates who succeeded in the first round will be removed, along with all the votes cast for him or her. A new quota will be calculated by taking into account the remaining votes and seats. Any independent candidate who satisfies the new quota will be allocated a seat.

23.4 In the third round, political parties will be allocated their seats. All independent candidates (whether successful or unsuccessful) and all votes casts for independent candidates will be removed. A droop quota will be used (as is currently the case) to allocate the remaining seats in proportion to the number of votes per political party.

24 We are of the view that this three-round approach strikes an appropriate balance between the interests of independent candidates and political parties.

THE EFFECT IN A HYPOTHETICAL ELECTION

25 To demonstrate how the Bill would include independent candidates in the electoral system, we focus on a single hypothetical provincial election for a provincial legislature. The same system would apply for the 200 regional seats

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in the National Assembly. We have broadly used the number of votes cast in the last election for the Gauteng Provincial Legislature in 2019.

26 The legislature has 80 seats.

27 There 4 400 000 votes were cast.

28 Four political parties and five independent candidates contested the election. Each received the following votes:

Party / Candidate	Votes
Party A	2 400 000
Party B	1 445 000
Party C	146 000
Party D	48 000
Independent 1	220 000
Independent 2	57 000
Independent 3	54 000
Independent 4	20 000
Independent 5	10 000

29 In the first round (Schedule 1A item 20):

29.1 The quota will be 55 000 votes per seat (4 400 000 votes / 80 seats).

29.2 Independent 1 and Independent 2 will be allocated seats as they both met the quota .

Candidate	Votes	Seat
Independent 1	220 000	1
Independent 2	57 000	1
Independent 3	54 000	-
Independent 4	20 000	-
Independent 5	10 000	-

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30 In the second round (Schedule 1A item 21):

30.1 Independent 1 and Independent 2 will be disregarded as they were successfully elected.

30.2 The votes cast for Independent 1 and Independent 2 will be disregarded, leaving 4 123 000 votes.

30.3 The seats allocated to Independent 1 and Independent 2 will be disregarded, leaving 78 seats.

30.4 The second quota will therefore be 52 858 votes per seat (4 123 000 / 78 disregarding factors).

30.5 Independent 3 will be allocated a seat as she satisfies the second quota

Candidate	Votes	Seat
Independent 3	54 000	1
Independent 4	20 000	-
Independent 5	10 000	-

31 In the third round (Schedule 1A item 22):

31.1 All independent candidates will be disregarded, including Independent 4 and Independent 5 who will not be allocated a seat.

31.2 All votes cast for independent candidates will be disregarded. In total, 361 000 votes were cast from independent candidates, leaving 4 039 000 votes cast for political parties.

31.3 The three seats allocated to Independent 1, Independent 2, and Independent 3 will be disregarded, leaving 77 seats.

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31.4 The third quota of votes per seat is then calculated using the formula for determining a droop quota: 52 455 (4 039 000 / 77 + 1, disregarding factors).

31.5 The parties each receive the following seats

Party	Votes	Seats
Party A	2 400 000	45.75
Party B	1 445 000	27.54
Party C	146 000	2.78
Party D	48 000	0.91

31.6 At this point, only 74 seats have been allocated, with a surplus of 3 seats.

31.7 The remaining three seats are allocated using the droop quota, in order of the surplus votes. Party D receives 1 seat (seat 75). Part C receives another seat (seat 76) and Party A receives another seat (seat 77).

31.8 So, the political parties receive the following seats

Party	Votes	Seats
Party A	2 400 000	46
Party B	1 445 000	27
Party C	146 000	3
Party D	48 000	1

32 The final allocation of seats will therefore be as follows:

Party / Candidate	Votes	Seats (out of 80)
Party A	2 400 000	46
Party B	1 445 000	27
Party C	146 000	3
Party D	48 000	1
Independent 1	220 000	1
Independent 2	57 000	1
Independent 3	54 000	1
Independent 4	20 000	0
Independent 5	10 000	0

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QUALIFICATIONS TO RUN AS AN INDEPENDENT CANDIDATE

33 In order to ensure that the Electoral Commission can effectively run the national and provincial elections, it will be important to adopt qualification criteria for independent candidates to contest the 200 regional seats and provincial legislatures.

34 A careful balance will have to be struck between, on the one hand, ensuring that serious citizens are not precluded from contesting elections as independent candidates, while on the other hand, not making the qualification criteria too easy to meet, so that ballot papers are impractically lengthy and impossible to use in elections, whether it be by voters marking their votes, or officials of the Electoral Commission counting and processing the votes.

35 It seems to us that the following criteria will have to be adopted.

35.1 A residential qualification – so that an independent candidate can only contest one region or province;

35.2 A voter supporter requirement – the independent candidate would be required to satisfy the Electoral Commission that they have sufficient support of registered voters within the province / region they intend contesting (similar to the requirement for local government elections);[10] and

[10] Section 17(2)(a) of the Local Government: Municipal Electoral Act 27 of 2000, requires that "*a prescribed form with the signatures of at least 50 voters whose names appear on the municipality's segment of the voters' roll for any voting district in the contested ward*" be attached to the nomination of an independent candidate.

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35.3 A prescribed monetary deposit.

36 The precise threshold of supporter numbers and the precise amount of the monetary deposit will have to be carefully chosen to strike an appropriate balance between facilitating participation of serious independent candidates, while not permitting too many independent candidates to contest the election such that it produces practical difficulties.

37 We have made provision for the amount of the deposit and threshold of voter support to be determined and prescribed by the Electoral Commission. We are of the opinion that the Electoral Commission is the most appropriate body to make these determinations, and which can be revised in light of changing circumstances.

38 Lastly, there is the question of whether the amended Act should adopt a restriction on the ability of members of political parties to run as independent candidates.

38.1 We have been referred to section 33(1) of the Kenya Elections Act 42 of 2011, which provides qualifications for contesting an election as an independent candidate:

> "A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—
>
> (a) has not been a member of any political party for at least three months preceding the date of the election. "

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38.2 The argument for such requirement is that, if a member of a political party loses an internal race to be included in a party list, then it is said that they should not be able to utilise the election to achieve a similar result. That would undermine party politics.

38.3 We have included such a requirement in the Bill (see section 33A(3)(f)).

38.4 Consideration will need to be given to whether to include this provision and whether it is consistent with the Constitution.

THE POSSIBILITY OF INDEPENDENT CANDIDATES BEING ELECTED TO THE NATIONAL COUNCIL OF PROVINCES

39 We have further been requested to consider whether independent candidates should be appointed to the National Council of Province (**NCOP**).

40 We note that neither the Constitutional Court judgment in *New Nation Movement* case nor the MAC report contains any suggestion that independent candidates should be appointed to the NCOP. The Constitutional Court judgment and order is limited to the National Assembly and provincial legislatures and does not mention the NCOP.

41 We are nevertheless asked to consider whether it would be possible for independent candidates to be appointed to the NCOP. The answer, in our view, is that this is not constitutionally permissible and, to be achieved, would require

MSC WB

an amendment of the Constitution itself (as an opposed to an amendment of the Electoral Act).

42 This is for the following reasons:

42.1 Section 60 of the Constitution provides for the composition of the NCOP. It provides that it is to be composed of a single delegation from each province consisting of ten delegates. The ten delegates are to be made up as follows[11]:

42.1.1 Four special delegates; and

42.1.2 Six permanent delegates appointed in terms of section 61(2) of the Constitution.

42.2 The allocation of delegates is dealt with in section 61 of the Constitution and provides that:

> "Parties represented in a provincial legislature are entitled to delegates in the province's delegation in accordance with the formula set out in Part B of Schedule 3 of the Constitution." (emphasis added)

42.3 Part B of Schedule 3 deals with the formula to determine party's participation in Provincial delegations to the National Council of Provinces. It provides as follows:

> "1. The number of delegates in a Provincial delegation to the National Council of Provinces to which a party is

[12] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC).

MSC WB

entitled, must be determined by multiplying the number of seats the party holds in the Provincial Legislature by ten and dividing the result by the number of seats in the legislature plus one;

2. If a calculation in terms of Item 1 yields a surplus not absorbed by the delegates allocated to a party in terms of that item, the surplus competes with similar surpluses accruing to any other party or parties, and any undistributed delegates in the delegation must be allocated to the party or parties in the sequence of the highest surplus;

3. If the competing surpluses envisaged in Item 2 are equal, the undistributed delegates in the delegation must be allocated to the party or parties with the same surplus in the sequence from the highest to the lowest number of votes that have been recorded for those parties during the last election for the Provincial Legislature concerned;

4. If more than one party with the same surplus recorded, the same number of votes during the last election for the Provincial Legislature concerned, the Legislature concerned must allocate the undistributed delegates in the delegation to the party or parties with the same surplus in the manner which is consistent with democracy."

43 The above provisions make clear that, from a constitutional perspective, NCOP seats may only be allocated to "*parties*" – not independent candidates.

44 The Constitution therefore does not require or permit independent candidates to sit in the NCOP. Only an amendment to the Constitution (as opposed to an amendment to the Electoral Act) could achieve this.

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CONSEQUENTIAL AMENDMENTS TO THE POLITICAL PARTY FUNDING ACT

45 Finally, we note that the Bill will require consequential amendments to be enacted to the Political Party Funding Act 6 of 2018 (**Funding Act**).

46 The Funding Act currently regulates the provision of public funding to political parties, as well as the restriction and disclosure of private donations made to political parties.

47 Independent candidates will have to be catered for by the Funding Act.

48 In respect of public funding:

48.1 The Funding Act was enacted in part in compliance with section 236 of the Constitution. The provision is headed "*Funding for political parties*" and provides:

> "To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis"

48.2 Therefore, section 236 of the Constitution does not itself require the provision of public funding for independent candidates.

48.3 Other provisions of the Constitution may, however, be said to require funding to be provided on a similar basis to independent candidates elected to the National Assembly and provincial legislatures.

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48.4 The National Assembly will need to decide whether to include consequential amendments to the Funding Act so as to provide for the allocation of funds to them on a proportional basis from the two funds established in sections 2 and 3 of the Act. We will prepare the necessary draft amendments in this regard as a matter of caution.

49 In respect of private funding:

49.1 In *My Vote Counts II*,[12] the Constitutional Court explicitly declared that "*information on private funding of political parties and independent candidates must be recorded, preserved and made reasonably accessible.*"

49.2 The Funding Act does not at present regulate the private funding of independent candidates. Its provisions which prohibit donations and require the disclosure of donations to political parties, do not bind independent candidates.

49.3 That is because the Funding Act does not mention independent candidates anywhere. A "political party" is defined by section 1 to include "*any entity that accepts donations principally to support or oppose any registered political party or **its candidates** in an election as defined in section 1 of the Electoral Act, 1998 (Act 73 of 1998).*" The emphasised reference to "*its candidates*" is clearly linked to the political party concerned. This appears to be a lacuna in the Funding Act given

[12] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC).

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that independent candidates can already contest local government elections.

49.4 We note that provision is already made elsewhere in the law for the recordal, preservation and disclosure of information on private funding of independent candidates.

49.4.1 Section 52A(1)(a) of the Promotion of Access to Information Act 2 of 2000 (**PAIA**) requires political parties to keep records of donations from private sources above a prescribed threshold and paragraph (b) specifies that political parties must "*make the records available on a quarterly basis, as prescribed*".

49.4.2 Regulation 6 of the Regulations relating to the Promotion of Access to Information, 2021[13] prescribe that access must be available at a party's physical address and online.

49.4.3 These provisions do apply to independent candidates as section 1 of PAIA defines "*political party*" to include "*a natural person who is an independent candidate*".

49.5 Nonetheless, independent candidates should also be bound by the regulation of private donations (including restrictions) contained in the Funding Act.

[13] Promulgated in GNR 757 of 27 August 2021 (*Government Gazette* 45057).

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49.6 The National Assembly will need to decide whether to include consequential amendments to the Funding Act in this regard. We will again prepare the necessary draft amendments in this regard as a matter of caution.

STEVEN BUDLENDER SC
SALOME MANGANYE
MITCHELL DE BEER
MFUNDO SALUKAZANA

Chambers, Sandton, Pretoria & Cape Town
25 November 2021

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REPUBLIC OF SOUTH AFRICA

ELECTORAL AMENDMENT BILL

(MINISTER OF HOME AFFAIRS)

[B_____—2022]

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GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments.
_____	Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Electoral Act, 1998, to make provision for the election of independent candidates to the National Assembly and provincial legislatures; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 1 of Act 73 of 1998, as amended by section 1 of Act 18 of 2013 and section 7 Act 4 of 2021

1. Section 1 of the Electoral Act 73 of 1998 (hereinafter referred to as the "principal Act") is amended by—

(a) the insertion after the definition of "agent" of the following definition:

"'**candidate**' means a person contesting an election, whether he or she is nominated on a list of a political party or not, as the context requires;"

(b) the insertion after the definition of "identity document" of the following definition:

"'**independent candidate**' means a person contesting an election who is not nominated on a list of a political party;"

(c) the insertion after the definition of "list of candidates" of the following definition:

"'**list of independent candidates**' means the list of independent candidates referred to in sections 32C and 32E;"

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(d) the insertion after the definition of "presiding officer" of the following definition:

"**province** means a province referred to in section 103 of the Constitution;"

(e) the insertion after the definition of "registered party" of the following definition:

"'**region**' means the territorial area of a province;"

Substitution of paragraph (c) of section 27(2) of Act 73 of 1998, as repealed by section 10 (b) of Act 4 of 2021

2. The following paragraph is substituted for paragraph (c) of section 27(2) of the principal Act:

"(c) declaration, signed by each candidate appearing on the party's regional list of candidates or provincial list of candidates referred to in Schedule 1A, confirming that he or she is registered to vote within the region or province in which the election will take place;"

Amendment of section 28 of Act 73 of 1998, substituted by section 11 of Act 1 of 2019 and section 11(a) and (b) of Act 4 of 2021

3. Section 28 of the principal Act is amended by—

(a) the substitution for subsection (1) of the following subsection:

"(1) If a registered party that has submitted a list of candidates has not fully complied with section 27 (2) (a), (b), (c), (d) or section 27 (4), the chief electoral officer must notify that party of its non-compliance."

(b) the substitution for subsection (2) of the following subsection:

"(2) The notification must be given in the prescribed manner by not later than the relevant date stated in the election timetable, and must indicate that the party has an opportunity to comply with section 27 (2) (a), (b), (c), (d) or section 27 (4), by not later than the relevant date stated in the election timetable."

Amendment of Part 4 of Chapter IV and section 32 of Act 73 of 1998, as repealed by section 8 of Act 34 of 2003

4. Part 4 of Chapter IV and section 32 of the principal Act are amended by the substitution and insertion of the following provisions:

"**Part 4**
Independent candidates (sections 32 to 32E)

32. Nomination of independent candidates

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(1) A person may be nominated to contest an election as an independent candidate in a region for the National Assembly or for a provincial legislature by a person who is–

(a) ordinarily resident in the region or province concerned; and

(b) registered as a voter on the segment of the voters' roll for the region or province concerned.

(2) Provided the other provisions of this Act are complied with, a person nominated in terms of subsection (1) stands as an independent candidate in that election."

32A. Requirements and qualifications for independent candidates to contest elections

(1) A person may contest an election as an independent candidate only if that person is nominated on a prescribed form and that form is submitted to the Commission by not later than a date stated in the timetable for the election and complies with the requirements of subsection (3).

(2) The prescribed nomination form must be submitted in the prescribed manner by not later than the relevant date stated in the election timetable.

(3) The following must be attached to a nomination when it is submitted–

(a) a prescribed form, with at least the prescribed minimum number of signatures of voters whose names appear on the segment of the voters' roll for the region or province in which the candidate is standing for election;

(b) a deposit equal to a prescribed amount, if any, payable in the prescribed form and manner;

(c) a prescribed undertaking, signed by the candidate, to be bound by the Code;

(d) a prescribed declaration, signed by the candidate, that he or she is not disqualified from standing for election in terms of the Constitution or any applicable legislation;

(e) a prescribed declaration, signed by the candidate, confirming that his or her residential address is situated within the region or province in which the election will take place that he or she intends contesting;

(f) a prescribed declaration, signed by the candidate, confirming that he or she has not been a member of any political party for at least three months preceding the date of the nomination; and

(g) a recent photograph of the candidate in such form as may be prescribed.

(4) The Commission may in the form and manner as may be prescribed request–

(a) an acceptance of nomination signed by the candidate; and

(b) a copy of the identity card or that page of the candidate's identity document on which the candidate's photo, name and identity number appear.

(5) The Commission must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the election if the provisions of section 32 and this section have been complied with.

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32B. Non-compliance

(1) If the nomination of an independent candidate does not fully comply with section 32A (3) (a), (c), (d), (e), (f), (g) or section 32A (4), the chief electoral officer must notify the nominated person of the non-compliance.

(2) The notification must be given in the prescribed manner by not later than the relevant date stated in the election timetable, and must indicate that the nominated person has an opportunity to comply with section 32A (3) (a), (c), (d), (e), (f), (g) or section 32A (4), by not later than the relevant date stated in the election timetable.

(3) If a person has been nominated both as an independent candidate and by one or more parties for an election-

(a) the chief electoral officer must, where possible, in writing, notify the person and such party or parties who have nominated such person about such state of affairs by no later than the relevant date and time stated in the election timetable; and

(b) the party or parties to whom notice has been given in terms of paragraph (a) may, by not later than the relevant date and time stated in the election timetable, substitute such a candidate.

32C. Inspection of copies of lists of independent candidates and accompanying documents

(1) By not later than the relevant date stated in the election timetable, the chief electoral officer must–

(a) compile a draft list of independent candidates; and

(b) give notice that copies of the draft list of independent candidates and accompanying documents submitted in terms of section 32A, as amended and supplemented in terms of section 32B, will be available for inspection.

(2) The notice referred to in subsection (1)(b) must be–

(a) published in the *Government Gazette*; and

(b) publicised in the media considered appropriate by the chief electoral officer so as to ensure wide publicity of the lists.

(3) The notice referred to in subsection (1)(b) must state, and the chief electoral officer must ensure, that for the relevant period stated in the election timetable–

(a) copies of the lists for–

(i) an election of the National Assembly, will be available for inspection at the Commission's head office, a place in each province designated in the notice and the office of each municipality in the country; and

(ii) an election of a provincial legislature, will be available for inspection at the Commission's head office, a place in the province designated in the notice and the office of each municipality in that province; and

(b) copies of the documents accompanying the lists are available for inspection at the Commission's head office.

(4) Any person may inspect a copy of the draft list of independent candidates and accompanying documents referred to in subsection (1).

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(5) The chief electoral officer must provide a certified copy of, or extract from, the draft list of independent candidates or document referred to in subsection (1), to any person who has paid the prescribed fee.

32D. Objections to independent candidates

(1) Any person, including the chief electoral officer, may object to the nomination of an independent candidate on the following grounds:

(a) the nominated candidate is not qualified to stand in the election;

(b) the nominated candidate has failed to submit the prescribed acceptance of nomination signed by the candidate as contemplated in section 32A (4); or

(c) there is no prescribed undertaking, signed by the nominated candidate, that the candidate is bound by the Code.

(2) The objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable, and must be served on the nominated candidate.

(3) The Commission must decide the objection, and must notify the objector and the nominated candidate of the decision in the prescribed manner by not later than the relevant date stated in the election timetable.

(4) The objector, or the nominated candidate, may appeal against the decision of the Commission to the Electoral Court in the prescribed manner and by not later than the relevant date stated in the election timetable.

(5) The Electoral Court must consider and decide the appeal and notify the parties to the appeal and the chief electoral officer of the decision in the prescribed manner and by not later than the relevant date stated in the election timetable.

(6) If the Commission or the Electoral Court decides that a candidate's nomination does not comply with section 32A, the Commission or the Electoral Court may allow the nominated candidate an opportunity to comply with that section.

32E. List of independent candidates entitled to contest election

(1) By not later than the relevant date stated in the election timetable, the chief electoral officer must–

(a) give effect to a decision of the Commission in terms of section 32D (3) and to a decision of the Electoral Court in terms of section 32D (5); and

(b) compile a final list of independent candidates entitled to contest the election concerned.

(2) The chief electoral officer must provide a certified copy of, or extract from, a list mentioned in subsection (1) (b) to any person who has paid the prescribed fee.

(3) By not later than the relevant date stated in the election timetable, the chief electoral officer must issue to each independent candidate on the list of independent candidates for an election, a certificate stating that the person is an independent candidate in that election.

Amendment of section 57A of Act 73 of 1998, as inserted by section 15 of Act 34 of 2003

5. Section 57A of the principal Act is amended by—

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(a) the substitution for paragraph (a) of the following paragraph:

"(a) lists of candidates and lists of independent candidates;"

(b) the subsection for paragraph (c) of the following paragraph:

"(c) the designation of candidates from candidate lists and independent candidate lists as representatives **[in]** for those seats;"

Amendment of section 94 of Act 73 of 1998

6. Section 94 of the principal Act is amended by the substitution for the section of the following section:

"No person, **[or]** registered party or independent candidate bound by the Code may contravene or fail to comply with a provision of that Code."

Amendment of section 99 of Act 73 of 1998

7. Section 99 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

"(1) The Electoral Code of Conduct must be subscribed to–
(a) by every registered party before that party is allowed to contest an election; **[and]**
(b) by every candidate before that candidate may be placed on a list of candidates in terms of section 31**[.]**; and
(c) by every independent candidate before that independent candidate may be placed on a list of independent candidates in terms of section 32E."

Amendment of section 106 of Act 73 of 1998

8. Section 106 of the principal Act is amended by—

(a) the insertion of the following subsection (1A) after subsection (1):

"(1A) Subject to section 96 (2) (c), the Commission must refund to an independent candidate any deposit paid by such candidate in terms of section 32A (3) (b) if the candidate is allocated a seat in the legislature whose election the independent candidate contested."

(b) the substitution for subsection (2) of the following subsection:

"(2) A deposit that is not refundable in terms of subsection (1) or (1A) is forfeited to the State."

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Amendment of section 110 of Act 73 of 1998

9. Section 110 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

"(1) Any mistake in the certified segment of the voters' roll referred to in section 24, **[or]** the final list of candidates referred to in section 31 or the final list of independent candidates referred to in section 32E does not invalidate that voters' roll, **[or]** that list of candidates, or that list of independent candidates."

Amendment of Schedule 1 to Act 73 of 1998, as amended by section 24 of Act 34 of 2003 and section 17 of Act 1 of 2019

10. Schedule 1 to the principal Act is amended by—

(a) the substitution for item 4 of the following item:

"4 Cut-off date for submission of list of candidates and nominations of independent candidates:

(a) Registered parties that intend to contest this election must nominate and submit a list of their candidates for the election to the chief electoral officer in the prescribed manner by ..... [day/month/year].

(b) Nominators of independent candidates that intend to contest this election must submit their nominations to the chief electoral officer in the prescribed manner by ..... [day/month/year]."

(b) the substitution for sub-item 5 (1) of the following sub-item:

"(1) The chief electoral officer must notify a registered party that has submitted a list of candidates in terms of section 27 but has not fully complied with **[that]** section 27 (2) (a), (b), (c), (d) or section 27 (4), of that non-compliance by.....[day/month/year]"

(c) the insertion of sub-item 5 (1A) after sub-item 5 (1):

"(1A) The chief electoral officer must notify the person nominated to be an independent candidate who has not fully complied with section 32A (3) (a), (c), (d), (e), (f), (g) or section 32A (4), of that non-compliance by..... [day/month/year]."

(d) the substitution for sub-item 5 (2) of the following sub-item:

"(2) If the party or person notified **[party]** in terms of sub-item (1) or (1A) takes the opportunity to comply with section 27(2) (a), (b), (c), (d), section 27 (4), section 32A (3) (a), (c), (d), (e), (f), (g) or section 32A (4), that party or person must do so by..... [day/month/year]."

(e) the insertion of sub-item 5A (1A) after sub-item 5A (1):

"(1A) The Commission must notify a person who has been nominated both as an independent candidate and by one or more parties for an election, and all the

parties on whose party lists such a candidate appears by ..... [day/month/year]."

(f) the substitution for sub-item 5A (2) of the following sub-item:

"(2) If the notified party decides to act in terms of section 28 (3) or 32B (3), that party must do so by..... (date)."

(g) the substitution for item 6 with the following item:

"**6 Inspection of lists of candidates and draft list of independent candidates and accompanying documents**

The chief electoral officer must give notice by ..... [day/month/year], that from the date of the notice until ..... [day/month/year], copies of the following documents will be available for inspection:

(a) The lists of candidates and accompanying documents submitted by registered parties in terms of section 27, as amended and supplemented in terms of section 28[.]; and

(b) The draft list of independent candidates and accompanying documents submitted in terms of section 32A as amended and supplemented in terms of section 32B. "

(h) the substitution for item 8 of the following item:

"**8 Decision of objections**

The Commission must decide an objection under section 30 or 32D, and must notify the objector, **[and]** the registered party that nominated the candidate and/or the nominated independent candidate of the decision in the prescribed manner by ..... [day/month/year]."

(i) the substitution for item 9 of the following item:

"**9 Cut-off date for appeals against decisions**

(1) The objector or the registered party who nominated the candidate may appeal against a decision of the Commission in terms of section 30 ([3]4) to the Electoral Court in the prescribed manner by ..... [day/month/year].

(2) The objector or the nominated independent candidate may appeal against a decision of the Commission in terms of section 32D (4) in the prescribed manner by ..... [day/month/year]."

(j) the substitution for item 10 of the following item:

"**10 Deciding appeals**

The Electoral Court must consider and decide an appeal brought under section 30 (4) or 32D (4) and notify the parties to the appeal, and the chief electoral officer, of the decision in the prescribed manner by ..... [day/month/year]."

(k) the substitution for item 11 of the following item:

"**11 List of parties and candidates entitled to contest election and final list of candidates**

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By ..... [day/month/year], the chief electoral officer–

(a) must give effect to a decision of the Commission in terms of section 30 (3) or section 32D (3) or a decision of the Electoral Court in terms of section 30 (5) or 32D (5); and

(b) must compile a list of the registered parties entitled to contest the election, **[and]** the final list of candidates for each of those parties and the list of independent candidates contesting this election."

(l) the substitution for item 12 of the following item:

"**12 Issue of certificate to candidates**

By ..... [day/month/year], the chief electoral officer must issue in the prescribed manner to each candidate on a final list of candidates and each independent candidate on the final list of independent candidates a certificate stating that the person is a candidate in this election in terms of section 31 (3) and section 32E (3)."

Amendment of Schedule 1A to Act 73 of 1998, as inserted by section 25 of Act 34 of 2003 and amended by section 8 of Act 55 of 2008

11. Schedule 1A to the principal Act is substituted for the following schedule:

"**Schedule 1A**
SYSTEM OF REPRESENTATION IN NATIONAL ASSEMBLY AND PROVINCIAL LEGISLATURES
(Section 57A)

National Assembly

1 The seats in the National Assembly are allocated as follows:

(a) half the seats are filled by independent candidates and candidates from lists of candidates of political parties contesting the nine regions – regional seats; and

(b) half the seats are filled by candidates from lists of candidates of political parties – compensatory seats.

2 The Commission must prepare a list of independent candidates contesting an election of the National Assembly in each region in accordance with the Act.

3 (1) Registered parties contesting an election of the National Assembly must nominate candidates on a list of candidates prepared in accordance with the Act.

(2) A party's list of candidates must consist of–

(a) a regional list for each region; and

(b) a national list,

with such number of names on each list as the party may determine subject to subsection (3).

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(3) The lists of candidates submitted by a party must together not contain more names than the number of seats in the National Assembly, and each such list must denote the fixed order of preference, of the names as the party may determine.

(4) The same name:

(a) may appear on a list for one region and the national list of a party; and

(b) may not appear on more than regional list.

Regional seats

4 The Commission must determine a fixed number of seats reserved for each region for every election of the National Assembly, taking into account available scientifically based data in respect of voters and representations by interested parties.

5 The regional seats are allocated for each region in three separate rounds.

6 In the first round:

(a) A quota of votes per seat is determined in respect of each region by dividing the total number of votes cast in a region by the total number of seats allocated to that region and the result, disregarding fractions is the first quota of votes per seat.

(b) Each independent candidate who receives enough votes to meet the first quota is awarded a seat.

7 In the second round:

(a) A second quota of votes is determined in each region by–

(i) disregarding the independent candidates who were allocated seats in the first round;

(ii) disregarding the votes cast for independent candidates who were allocated seats in the first round;

(iii) disregarding the number of seats allocated to independent candidates in the first round;

(iv) dividing the remaining number of votes cast in a region by the remaining number of seats allocated to that region,

and the result, disregarding fractions, is the second quota of votes per seat.

(b) Each remaining independent candidate who receives enough votes to meet the second quota is awarded a seat.

8 In the third round:

(a) A third quota of votes is determined in each region by–

(i) disregarding all independent candidates;

(ii) disregarding all votes cast for independent candidates;

(iii) disregarding the number of seats allocated to independent candidates in first and second rounds;

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(iv) dividing the remaining number of votes cast in a region, by the remaining number of seats allocated to that region, plus one,

and the result plus one, disregarding fractions, is the third quota of votes per seat.

(b) The number of seats to be awarded for the purposes of paragraph (d) in respect of such region to a political party, subject to paragraph (c), is determined by dividing the total number of votes cast in favour of such party in a region by the third quota of votes per seat indicated by paragraph (a) for that region.

(c) Where the result of the calculation referred to in paragraph (b) yields a surplus of seats not absorbed by the number awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties in respect of the relevant region, and any seat or seats in respect of that region not awarded in terms of paragraph (b), is awarded to the party or parties concerned in sequence of the highest surplus.

(d) The aggregate of a party's awards in terms of paragraphs (b) and (c) in respect of a particular region is that party's allocation of regional seats for that region.

9 Regional seats are allocated to a party according to the party's regional lists for each region.

10 (1) A party that has submitted a regional list containing fewer names than the number of its allocation of seats which would have been filled from such list in terms of item 8, forfeits a number of seats equal to the deficit in that region.

(2) In the event of any forfeiture of seats in terms of subitem (1) affecting the allocation of seats in respect of any particular region in terms of item 8, such allocation is recalculated as follows:

(a) The party forfeiting seats is disregarded in such recalculation, and the allocation of seats in terms of item 8 for the region in question, minus the number of seats forfeited by it in respect of its list for such region, is its final allocation the seats in such region.

(b) An amended quota of votes per seat is determined in respect of such region by–

(i) disregarding all independent candidates;

(ii) disregarding all votes for independent candidates;

(iii) disregarding the number of seats allocated to independent candidates in first and second rounds;

(iv) dividing the total number of votes cast in the region; minus the number of votes cast in such region in favour of the party referred to in paragraph (a) by the number of seats, plus one, reserved for such region, minus the number of seats allocated to the said party in terms of paragraph (a),

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and the result plus one, disregarding fractions, is the amended quota of votes per seat in respect of such region for purposes of the said recalculation.

(c) The number of seats awarded for the purposes of paragraph (e) in respect of the region to a party participating in the recalculation, subject to paragraph (d), is determined by dividing the total number of votes cast in favour of such party in such region by the amended quota of votes per seat indicated by paragraph (b) for such region.

(d) Where the result of the recalculation in terms of paragraph (c) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties participating in the recalculation in respect of the said region, and any seat or seats in respect of such region not awarded in terms of paragraph (c), is awarded to the party or parties concerned in sequence of the highest surplus.

(e) The aggregate of a party's awards in terms of paragraphs (c) and (d) in respect of such region, subject to subitem (3), is that party's final allocation of regional seats for that region.

(3) In the event of a party being allocated an additional number of seats in terms of this item, and if its list in question does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item is repeated with the changes required by the context until all seats are allocated.

Compensatory seats

11 A quota of votes per compensatory seat is determined by–

(a) disregarding all independent candidates who contested the election in the nine regions;

(b) disregarding all votes for independent candidates cast in the nine regions;

(c) dividing the total number of remaining votes cast for political parties in all nine regions, by the number of compensatory seats in the National Assembly, plus one,

and the result plus one, disregarding fractions, is the quota of votes per compensatory seat.

12 The number of seats to be awarded to a party for the purposes of item 14 subject to item 11, is determined by dividing the total number of votes cast nationally in all nine regions in favour of the party by the quota of votes per seat determined in terms of item 11.

13 Where the result of the calculation in terms of item 12 yields a surplus not absorbed by the number of seats awarded to a party concerned–

(a) such surplus competes with other similar surpluses accruing to any other party or parties, and any seat or seats not awarded in terms of item 12, is awarded to the party or parties concerned in sequence of the highest surplus, up to a maximum of five seats so awarded;

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(b) provided that seats still remaining unawarded, are awarded in sequence to those parties having the highest average number of votes per seat already awarded in terms of item 12 and this item.

14 The aggregate of a party's awards in terms of items 12 and 13 is that party's allocation of compensatory seats.

15 Compensatory seats are allocated according to a party's national list.

16 (1) A party that has submitted a national list containing fewer names than the number of its allocation of seats which would have been filled from such list in terms of item 14, forfeits a number of seats equal to the deficit.

(2) In the event of any forfeiture of seats in terms of subitem (1) affecting the allocation of seats in terms of item 14, such allocation is recalculated as follows:

(a) The party forfeiting seats is disregarded in such recalculation, and the allocation of seats in terms of item 14, minus the number of seats forfeited by it in respect of its national list, is its final allocation of compensatory seats.

(b) An amended quota of votes per compensatory seat is determined by–

(i) disregarding all independent candidates who contested the election in the nine regions;

(ii) disregarding all votes for independent candidates cast in the nine regions;

(iii) dividing the total number of votes cast for political parties in all nine regions, minus the number of votes cast in favour of the party referred to in paragraph (a) by the number of compensatory seats, plus one, minus the number of compensatory seats allocated to the said party in terms of paragraph (a),

and the result plus one, disregarding fractions, is the amended quota of votes per compensatory seat for purposes of the said recalculation.

(c) The number of compensatory seats to be awarded for the purposes of paragraph (e) to a party participating in the recalculation, must, subject to paragraph (d), be determined by dividing the total number of votes cast in favour of such party in all nine regions by the amended quota of votes per seat indicated by paragraph (b).

(d) Where the result of the recalculation in terms of paragraph (c) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties participating in the recalculation, and any compensatory seat or seats not awarded in terms of paragraph (c), is or are awarded to the party or parties concerned in sequence of the highest surplus.

(e) The aggregate of a party's awards in terms of paragraphs (c) and (d), subject to subitem (3), is that party's final allocation of the compensatory seats.

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(3) In the event of a party being allocated an additional number of seats in terms of this item, and if its national list does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item is repeated with the changes required by the context until all compensatory seats are allocated.

Provincial legislatures

17 (1) Registered parties contesting an election of a provincial legislature must nominate candidates on a provincial list of candidates prepared in accordance with the Act, with such number of names on each list as the party may determine subject to subsection (3).

(2) The list of candidates submitted by a party must not contain more names than the number of seats in the provincial legislature concerned, and must denote the fixed order of preference, of the names as the party may determine.

18 The Commission must prepare a list of independent candidates contesting an election of a provincial legislature in accordance with the Act.

19 The seats in a provincial legislature are allocated in three separate rounds.

20 In the first round:

(a) A quota of votes per seat is determined by dividing the total number of votes by the total number of seats and the result, disregarding fractions is the first quota of votes per seat.

(b) Each independent candidate who receives enough votes to meet the first quota is awarded a seat.

21 In the second round:

(a) A second quota of votes is determined by–

(i) disregarding all independent candidates who were allocated seats in the first round;

(ii) disregarding all votes for independent candidates who were allocated seats in the first round;

(iii) disregarding the number of seats allocated to independent candidates in the first round;

(iv) dividing the remaining number of votes cast by the remaining number of seats,

and the result, disregarding fractions, is the second quota of votes per seat.

(b) Each remaining independent candidate who receives enough votes to meet the second quota is awarded a seat.

22 In the third round:

(a) A third quota of votes is determined by–

(i) disregarding all independent candidates;

(ii) disregarding all votes for independent candidates;

(iii) disregarding the number of seats allocated to independent candidates in first and second rounds;

(iv) dividing the remaining number of votes cast, by the remaining number of seats, plus one,

and the result plus one, disregarding fractions, is the third quota of votes per seat.

(b) The number of seats to be awarded for the purposes of paragraph (d) to a political party, must, subject to paragraph (c), be determined by dividing the total number of votes cast in favour of such party by the third quota of votes per seat indicated by paragraph (a).

(c) Where the result of the calculation referred to in paragraph (b) yields a surplus of seats not absorbed by the number awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties, and any seat or seats not awarded in terms of paragraph (b), is or are awarded to the party or parties concerned in sequence of the highest surplus.

(d) The aggregate of a party's awards in terms of paragraphs (b) and (c) is that party's allocation of seats for provincial legislature.

23 Seats in provincial legislatures are allocated to a party according to the party's list of candidates for the province.

24 (1) If a party has submitted a list of candidates for the province containing fewer names than the number of its allocation of seats which would have been filled from such list in terms of item 22, it forfeits a number of seats equal to the deficit.

(2) In the event of any forfeiture of seats in terms of subitem (1) affecting the allocation of seats in terms of item 22, such allocation is recalculated as follows:

(a) The party forfeiting is be disregarded in such recalculation, and the allocation of seats in terms of item 22, minus the number of seats forfeited by it in respect of its list for such province, becomes its allocation of seats for the provincial legislature.

(b) An amended quota of votes per seat is determined by–

(i) disregarding all independent candidates;

(ii) disregarding all votes for independent candidates;

(iii) disregarding the number of seats allocated to independent candidates in first and second rounds;

(iv) dividing the total number of votes cast, minus the number of votes cast in favour of the party referred to in paragraph (a) by the number of seats, plus one, minus the number of seats allocated to the said party in terms of paragraph (a),

and the result plus one, disregarding fractions, is the amended quota of votes per seat for purposes of the said recalculation.

(c) The number of seats to be awarded for the purposes of paragraph (e) to a party participating in the recalculation, must, subject to paragraph

(d), be determined by dividing the total number of votes cast in favour of such party by the amended quota of votes per seat indicated by paragraph (b).

(d) Where the result of the recalculation in terms of paragraph (c) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties participating in the recalculation, and any seat or seats not awarded in terms of paragraph (c), is or are awarded to the party or parties concerned in sequence of the highest surplus.

(e) The aggregate of a party's awards in terms of paragraphs (c) and (d), subject to subitem (3), is that party's final allocation of the seats for the provincial legislature.

(3) In the event of a party being allocated an additional number of seats in terms of this item, and if its list of candidates for the province in question does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item is repeated with the changes required by the context until all seats are allocated.

Ballot papers

25 (1) The Commission must produce separate ballot papers for the election of members of the National Assembly and of members of the provincial legislatures.

(2) The ballot paper to be used in each region for the election of members of the National Assembly shall include only the independent candidates standing in that region for election to the National Assembly, together with the relevant political parties.

Designation of representatives of political parties

26 (1) After the counting of votes has been concluded, the number of representatives of each party has been determined and the election result has been declared in terms of section 190 (1) (c) of the Constitution, the Commission must, within two days after such declaration, designate from each list of candidates, the representatives of each party in the legislature.

(2) Following the designation in terms of subitem (1), if a candidate's name appears on more than one list for the National Assembly or on lists for both the National Assembly and a provincial legislature (if an election of the Assembly and a provincial legislature is held at the same time), and such candidate is due for designation as a representative in more than one case, the party which submitted such lists must, within two days after the said declaration, indicate to the Commission from which list such candidate will be designated or in which legislature the candidate will serve, as the case may be, in which event the candidate's name must be deleted from the other lists.

(3) If a party fails to indicate to the Commission from which list a candidate will be designated or in which legislature a candidate will serve, such candidate's name must be deleted from all the lists.

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(4) The Commission must forthwith publish the list of names of representatives in the legislature or legislatures.

Supplementation of lists of candidates of political parties

27 A political party may not supplement a list of candidates for any legislature prior to the designation of representatives in terms of item 26.

28 After the designation of representatives in terms of item 26 has been concluded, political parties may supplement their lists of candidates by the addition of an equal number of names at the end of the applicable list, if-

(a) a representative is elected as the President or to any other executive office as a result of which he or she resigns as a representative of a legislature;

(b) a representative is appointed as a permanent delegate to the National Council of Provinces;

(c) a name is deleted from a list in terms of item 26 (2) or (3); or

(d) a vacancy has occurred and the appropriate list of candidates of the party concerned is depleted.

29 A political party may supplement a list of candidates referred to in item 26 (1) on one occasion only at any time during the first 12 months following the date on which the designation of representatives in terms of item 26 has been concluded, in order to fill casual vacancies: Provided that any such supplementation must be made at the end of the list.

30 The number of names on lists of candidates as supplemented in terms of item 28 may not exceed the difference between the number of seats in the National Assembly or a provincial legislature, as the case may be, and the number of representatives of a party in any such legislature.

Review of lists of candidates by party

31 A party may review its undepleted lists as supplemented in terms of items 28, 29 and 30, within seven days after the expiry of the period referred to in item 29, and annually thereafter, until the date on which a party has to submit lists of candidates for an ensuing election, in the following manner:

(a) all vacancies may be supplemented;

(b) no more than 25 per cent of candidates may be replaced; and

(c) the fixed order of lists may be changed.

Publication of supplemented and reviewed lists of candidates

32 The Secretary to Parliament and the Secretaries of the provincial legislatures must publish lists of candidates supplemented in terms of items 28 and 29 or reviewed in terms of item 31 within 10 days after the receipt of such lists from the parties concerned.

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Vacancies

33 (1) In the event of a vacancy in a legislature from a seat allocated to a political party, the party which the vacating member represented must fill the vacancy by nominating a person–

(a) whose name appears on the list of candidates from which that party's members were originally nominated; and

(b) who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy must be submitted to the Speaker of the legislature in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of section 47 (3) (c) or 106 (3) (c) of the Constitution, the seats in question must be allocated to the remaining parties with the changes required by the context as if such seats were forfeited seats in terms of item 16 or 24, as the case may be.

34 (1) In the event of a vacancy in a legislature in a seat allocated to an independent candidate, the seat in question will not be filled until the next elections.

Definitions

35 In this Schedule-

"**Constitution**" means the Constitution of the Republic of South Africa, 1996

'**national list**' means a list of candidates prepared by a party for an election of the National Assembly to reflect that party's order of preference of candidates in respect of the allocation of compensatory seats;

'**provincial list**' means a list of candidates prepared by a party for an election of a provincial legislature;

'**regional list**' means a list of candidates in respect of a region prepared by a party for an election of the National Assembly to reflect that party's order of preference of candidates in respect of the allocation of regional seats in respect of each region;

'**votes**' means–

(a) where it occurs in items 6, 7, 8, 10, 11, 12, 13 and 16, votes cast in an election for the National Assembly;

(b) where it occurs in items 20, 21, 22 and 24, votes cast in the election for the provincial legislature of a province concerned; and

(c) where it occurs in item 26, votes cast in the election for the National Assembly and the provincial legislatures."

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Short title and commencement

12. This Act is called the Electoral Amendment Act, 2022, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

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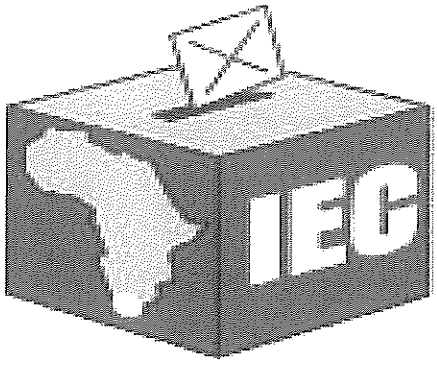

SOUTH AFRICA

SUBMISSION BY THE ELECTORAL COMMISSION TO THE NATIONAL ASSEMBLY'S

PORTFOLIO COMMITTEE ON HOME AFFAIRS

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TABLE OF CONTENTS

MSC

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A. INTRODUCTION

1 Free and fair elections are the lifeblood of democracy.[1] They allow people to select their leaders and then to hold them accountable.[2]

2 The Constitution requires the Electoral Commission (Commission) to manage elections of national, provincial and municipal legislative bodies in accordance with national legislation, to ensure that those elections are free and fair, and to declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.[3]

3 The determination of the most appropriate electoral system and any review of the legislation pertaining to elections requires significant consultation with all South Africans and finalisation by democratically elected representatives. One of the Commission's duties – as set out in section 5(1)*(j)* of the Electoral Commission Act, 1996[4] - is to review proposed electoral legislation and to make recommendations in connection therewith. The role of the Commission in these processes is to assist on the basis of its knowledge, experience and expertise and to outline potential practical implications of any proposal.

4 Sections 46(1)*(d)* and 105(1)(d) of the Constitution require the election of members of the National Assembly and provincial legislatures, respectively, to be conducted in terms of an electoral system that results, in general, in proportional representation.

5 In New Nation Movement NPC v President of the Republic of South Africa,[5] the Constitutional Court declared that the Electoral Act, 1998[6] is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties. The Court suspended the operation of the declaration of invalidity for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.

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1 Donald J. Trump for President, Inc. and Others v Secretary Commonwealth of Pennsylvania and Others, available at https://www2.ca3.uscourts.gov/opinarch/203371np.pdf

2 Steven L. Taylor, Matthew S. Shugart, Arend Lijphart, and Bernard Grofman, *A Different Democracy* (Yale University Press, 2014).

3 Section 190(1) of the Constitution

4 Act No. 51 of 1996

5 2020 (6) SA 257 (CC).

6 Act No. 73 of 1998

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6 On 31 December 2021 the Minister of Home Affairs (Minister) published a notice of his intention to introduce the Electoral Amendment Bill, 2022[7] in the National Assembly, together with an explanatory summary of the Bill.[8] The Bill was subsequently introduced in the National Assembly on 10 January 2022 and referred to the Portfolio Committee on Home Affairs (Committee).

7 The Amendment Bill seeks to make provision for the election of independent candidates to the National Assembly and provincial legislatures and to provide for matters connected therewith.

8 In general, the Bill has adopted a "minimalistic" option – one of two approaches proposed by the Ministerial Advisory Committee (MAC). The option envisages the accommodation of independent candidates in the existing electoral system. It does so by dividing the 400 seats in the National Assembly into 200 "regional seats" and "compensatory seats".

8.1 Each region is a multi-member constituency and is allocated a proportional number of regional seats, for which both political parties and independent candidates can compete on a proportional basis.

8.2 Only political parties can compete for the compensatory seats on a proportional representation basis, using a closed list system.

9 In line with the request of the Portfolio Committee on Home Affairs (Committee) and given its constitutional mandate, the Commission makes these submissions to the Committee in its capacity as the country's election management body. In keeping with this role, the Commission's submissions focus on the technical aspects of the proposed amendments and their expected impact on the freeness and fairness of elections by optimising the operation of the electoral system proposed in the Amendment Bill. The submission avoids expressing itself on policy preferences and choices of any electoral system.

10 In this submission, the Commission makes its submissions thematically, as opposed to a clause-by-clause critique.

B. ALLOCATION OF REGIONAL SEATS IN THE NATIONAL ASSEMBLY

11 Under the existing legislative scheme, regional seats in the National Assembly are allocated per region to the parties contesting an election according to a quota and highest surplus method as follows:

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7 B1 - 2022

8 Under GN No. 1660 in *GG* No. 45716 of 31 December 2021

11.1 A quota of votes per seat must be determined in respect of each region by dividing the total number of votes cast in a region by the number of seats, plus one (the Droop quota basis), reserved for such region.

11.2 The result plus one, disregarding fractions, is the quota of votes per seat in respect of a particular region.

11.3 The number of seats to be awarded in respect of such region to a party is determined by dividing the total number of votes cast in favour of such party in a region by the quota of votes per seat for that region.

11.4 Where the result of the calculation yields a surplus of seats not absorbed by the number awarded to contesting parties, such surplus competes with other similar surpluses accruing to any other party or parties in respect of the relevant region, and any seat or seats in respect of that region not awarded must be awarded to the party or parties concerned in sequence of the highest surplus.

12 The Amendment Bill proposes the allocation of regional seats in the National Assembly using a quota system in three rounds. In the first and second rounds, independent candidates will have an opportunity to gain a seat if they meet the quota of votes per seat. A Hare quota is used for the quota calculation in the first two rounds, i.e., dividing the number of valid votes (parties and independents) by the number of seats available in the region. The result, plus one, disregarding fractions is the quota to be used.

12.1 In the first round, any independent candidate who satisfies the quota for a seat will be allocated a seat.

12.2 In the second round, any independent candidates who succeeded in the first round will be removed, along with all the votes cast for him or her. A new quota will be calculated by taking into account the remaining votes and seats. Any independent candidate who satisfies the new quota will be allocated a seat.

12.3 In the third round, political parties will be allocated their seats. All independent candidates (whether successful or unsuccessful) and all votes casts for independent candidates will be removed. A Droop quota will be used (as is currently the case) to allocate the remaining seats in proportion to the number of votes per political party.

13 As already indicated, the Constitution requires the election of members of the National Assembly and provincial legislatures, respectively, to be conducted in terms of an electoral system that results, in general, in proportional representation.

14 At the outset, it is apt to point out that none of the proportional representation systems actually achieve complete proportionality. The list systems of PR incorporate their own distortions to proportionality. In the existing legislative scheme, our PR system uses subnational

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constituencies, or regions, which do not create a perfect reflection of overall proportionality because of the inevitable distorting effects of all electoral formulas.[9] Electoral formulas are therefore not as innocuous as they may at first blush look.

15 This ties in with the requirement to ensure "free and fair elections", which the Constitutional Court has held to highlight "*both the freedom to participate in the electoral process and the ability of the political parties and candidates, both aligned and non-aligned, to compete with one another on relatively equal terms*".[10]

16 The Commission would recommend the simplification of the three round allocation system by adopting a single round allocation using a Droop quota and a highest remainder method. By simply including the independents in the current calculation of regional seats, more proportional results will be produced, with smaller parties (and in this case independent candidates) standing a better chance of gaining seats. A Droop quota moderates the potential bias in favour of smaller parties resulting from the largest remainder system by providing for a lower quota (as opposed to the Hare system), which results in more seats being allocated to parties and independent candidates who receive a full quota and fewer being allocated by remainders.[11] In addition, independent candidates will benefit from highest remainder allocations, which, in the current Bill, will not be the case.

17 The Commission's suggestion in response to the existing provisions in the Bill would operate as follows:

17.1 A quota of votes per seat must be determined in respect of each region by dividing the total number of votes cast in a region by the number of seats, plus one, reserved for such region.

17.2 The result plus one, disregarding fractions, is the quota of votes per seat in respect of a particular region.

17.3 The number of seats to be awarded in respect of such region to a party or independent candidate is determined by dividing the total number of votes cast in favour of such party or candidate in a region by the quota of votes per seat for that region. Each independent candidate who meets the quota is allocated a seat and does not take any further part in the allocation process.

17.4 Where the result of the calculation yields a surplus of seats not absorbed by the number awarded to a party or independent candidate, these seats are allocated to parties and

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9 David M Farrell, Electoral Systems (A Comparative Introduction), 2nd Ed., Red Globe Press, London, 2011, at page 65

10 Kham and Others v Electoral Commission and Another 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC), para [86]

11 Farrell *supra*, note **Error! Reference source not found.**, pages 68 – 69

independent candidates who have not already been allocated seats on the basis of the largest remaining votes in descending order.

C. RESTORING PROPORTIONALITY

18 In the current scheme, after the regional seats are determined and aggregated by party, a national proportional quota is determined.

19 The quota, using the Droop method, is determined by dividing the total valid votes by 400 plus 1 seats (i.e. 401) and the result plus 1, disregarding fractions, is the national proportional quota.

20 The regional seats (200) are then subtracted from the national seats (400) to arrive at the 200 proportional seats.

21 The Amendment Bill proposes to restore proportionality by determining a compensatory quota with 200 seats, i.e. the quota is calculated by dividing the total valid votes by 200 plus 1 seats (201) and the result plus 1, disregarding fractions, is the compensatory national quota.

22 The effect of using 200 seats instead of 400 seats is a doubling of the national proportional quota.

23 The Commission submits that this distorts proportionality and eliminates smaller parties.

24 The Commission suggests that the current scheme in the Bill, using 400 seats, is therefore adapted as follows:

24.1 The national quota is determined by dividing the total valid *party* votes by 400 plus 1 minus independent seats allocated. The result, plus 1, disregarding fractions is the national proportional quota.

D. FILLING OF VACANCIES IN RESPECT OF INDEPENDENT CANDIDATES

25 Sections 47(4) and 106(4) of the Constitution require that vacancies in the National Assembly and in a provincial legislature must be filled in terms of national legislation.

26 The current scheme – provided for in Item 23 of Schedule 1A to the existing Act – requires that in the event of a vacancy in a legislature, the party which the vacating member represented must fill the vacancy by nominating a person whose name appears on the list of candidates from which that party's members were originally nominated and who is the next qualified and available person on the list.

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27 The Amendment Bill proposes to retain this scheme for those members of the National Assembly and provincial legislatures who were elected from party lists.[12] However, it proposes to leave seats allocated to independent candidates which become vacant during a term unfilled until the next elections.[13]

28 The Commission submits that this differentiation between vacancies in seats allocated to political parties and those allocated to independent candidates is likely to negatively affect the constitutional requirement of general proportionality, the right to equality before the law, the express constitutional requirement that vacancies must be filled in terms of national legislation and the minimum requirement of representatives prescribed by the Constitution and national legislation. Simply put, if the will of the people, proportionally expressed, is that a legislature must comprise *inter alia* five independent candidates and two vacate office during a term, leaving the seat unfilled for the remainder of the term brings about a result that is no longer proportional and one that does not reflect the will of the people.

29 The issue of the filling of vacancies is something that needs further legislative consideration. However, any by-election using the scheme proposed in the current Amendment Bill is not practical during a term.

30 The Commission seeks to provide proposals on the basis of the current Amendment Bill for consideration by the Portfolio Committee as a contribution to the possible resolution of this vexed issue. The Commission's puts forward one suggestion as follows:

30.1 The vacant seat is allocated to the party or qualified and available independent candidate with the highest remainder of votes in the relevant regional election.

30.2 The quota to fill a vacant seat is recalculated according to the same formula, except that the vacant seat(s) and the number of votes cast for the previous incumbent as well as independent candidates already holding seats, are disregarded. The same process of highest remainders will also be followed for seats not allocated during the first round.

31 In terms of this initial suggestion as outlined above, a vacant seat arising from either a member of a party or an independent be reserved for either category of member which could be a second approach. However, to "reserve" a seat for an independent candidate or a member of a party could risk a seat being allocated in an unfair manner which may offend the principles of vote of equal value and the will of the voter.

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[12] See the proposed Item 33 of Schedule 1A

[13] See the proposed Item 34 of Schedule 1A

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E. ELIGIBILITY OF CANDIDATES TO CONTEST REGIONAL ELECTIONS FOR THE NATIONAL ASSEMBLY AND ELECTIONS OF PROVINCIAL LEGISLATURES

32 Sections 47(1) and 106(1) of the Constitution provide that every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly and/or of a provincial legislature.

33 The Commission accepts that eligibility to vote is subject to the additional requirement that the person seeking to vote must be registered to vote in terms of the Electoral Act. In New National Party,[14] the Constitutional Court considered the intersection between the right to vote and the right to free and fair elections:

> "The right to vote is, of course, indispensable to and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised."

34 Therefore, there is nothing constitutionally repugnant in making it a requirement (as the Amendment Bill does) for a person seeking to stand for public office to be registered to vote, as qualification for voting is subject to the statutory requirement of registration.

35 The current scheme gives effect to this constitutional injunction in that every citizen qualified to vote – regardless of their place of ordinary residence or where that person is registered to vote – may appear on a party's regional lists for the National Assembly and a party's provincial legislature list, even if that candidate does not ordinarily reside and is not registered to vote in the region or province concerned.

36 The Amendment Bill proposes to retain this system in relation to candidates nominated on a party's regional list: the candidate need not be ordinarily resident registered to vote in the region or province concerned, and the only requirement is that the candidate be qualified to vote in an election for the National Assembly.

37 However, the proposed section 31A(1) provides that a person may be nominated to contest an election as an independent candidate in a region for the National Assembly or for a provincial legislature if that person is *(a)* ordinarily resident in the region or province concerned and *(b)* registered as a voter on the segment of the voters' roll for the region or province concerned. The Commission understands that the requirement is intended to foster better accountability in respect

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[14] New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) para [12].

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of independent candidates but is concerned that the same requirement does not apply to party candidates.

38 For these reasons, the Commission would suggest:

38.1 That the requirement be removed from the Amendment Bill. The effect of removing that provision would be that a qualifying independent candidate who is registered as a voter will be entitled to contest the regional elections in all nine regions. This however, does not equate to the independent candidate being able to aggregate votes across regions. The independent's ability to stand without limitation to a specific region is conditional on the independent being only allocated to a seat they have won with the highest proportion of votes relative to the respective quota in that region. All other seats won by the independent in other regions would be forfeited and excluded from further results calculation in all other elections contested by that independent. This will require that provision be made for a recalculation of the quota in the forfeited regional constituency, disregarding the forfeited seat(s) and the votes cast in favour of the independent candidate who forfeited the seat concerned as well as any other independent candidates already holding a seat. Similarly, the proposal in Item 3(4)*(b)* that a party list candidate may only appear on one regional list would have to be discarded.

38.2 Alternatively, and to the extent that the legislature approves the proposal that independent candidates should only be able to contest regional elections for the National Assembly and elections for provincial legislatures provided they are ordinarily resident and registered as a voter on the segment of the voters' roll for the region or province concerned, the Commission proposes that the same requirement should apply to persons whose names appear on a party's regional lists for the National Assembly and a party's provincial legislature list.

F. NUMBER OF BALLOTS

39 In the current scheme, elections for members of the National Assembly and provincial legislatures are conducted simultaneously.

39.1 A registered voter who presents at a voting station to vote is ordinarily given two ballot papers: one for the National Assembly and another for the legislature of the province in which he is registered to vote.[15]

39.2 Voters registered on the international segment of the voters' roll and those who are voting outside of the province where they are registered are not given a provincial ballot.

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[15] Item 15 of Schedule 1A to the Electoral Act

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39.3 A voter's vote for the National Assembly is cast on a single ballot, which means that the voter's vote for a regional list and a national list are cast for the same party on a single ballot.

40 The Amendment Bill proposes to retain the same scheme, with the additional requirement that the ballot paper to be used in each region for the election of members of the National Assembly shall include only the independent candidates standing in that region for election to the National Assembly, together with the relevant political parties.

41 The Commission is of the view that it would better enable the realisation of the right to make political choices if the voter is afforded a multiplicity of choices regarding who to vote for in the election of members of the National Assembly. Accordingly, the Commission recommends that the Committee considers amending this scheme to provide for three separate ballots:

41.1 The first ballot will be for the election of the compensatory 200 members of the National Assembly, which is contested on a closed list basis. In keeping with the legislative proposal in the Amendment Bill that this election be contested by registered parties only, only the names of those parties who have met the requirements for contesting this election will appear on this ballot.

41.2 The second ballot will be for the regional elections of the 200 members of the National Assembly. This ballot will vary from region to region, depending on which parties and independent candidates contest the relevant regional election. Only the names of the parties and independent candidates who have met the requirements for contesting each such regional election will appear on this ballot.

41.3 The third ballot will be for election of the members of the provincial legislature in each province (provincial ballot). The names of the parties and independent candidates who have met the requirements for contesting each such regional election will appear on this ballot.

42 The Commission has considered whether its proposal will not add an additional complexity to the elections for members of the National Assembly and provincial legislatures and is of the view that the proposal will make it easier for voters, to make informed choices, thus giving better effect to the will of the people. The current proposal is that there will be one ballot for the National Assembly, on which the voter must cast a vote for the regional constituency election and for the 200 compensatory seats. This will mean that a voter casting a vote for the National Assembly is offered a binary choice: vote for *either* a party *or* an independent candidate to represent them in the National Assembly. Such a voter may want to split their vote for the regional constituency election and for the 200 compensatory seats and, for instance, vote for an independent candidate in the regional constituency election and for a party in the election of the 200 members elected on a closed list system. The Commission's proposal would expand that choice.

43 In addition, most voters who are registered to vote outside metropolitan municipalities already have to cast three separate ballots in general local government elections, i.e., a ballot for the ward

constituency election (in which independent candidates compete with political parties for ward seats and is therefore similar to a regional constituency election), the local council PR election and the district council PR election. Previous experience has shown the Commission that, with adequate voter education, most voters are able to understand the system and give effect to their choices when marking each ballot.

44 The proposal would further facilitate the participation of voters abroad in the election of the envisaged 200 National Assembly compensatory seats which is consistent with the current scheme on the participation of South Africans resident outside of the Republic.

45 It follows, in the Commission's submission, that an additional ballot will not detract from the requirements of a free and fair election.

G. CONSEQUENTIAL MATTERS

46 As the Office of Parliamentary Legal Services rightly points out, the change in the electoral system will require several consequential amendments to the Electoral Act such as those we deal with below. There is other legislation, including that administered by the Commission such as the Political Party Funding Act, which may also require amendment.

Requirements for participation and electoral deposits

47 The Electoral Act currently provides for parties seeking to contest elections of members of the National Assembly and provincial legislatures to pay electoral deposits, which are refunded to the parties that obtain representation in the relevant legislature.

48 The proposed section 31B(3)*(b)* of the Electoral Act proposes to authorise the Commission to prescribe an electoral deposit in respect of independent candidates.

PLC representation

49 One of the Commission's duties is to establish and maintain liaison and co-operation with parties.[16] Pursuant to that power, the Commission has made the Regulations on Party Liaison Committees, 1998[17] to establish party liaison committees in which parties represented in the National Assembly and provincial legislatures are represented.

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[16] Section 5(1)*(g)* of the Electoral Commission Act, 1996

[17] Published under GN R824 in *GG* 18978 of 19 June 1998

50 The Commission submits that it may be necessary to amend section 5(1)*(g)* of the Electoral Commission Act, 1996,[18] to include liaison and co-operation with independent candidates as one of its duties.

Agents

51 As a natural consequence of the use of the closed party list system hitherto, the Electoral Act currently provides for only parties to have agents during elections.

52 Chapter 5 of the Electoral Act will have to be amended to allow independent candidates to appoint agents, similar to independent ward candidates in local government elections.

H. CONCLUSION

52 The Commission has apprehensions about the increase in the number of electoral contestants, namely that:

52.1 This has serious implications for the increased costs of elections;

52.2 The threshold which the Commission must adopt for determining qualification to be a candidate - whether by way of monetary deposit and demonstration of electoral support - may have to be adjusted upward to obviate frivolity without creating perceptions that barriers are being placed to participation;

52.3 The increase in number of contestants has a corresponding and consequential increase in the size of the ballot paper and electoral logistics generally. An unwieldy ballot paper also has a deleterious effect on the ability of voters to identify their candidates and to vote on an informed basis.

53 The Commission has an interest that whatever electoral system that Parliament eventually adopts must be simple both from a voter's perspective and that of election administration. For the voter, the ritual of making a mark on a ballot must retain the connection with the understanding of how seats are allocated in a legislative assembly. For an election management body, the system must be simple enough to facilitate the release of election outcomes sooner rather than later.

54 To the extent that the Portfolio Committee decides to pursue other specific alternatives other than those tabled in the current Bill following its consultations and deliberations, the Commission stands ready to express its views.

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[18] Act No. 51 of 1996

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MINISTER
HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA

Private Bag X741, Pretoria, 0001, Tel: (012) 432 6635 Fax: (012) 432 6675
Private Bag X9102, Cape Town, 8000, Tel: (021) 469 6507, Fax: (021) 461 4191

PUBLIC HEARINGS REPORT FROM THE PORTFOLIO COMMITTEE ON HOME AFFAIRS:

RESPONSES BY THE MINISTER OF HOME AFFAIRS

Clause 1	The main issue raised in respect of Clause 1 is the definition of Clause 1*(e)*, which defines a region. The argument is that the definition of a 'region' is confusing in the context of elections as it is likely to be confused with a geospatial boundary.	The definition of region is properly defined in the Amendment Bill. The Department is of the view that there is no confusion thereto. The term region was also maintained from the current Schedule 1A to the Act – "region" is chosen instead of "province" to avoid confusion between elections for the National Assembly and elections for the provincial legislatures
	Key issues raised by speakers regarding clause 31B: There was a concern as to who Independent Candidates would be accountable to between elections and that they would thus be more susceptible to monetary individualistic influence. A solution offered by other submissions was that	The difficulty with independent candidates is that they may not fully account to the electorate. However, the ConCourt judgment did not seek to introduce a "pseudo-political party" system save to allow for independent candidates to stand for election.

Clause 4	a body be established to monitor the behaviour and ensure discipline of Independent Candidates or that a clause be included on the role of Non-Profit Organisations role in holding independent candidates and political party candidates accountable on behalf of the people in the period between elections. Concerns were raised that most independent candidates were male and that measures should be considered as part of requirements to ensure better gender representation. In addition, there were calls for setting minimum required percentages for persons with disabilities.	Constituencies will hold independent candidates accountable Noted, save that the right to stand for elections is subjective. The MAC Report was firm on the issue of gender representativity, as well as all other issues relating to representativity, and as enshrined in the Constitution, it is imperative that the principle of equality is not compromised. In this regard, the principle embedded in the Amendment Bill regarding compensatory seats, will enable political parties to cater for gender representation
	Key issues raised by speakers regarding clause 31B 4(3)*(a)*: There are two opposing views on this clause. The first school of thought is that the Amendment Bill should prescribe a high number of signatures as proof of political support for both political parties. For example, some political parties propose that an independent should provide at least 15 000 to 20 000 signatures as proof of electorate support before they are eligible to contest provincial and national elections. Others go so far as to say that the number of signatures should be a third of that required to get a seat (up to 27000 of 82000 votes that	The requirement to request signatures is not unconstitutional nor it creates a barrier. The IEC will consider, in developing regulations, the number of signatures required and what is reasonable. Delegating that decision to the IEC, as an independent institution, will ensure that the requirement is reasonable.

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	could be needed for a seat in the bills new quota formulation). This school of thought argues that the high number of signatures will limit having candidates without the electorate's support on the ballot paper. This requirement will assist in reducing the size, cost, time and complexity required of a long ballot paper with many candidates. The opposing view is that the number of signatures required for independent candidates should be reasonable. For these members of society, it is best to allow everyone who wants to contest to participate in elections to not further disadvantage Independent Candidates that may not have the capacity to do so and are already having to compete with well-established and better resourced political parties. It is the voters who will reject the candidates they do not want and the Electoral Amendment Bill must not have unnecessary barriers of entry to contest national general elections	
	Key issues raised by speakers regarding clause 31B4(3)*(f)*: There were equally two opposing views on this clause in all of the provinces. The first view raised primarily by those who identified themselves to be belonging to political parties argued that the cooling-off period for one to resign from a political party and register themselves as an independent candidate should be increased from the proposed 3-months period to 6 months or more. Some	The period prescribed allows for a "cooling off" period and minimises the risk of individuals aggrieved by party mechanisms from simply standing for elections

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	even suggested that the cooling-off period should be one year. The rationale for this argument is that if a political party member loses a political contest within their party, they then resign from their political party to become independent candidates. Although this is their democratic right, it is misleading voters because these candidates are often just frustrated by internal political party processes. The opposing view on this clause is that the recommended three-month cooling-off period should be retained, reduced to one month or removed. The rationale for this argument is that some political parties do not respect the wishes of their community on who must be recommended to be a political party candidate prior to elections. Instead, political parties force their preferred candidates on communities. If this happens, the person who is a preferred candidate of the community should be allowed time to resign from a political party to become an independent candidate so that the community still have an option of electing that person on the ballot paper.	Comment is noted
	Key issues raised by speakers regarding clause 31E: There was some confusion across several submissions around the use of the word "qualifications" of Independent Candidates where it was assumed to mean educational or experiential qualifications and that this would be unfair given that this is not required of Political Parties. In contrast others felt that the introduction of qualifications such as	The term "qualification" does not relate to education or experiential qualification but the ability of an individual to be able to be included in the ballot paper. It means qualifying criteria rather than academic qualifications.

	minimum and maximum age and education for all candidates would be beneficial to improve the quality of representation.	
	Key issues raised by speakers regarding clause 31F(1)*(b)*: Across all provinces there was a concern about a potentially longer ballot paper as members of the community anticipate that there will be many independent candidates contesting provincial and national elections. Those who are not totally in support of independent candidates to contest elections argue that stringent measures of entry such as the high number of signatures and a high deposit fee would assist in addressing the challenge of a potentially longer ballot pater. These members of the community are of a view that a longer ballot paper will confuse voters particularly the elderly and illiterate which would lead to higher numbers of spoilt ballots. Therefore, the Electoral Amendment Bill should increase the threshold of participation in elections, in order to avoid purely opportunistic candidates. In addition, it is argued that the result would be that many small parties and candidates could occupy key seats that hold a balance in a legislature where no party gets over 50% of the seats. This would lead to unstable and temporary coalitions that could paralyse the government service delivery.	The criteria developed may assist in curbing the list of those who qualify.

MSC

	The opposing view is also concerned about a potentially longer ballot paper. However, these members of the community believe that the IEC is competent enough to design a ballot paper that will be suitable and not confuse the voter. General support for the independence, accountability and lower potential for corruption of Independent Candidates can also be included as in favour of this clause. Given that independent candidates strengthen democracy since they are not constrained by party political ideologies and policies, but the needs of the people. It was also argued by some that the IEC should exploit the advances in the Fourth Industrial Revolution and introduce methods such as electronic voting if necessary.	
Clause 6	**Key issues raised by speakers regarding clause 6:** Many submissions across the provinces agreed with the insertion of Clause 6. They were synonymous in calling for hasher sanctions including disqualifications for any political party or independent candidate who contravene the code of conduct as well as more rigorous vetting of the qualifications of candidates and their support signatures. It was also recommended that mechanisms be put in place for the public to report any violations of the code or the requirements for Independent Candidates stated in Clause 4. 31B	The comment is noted

Clause 8	**Key issues raised by speakers regarding clause 8:** In all of the provinces, there are two opposing views with regards to the payment of non-refundable deposit fee that must be paid by independent candidates. The first view, which was primarily raised by people who identified themselves to be members of political parties (in particular the African National Congress and Economic Freedom Fighters) argued that the deposit fee for independent candidates should be set very high and should be non-refundable. The view is that if the deposit fee is set very low, there will be many opportunistic or questionable candidates, which could dilute voter participation if elections become too complicated with too many choices and higher numbers of spoilt votes. Those who support this view also believe that the deposit fee should be non-refundable and be forfeited to the State as it proposed in the Electoral Amendment Bill [B1-2022]. The second opposing view is that the deposit fee should be set very low so that no one should be excluded from contesting elections due to financial constraints. This school of thought argues that a very high deposit fee will limit political contestation to the elite few and exclude grass root organisations, women and person's with disabilities who have community support but limited finances, particularly considering the country's current high unemployment rate and economy. Amongst those who	The IEC will further develop regulations relating to the fee required. It might very well be that the deposit required may be equivalent to that paid by political parties. Delegating this function to the IEC, an independent institution, will ensure that the fee is reasonable. The administration of the ballot paper will remain the mandate of the IEC.

	argue that the deposit fee should be affordable, there was a small minority that also proposed that if even if an independent candidate doesn't win a seat in the provincial or national legislature, their full deposit or a portion of it should be refundable. A question was also raised as to whether the deposit paid was related or aligned to Political Party Funding Act.	No, payment of the prescribed deposit fee cannot be aligned or related to the Political Funding Act. The two are completely separated and unrelated. There will be consequential amendments relating to the Political Party Funding Act to include independent candidates
Clause 11	**Key issues raised by speakers regarding clause 11(1)*(a)* & *(b)* & (3):** The key emerging issues across the provinces are mainly on the contestation regarding the allocation of seats in the National Assembly and Provincial Legislatures between independent candidates and candidates representing political parties. The first school of thought agrees with the Electoral Amendment Bill [B1-2022] proposal regarding the allocation of seats in the provincial and national legislatures. They argue that this proposal is most suitable for South Africa as it allows for the continuation of the Proportional Representation (PR) System which has served the country well without any contestation of the	The reality is that: (i) Independent candidates are not political parties. A single candidate cannot hold more than one seat. There is, therefore, no practical system, of which we are aware, that would avoid this "wasted" votes issue. (ii) An independent candidate chooses to run as an independent candidate rather than forming his or her own political party. In doing so, he or she accepts that he or she can only be elected to a maximum of one seat. (iii) A voter voting for an independent candidate chooses to vote for the independent candidate rather than a political party. In doing so, the voter accepts that

	freedom and fairness of elections. Those who support this school of thought argue that it is only under the PR System that minority groups can find a political voice. For instance, small parties that represent minority groups (i.e. racial, cultural and religious) are most likely to have representation on the PR System. The opposing view, supported mainly by communities who identified themselves as not members of political parties argued that the proposed seat allocation system is biased towards political parties. In their view, all 400 seats in the National Assembly should be equally contested by both independent candidates and candidates of political parties. They emphasise that there should be no number of seats that are reserved for contestation by political parties only. These members of the communities argued that any reservation of seats for political parties would be unconstitutional as it will not allow for an equal contestation as required by section 19(3)*(b)* of the Constitution. For them, if the voters want to be represented by 400 independent candidates they should be afforded that opportunity. There were also submissions calling for the proportion of regional versus compensatory seats to change to 75% (300) and 25% (100) respectively (from the 50/50 proposed in the Bill) as per the Van Zyl Slabbert report. Also in this general view it is argued that the closed	his candidate can only be elected to a maximum of one seat. There can accordingly be no complaint of prejudice or unfairness by the independent candidate or the voter.

	party list must be scrapped in favour of an open list because it does not add value in electing a representative. Regarding Clause 11.3 on the required number of candidates on the party list there were two submissions that they should be dealt with as a matter of compliance prior to the election rather than the complicated procedure concerning the forfeiture of seats dealt with in Clause 11.16	
	Key issues raised by speakers regarding clause 11(4)(5)(6)(7)(8)(9) (Regional Seats): The main issues raised on this clause which cut across the provinces is that term "regional seat" seems confusing in this regard (as per the objection stated in Clause 1 dealing with definitions). Those who opposed this term argued that regional seats should be replaced by constituencies. They argued that the Electoral Amendment Bill should adopt the proposal made by the Van Zyl Slabbert Report supported by option two of the Ministerial Advisory Committee and the Lekota 2020 Private members Bill. Suggestions range from 66 to 200 constituencies. Of emphasis is that independent candidates and political party candidates must compete for the votes in their constituencies without reserving seats for political parties. The concern was also that in the Bill the proposed 9 regions would require 82 000 or 5.5% of votes for each independent candidate seat compared to the 40 000 in the last elections and that this was unfair when	There are 400 seats in the National Assembly. The first 200 seats are elected from each of the nine provinces or regions. The remaining 200 seats are compensatory seats designed to achieve the proportional representation required to be achieved by section 46(1)*(d)* of the Constitution. It is correct that the independent candidates may only be elected to occupy the 200 regional seats.

	small political parties could get a seat with less than 1% of the vote. Further support for this view also calls for more extensive review of the electoral system as indicated: a) In 1999, when Mandela left presidential office, he called for a review of the electoral system. b) In 2002, President Thabo Mbeki established a task team, again led by Van Zyl Slabbert, to examine electoral reform and the team called for a more accountable system combining constituency based representation by voting for a specific individual and proportional representation – known as a mixed system. c) In 2006, Parliament appointed an individual panel to assess the electoral system and they found it in need of electoral reform. d) Since 2006, the last of the 4 investigations confirming the need for electoral reform, and no concrete action has been taken in 16 years ago and in addition the same political party has held office since 1994. An alternative proposal for the calculations of regional seats was also proposed: A two-stage process where all who meet the full quota for one seat, be awarded a seat – whether as parties or independents. Once no one is left who is entitled to a seat based on meeting the full quota threshold, the remaining	

	seats should then be given to the parties that have the highest average of votes per seat won. Related to this is the concern that if Parliament is divided into many small fractions, forming government would be challenging. It would be a big danger to use the current formula for seats allocation and a lot of parties/candidates come in on less than on seat's worth of votes. Votes required for the quota for one seat has often been between 40 000 and 60 000 per seat, depending on the legislature and voter turnout. However, some small parties have won seats on 10 000 votes in the National Assembly due to the formula for the largest remainder vote being used to allocate left over seats. In support of this it was stated that other countries with PR system have a much higher threshold of 3% - 7% of the votes before any seats are awarded. This could be done to maintain stable government. He maintained that it would be difficult to negotiate across dozens of fractions and totally acceptable in international practice to require significant support for representatives. Another issue raised across provinces is "discarding votes" once an independent candidate meets the threshold for a seat. Many of those who opposed discarding of votes did not really offer alternative solutions but indicated discarding surplus votes goes against the equality clause in the Constitution and means that surplus voters are deprived of an opportunity to participate in an election. A PR list should	The reality is that: (i) Independent candidates are not political parties. A single candidate cannot hold more than one seat. There is, therefore, no practical system, of which we are aware, that would avoid the so-called "wasted" votes issue.

	be introduced to deal with situations wherein a candidate dies or resigns. But it is worth to note that One South Africa Movement and others argued that the 'excess votes' of independent candidates should be transferable to candidates identified by the winner of these excess votes in advance of the elections, as per the Lekota Bill. This would also better allow for the inclusion of Independent Candidates in the National Council of Provinces seats if their pre-determined affiliates could be represented in the NCOP if they have a seat in the National Assembly. This view was however rejected by more of the oral submissions than those in support.	(ii) An independent candidate chooses to run as an independent candidate rather than forming his or her own political party. In doing so, he or she accepts that he or she can only be elected to a maximum of one seat. (iii) A voter voting for an independent candidate chooses to vote for the independent candidate rather than a political party. In doing so, the voter accepts that his or her candidate can only be elected to a maximum of one seat. There can, accordingly, be no complaint of prejudice or unfairness by the independent candidate or the voter.
	Key issues raised by speakers regarding clause 11(33) **Vacancies:** Again, there were two opposing views on this clause. The first view which was mainly raised by those who identified themselves to be members of political parties is to support the proposal of the Electoral Amendment Bill [B1-2022] that vacancies left by independent candidates should be left vacant until the next election. Their rationale for supporting this proposal is that the country will be in perpetual elections, which disturbs service delivery and is very costly as political parties and independent candidates will continually be campaigning if the seats should be filled.	It would be utterly impractical and an unjustified financial strain on the fiscus, but also on the ability of the state to govern, to similarly provide for a replacement of the independent candidate through a by-election. This is because independent candidates are voted for at a provincial or regional level. As a result, the by-election would have to be organised at a provincial or regional level every single time there is a vacancy in the National Assembly.

MSC

	The opposing view is that any vacancy left by an independent candidate should be filled as early as possible in line with the local government benchmark. These members argue that the same way a political party is allowed to fill in a vacancy from their party list, independent candidates should be allowed to do the same. This presumes the above addition of a transferable vote from a list of "running mates" or affiliated independents stated by the vacating candidate prior to the election. Alternatively, vacancies could also be done through by-elections or filled by the most popular runner up in the elections that didn't win a seat.	

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OPINION

for

MINISTER OF HOME AFFAIRS

on

PUBLIC COMMENTS RECEIVED ON ELECTORAL AMENDMENT BILL [B 1—2022]

PROPOSED AMENDMENTS TO ELECTORAL AMENDMENT BILL

&

QUESTIONS RAISED BY PORTFOLIO COMMITTEE

STEVEN BUDLENDER SC
MITCHELL DE BEER

Chambers, Sandton & Cape Town
8 July 2022

MSC WB

TABLE OF CONTENTS

MSC WB

OVERVIEW

1 We are instructed by the Minister of Home Affairs.

2 In June 2020, in *New Nation Movement NPC v President of the Republic of South Africa* the Constitutional Court declared the Electoral Act 73 of 1998 unconstitutional and invalid to the extent that it requires adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties.[1]

3 We were briefed to draft an Amendment Bill to give effect to the "minimalist option" set out in a report of the Ministerial Advisory Committee (**MAC**) appointed by the Minister to investigate electoral reform. This option prefers to incorporate independent candidates into the framework of the existing electoral system. The Electoral Amendment Bill [B 1—2022] has been introduced into Parliament and is currently undergoing public participation processes by Parliament.

4 Parliament and the Minister received numerous comments on the Bill from the public, political parties, civil society organisations and the Electoral Commission. We have read and considered summaries of these comments provided to us by the Minister's office.

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[1] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC).

5 In considering the comments on the Bill, we are of the opinion that certain amendments should be effected to the Bill to create a more straightforward electoral system than what is currently proposed in the Bill.

6 We have also prepared proposed draft amendments to the Political Party Funding Act 6 of 2018 ("*Funding Act*"), as requested by the Minister and considered that a single amendment should be made to the Electoral Commission Act 15 of 1996 ("*Commission Act*"), to address the question of liaison committees.

7 To this end, we have prepared an omnibus Electoral Matters Amendment Bill, incorporating our suggested amendments to the current Bill, and introducing the suggested amendments to the Funding Act and Commission Act. Our amendments are "tracked" into the original Bill we provided to the Minister for ease of reference.

8 In this covering opinion, we summarise and explain the changes we suggest should be adopted in respect of the Bill, as well as the suggested amendments to the Funding Act and Commission Act. We assume that the reader is familiar with the electoral system currently set out in the Electoral Act, and the system currently proposed in the Amendment Bill.

9 We do not address the import of all of the comments received during the consultation process. For instance, we do not address the desirability of adopting a single member constituency system, nor do we discuss certain

MSC WB

proposals, such as using a ranked choice preference voting system to avoid losing votes in respect of independent candidates.

10 In this opinion, we also address certain queries raised by the Portfolio Committee of Home Affairs and Parliamentary Legal Services. Most of these questions are dealt with in our discussion of the proposed amendments to the Bill. The remaining questions are dealt with under a separate hearing below.

PROPOSED AMENDMENTS TO ELECTORAL AMENDMENT BILL

Agents for independent candidates

11 During the Parliamentary processes, questions were raised about whether independent candidates should also be entitled to appoint agents as parties are currently entitled to.

12 In our opinion, not making provision for the appointment of agents for independent candidates could be criticised as an irrational differentiation.

13 We understand that the Department and Portfolio Committee agree that independent candidates ought to be entitled to appoint agents.

14 We have accordingly made provision for suggested amendments to sections 39, 58, 59 and 66 of the Electoral Act to permit the appointment of agents by independent candidates.

MSC WB

Amendments to the allocation of seats

15 Much criticism was levied against the three-stage system to be used to allocate seats. A primary concern is that independent candidates, under the three-stage system, will have to obtain a higher quota of votes in order to obtain a seat, than political parties.

16 This is because in the current proposed system, in the third round when seats are allocated to political parties, all votes for independent candidates are removed from the calculation, effectively reducing the quota required by political parties to obtain seats.

17 We have always been alive to this problem. Indeed, that is why it was suggested that independent candidates have two-rounds to obtain a seat: after the first round, votes in favour of independent candidates who were awarded a seat are removed, effectively reducing the quota for the second round.

18 Another criticism levied against the three-round system, is that it is complex and may be difficult to understand for voters and those contesting elections, and to implement by the Electoral Commission.

19 Having now considered the public comments and possible alternatives, we are of the opinion that there is more straightforward allocation system that can be used, that does not result in political parties obtaining seats with a lower quota than all independent candidates.

MSC 208

20 The suggested alternative was proposed by the Commission, which we have embraced and developed.

21 The system would work as follows.

22 Instead of having separate rounds for allocating seats to independent candidates and political parties, the same system currently used in Schedule 1A of the Electoral Act would be retained, save that independent candidates would be inserted into the system.

23 The droop formula will be used, as it is currently, to determine the quota for seats. For both political parties and independent candidates, regional seats in the National Assembly or seats in the provincial legislatures will be allocated by dividing the total number of votes for the party or candidate by the quota, as the current Schedule 1A of the Act provides.

24 Of course, an independent candidate may only receive a single seat. In circumstances where an independent candidate obtains votes in excess of two or more of the relevant quota, then our proposed model will require the independent candidate to forfeit those seats. Thereafter, the allocation of seats will be recalculated using an amended quota, removing all the votes for the independent candidate concerned as well as the single seat they obtained. The new quota will be reduced. But, importantly unlike the current system, both political parties and any remaining independent candidate who did not receive a seat already, will be able to obtain the forfeited seats.

MSC WB

25 We have modified the current forfeiture provision in Schedule 1A – which addresses the situation where a party's list of candidates has fewer names than seats allocated to it – to achieve the above.

26 There are two main advantages of using this system:

26.1 First, it is far simpler and more straightforward than the three-stage allocation system currently proposed in the Bill, and is familiar to votrs and the Commission being a modified version of the current system in Schedule 1A;

26.2 Second, political parties and independent candidates will compete on a level playing field, in that: (a) in order to obtain seats, they all need to receive votes to satisfy the same quota; and (b) where an independent candidate receives votes which exceed multiple quotas and therefore forfeits those seats, all parties and independent candidates will be entitled to contest those forfeited seats with a reduced quota.

27 The proposed Schedule 1A we have drafted, retains provisions for the allocation of surplus seats, where – again – both political parties and independent candidates will be eligible to receive them.

28 We have included a new Schedule 1A in the omnibus bill to set out this alternative system.

MSC WB

29 If such a different system is not adopted and the three-round system remains, then we emphasise that the droop quota rather than using a simple quota should be adopted in the first two rounds for allocating seats to independent candidates.

29.1 This is because the droop quota is generally smaller than the simple quota – the effect would be that independent candidates would have a better opportunity of being allocated seats in the first two rounds.

29.2 As the droop quota is used for political parties, and political parties are allocated seats in a different round, we are of the view that using the droop quota may ameliorate some concerns raised in the public participation processes.

Retaining the requirement that independent candidates may only contest a single region

30 A concern was raised in some public comments that independent candidates are required to contest a single region, but that the same requirement does not apply to political parties and candidates of political parties.

31 To be clear, some of comments are incorrect as the Amendment Bill in clause 2 currently provides that a party must provide the following with its list of candidates for national and provincial elections:

> "(c) declaration, signed by each candidate appearing on the party's regional list of candidates or provincial list of candidates referred to in Schedule 1A, confirming that he or she is registered to vote within the region or province in which the election will take place;"

MSC WB

32 Accordingly, party candidates contesting regional seats in the National Assembly or provincial legislatures effectively are also only entitled to contest one province or region. (Party candidates on national lists do not have the same requirement.)

33 We would caution against permitting independent candidates to contest more than one region or province at a time, and in circumstances where they receive enough votes in multiple regions or provinces, be permitted to elect which seat to take up.

34 Such a situation would concentrate immense power in the hands of one or a few individuals, who could choose to join certain regions or provinces over others to support certain powers or politics.

35 We have accordingly not adopted such a permissive approach.

36 If the Minister or Parliament wishes to permit such an option, then our firm view is that an independent candidate contesting more than one region or province should be required to rank their preferences between regions or provinces up front and *before* the election, so that they will have no discretion to choose a region or province once the election is held.

Two ballots in elections for the National Assembly

37 Criticisms were levied against the Bill, insofar as in the current system a vote for a political party for the National Assembly is counted twice, once for the regional

MSC VJB

seats, and once for the compensatory seats; whereas a vote for an independent candidate is counted only once for the regional seats.

38 Initially, we expressed the view that reducing the number of ballots was important to simplify voting. However, on reflection it appears to us that it is problematic that voters casting a vote for an independent candidate lose out on influencing the election of members to the compensatory seats – the intention of which is to ensure proportionality.

39 In our opinion, a similar approach to that followed in local government elections should be adopted, namely that there are two ballots for the National Assembly:

39.1 a regional ballot for each region, on which all political parties and independent candidates contesting the region will appear; and

39.2 a compensatory ballot, on which only political parties will appear.

40 Voters will therefore vote twice: once for the regional seats; and once for the compensatory seats.

41 Voters will then not be forced to choose between a false dichotomy between political party or independent candidate, but may for example vote for an independent candidate for their region and for a political party for the compensatory seats.

MSC PJB

42 In addition to enabling greater voter participation, having two ballots will also aid in satisfying the requirement in section 46(1)(*d*) of the Constitution, of adopting a system which "*results, in general, in proportional representation*".

43 Section 157(2) and (3) of the Constitution expressly contemplates an electoral system at local government level that balances participation of independent candidates and proportional party representation.

43.1 Subsection (2) requires national legislation must prescribe a system for the election of members of a municipal council:

> "(a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; **or**
>
> (b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll." [Emphasis added.]

43.2 Subsection (3) requires that an "*electoral system in terms of subsection (2) must result, in general in proportional representation.*"

44 In *New Nation Movement*, Madlanga J commented on this provision when considering whether the participation of independent candidates would undermine proportional representations. He held that:[2]

> "[I]t is quite plain from the provisions of section 157(3) of the Constitution that proportional representation is quite possible where there is a combination of representation through party lists and representation by individuals who need not be attached to political parties. Here is why I say

[2] At paras 79-80.

MSC KJB

so. In respect of the election of members of a Municipal Council, section 157(2) empowers Parliament to pass legislation that prescribes a system: where members are exclusively elected through party lists (section 157(2)(a)); or where membership is drawn from a combination of party lists and ward representation (section 157(2)(b)). Read in the context of section 157(2)(a), which is specific on exclusive party representation, ward representation under section 157(2)(b) certainly does admit of independent candidate representation. That is so because in respect of ward representation the section is silent on party participation. It matters not that in ward representation some – even most – individual candidates may, in fact, be sponsored by political parties.

Section 157(3) then requires that an electoral system under section 157(2) (meaning either exclusively party based or comprising a combination of party lists and ward representation) "must result, in general, in proportional representation". This is the clearest possible statement that dispels the notion that proportional representation is consonant only with representation through political parties."

45 Thus, the Constitution recognises that a mixed system – of political party proportional- and independent candidate-representation – can still satisfy the requirements that the system must generally result in proportional representation.

46 Parliament enacted a mixed system at local government level. Section 22 of the Local Government: Municipal Structures Act 117 of 1998 provides the following in respect of the election of councilors to metropolitan and local municipalities:

"(1) The council of a metropolitan or local municipality consists of councillors elected in accordance with Schedule I—

(a) by voters registered on that municipality's segment of the national common voters roll, to proportionally represent the parties that contested the election in that municipality; and

MSC WB

(b) by voters registered on that municipality's segment of the national common voters roll in the respective wards in that municipality, to directly represent the wards.

(2) The number of ward councillors in a metropolitan or local council referred to in subsection (1) (b) must be equal to 50 per cent of the number of councillors determined for the municipality in terms of section 20 the number of councillors determined in terms of section 20 is an uneven number, the fraction must be rounded off upwards.

(3) The number of proportionally elected councillors in a metropolitan or local municipality referred to in subsection (1) (a) is determined by subtracting the number determined in terms of subsection (2) from the number of councillors determined for the municipality in terms of section 20."

47 Two ballots are used to determine the votes for ward councillors and proportional representation councillors.

48 In our view, mirroring a similar system for elections of the National Assembly – including the use of two ballots – strikes a balance between permitting independent candidates to contest the election, while at the same time ensuring proportionality.

49 Consideration should also possibly be given to using the same system for provincial legislatures.

The filling of vacancies of independent candidates

50 At the present, the Bill provides that where an independent candidate vacates their seat from the National Assembly or provincial legislature, it will remain unfilled until the next election.

MSC WB

51 This was criticised, although very few suggestions were put forward as to how to fill the seat in a sustainable and practical manner. We understand that holding a by-election across a region would be practically difficult and expensive every time a vacancy arises.

52 A possible alternative suggested, is to use the votes from the previous election to fill the seat.

53 It seems to us that this may be a workable solution. It does not require the Commission to hold by-elections, and still – to an extent – ensures that the membership of the National Assembly or a provincial legislature reflects the will of the voters.

54 It could, however, be argued such an approach still gives political parties the benefit of replacing their seats with chosen candidates next on their list; while the independent candidate who vacated their seat, and those who voted from them, would lose out since they would be replaced by another person (whether from a party or another independent candidate) who may even have a different ideological view.

55 In light of the Department's view, we have incorporated the forfeiture procedure into the vacancy provision to achieve this. The proposal is that should an independent candidate vacate their seat, the votes for them will be forfeited, and all the seats in the will be reallocated (in a similar fashion to when independent candidates win more than one seat).

MSC WB

CONSEQUENTIAL AMENDMENTS TO THE FUNDING ACT

56 The consequential amendments to the Funding Act we propose mostly speak for themselves.

57 There are, however, a number of policy issues that we require instructions on to finalise the amendments. Full drafting notes are specified on the omnibus bill. In summary they are the following.

58 First, in the Funding Act presently, only parties in Parliament and the provincial legislatures get funding – i.e. not parties represented in municipal councils. At the moment we have drafted this in the same way regarding independent candidates. But we require instructions as to the way forward for this policy question.

59 Second is the formula used to allocate monies from the funds. At present, under the regulations, approximately two thirds of the amounts available gets split proportionally amongst the parties. The remaining third gets divided equally among all political parties. There is an important policy choice here: do independents get to share in the equitable allocation or not? The Regulations will probably have to be changed as well.

60 Third, we draw the Minister's attention to section 10 of the Funding Act, which provides:

> "10. Prohibition on donation to member of political party.

MSC LJB

(1) No person or entity may deliver a donation to a member of a political party other than for party political purposes.

(2) A member of a political party may only receive a donation contemplated in subsection (1) on behalf of the party.

(3) No person may circumvent subsections (1) or (2), or any of the provisions of this Chapter."

61 The provision is unclear as to its effect. Is it meant to prohibit donations for internal party campaigns or not? Does it preclude *any* donations being made to members of political parties, even those made entirely for private purposes? This may be an opportunity to fix it but instructions will be required.

62 Fourth, is the question of accounting.

62.1 In our view, requiring all independent candidates to account as political parties are required to would be unmanageable – imagine how many of them might participate in local government elections. Indeed, many may never get into power and at local government level, an independent may not have the resources to account – i.e. appointing an auditor.

62.2 Assuming this is right (and we require an instruction on this score), we have adopted the approach of requiring only independents who are representative in the National Assembly and provincial legislatures to account. In section 8, independents generally are still prohibited from receiving certain donations, but simply do not have to account therefor. And in section 9(1) and (2) all other independents are required to inform the Commission of donations above a threshold as well as the donors.

MSC WB

62.3 The calculus, however, is different at national and provincial levels.

CONSEQUENTIAL AMENDMENT TO THE COMMISSION ACT CONCERNING LIAISON COMMITTEES

63 There is a single amendment that we propose for the Commission Act.

64 Section 5(1)(*g*) of the Commission Act provides:

> "The functions of the Commission include to … establish and maintain liaison and co-operation with parties;"

65 The Commission relied on this provision to enact Regulations on Party Liaison Committees in GNR 824 of 19 June 1998.

66 Section 1 of the Electoral Act defines "*party liaison committee*" as "*a committee established in terms of the Regulations on Party Liaison Committees published in terms of the Electoral Commission Act.*"

66.1 Regulation 2 of the Regulations on Party Liaison Committees provides for the establishment of party liaison committees:

> "The Electoral Commission establishes the following party liaison committees:
>
> 2.1 A party liaison committee in the national sphere with not more than two representatives from every registered party represented in the National Assembly.
>
> 2.2 A provincial party liaison committee for each province with—
>
> 2.2.1 not more than two representatives from every registered party represented in the legislature of the province concerned; and

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2.2.2 not more than two representatives from every registered party represented in the party liaison committee in the national sphere but not represented in the provincial party liaison committee concerned.

2.3 Municipal party liaison committees for a single municipality or a group of municipalities with—

2.3.1 not more than two representatives from every registered party represented in the municipal council or councils concerned; and

2.3.2 not more than two representatives from every registered party represented in the party liaison committee in the relevant province, but not represented in the municipal party liaison committee concerned; and

2.3.3 not more than one representative of every independent councillor represented in the municipal council or councils concerned."

66.2 Regulation 2.3.3 already contemplates the inclusion of representatives for independent candidates in liaison committees municipal elections.

66.3 We have previously advised that this regulation will have to be amended by the Commission to include independent candidates in liaison committees for national and provincial elections.

66.4 As for the 2024 elections, since there would not have been any independent candidates represented in the National Assembly or provincial legislatures, we are of the view that the regulation should permit for example five representatives for independent candidates chosen at random from those contesting the election concerned.

MSC WB

67 The Commission has emphasised that it enacted the Regulation under section 5(1)(*g*) – which specifically requires it to maintain liaison and co-operation with political parties.

68 In our view, it is appropriate to amend section 5(1)(*g*) to specify that the Commission must also liaise and co-operate with independent candidates and representatives.

69 We have also proposed amendments to the term of "*party liaison committee*" in sections 1, 20, 62, 64 and 100 of the Electoral Act, as well as item 7(g)(iii) of Schedule 2 to the Act.

QUESTIONS RAISED BY PORTFOLIO COMMITTEE AND PARLIAMENTARY LEGAL SERVICES

70 Most of the questions have been dealt with above. We address certain comments in what follows.

The definition of "region"

71 Comments have been made that the use of the term "*region*" to describe the multi-member constituencies that both independent candidates and political parties may contest, could be confusing, since the area of the nine regions is synonymous with the area of the nine provinces.

MSC WB

72 Suggestions have been made that a better term, such as "*multi-member regional constituency*" could be used to avoid confusion.

73 The reason why the Amendment Bill uses the term "*region*" is because that is what is currently contained in the Schedule 1A to the Electoral Act, and the Bill was drafted on the basis of the MAC's minimalist option which used this terminology.

74 There would be no problem with amending the term.

The Commission's role in setting the deposit and number of signature's required for independent candidates to contest elections

75 We reiterate our view that the question of the amount of the deposit to be paid by and the number of signatures in favour of a person wishing to contest an election of the National Assembly or provincial legislature as an independent candidate, should be left to the Commission as an independent and non-partisan body.

76 It is ultimately a policy question as to whether the amount of deposit and number of signatures should be included in the Act or be left to the Commission to determine.

77 Whatever approach is adopted, we are of the firm view that the amount of the deposit for an independent candidate would have to be less than that for a political party. A single individual can only obtain a single seat, whereas a

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political party can obtain many. A single individual will not be able to fund raise to the same extent as a political party. So they would have to be treated differently.

Cooling-off period

78 At present, the Bill stipulates that a former member of a political party may only contest an election as an independent candidate if he or she has not been a member of any political party for at least three months preceding the date of the nomination as an independent candidate.

79 This requirement is not unique to the Amendment Bill.

80 Section 33(1) of the Kenya Elections Act 42 of 2011, which provides qualifications for contesting an election as an independent candidate:

> "A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—
>
> (a) has not been a member of any political party for at least three months preceding the date of the election..."

81 The argument for such requirement is that, if a member of a political party loses an internal race to join a party list, then it is said that they should not be able to utilise the election to achieve a similar result. That would undermine party politics.

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82 It could however be argued that the that such a restriction may well not be constitutional.

82.1 Section 47(1) of the Constitution declares that "*[e]very citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly*" save for a closed list of exceptions. Section 106(1) mirrors this provision in respect of provincial legislatures.

82.2 Section 19(3)(b) guarantees the correlate right of citizens to stand for public office, which right allows citizens to stand as independent candidates according to *New Nation Movement*.

82.3 Placing a restriction on former members of political parties may well be inconsistent with section 47(1) and section 19(3), and thus constitutionally invalid.

83 We raise this for the Minister's and Department's consideration.

The proportion of regional and compensatory seats

84 At present, the Bill divides the number of seats in the National Assembly equally between regional and compensatory seats.

85 Various comments have been submitted that it may be more appropriate for the compensatory seats to represent a smaller proportion of the total number (say

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25%) leaving the remaining seats as regional seats for independent candidates and parties to contest (for example 75%).[3]

86 This is ultimately a policy question. The Bill follows the proposal in minimalist option presented by the MAC.

CONCLUSION

87 We advise accordingly.

STEVEN BUDLENDER SC
MITCHELL DE BEER

Chambers, Sandton & Cape Town
8 July 2022

[3] At local government level, for example,

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"PA8"

MEMORANDUM

for

MINISTER AND DEPARTMENT OF HOME AFFAIRS

on

PUBLIC COMMENTS RECEIVED BY NCOP SELECT COMMITTEE ON ELECTORAL AMENDMENT BILL

STEVEN BUDLENDER SC
MITCHELL DE BEER

Chambers, Sandton & Cape Town
13 November 2022

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OVERVIEW

1 Our urgent advice is sought by the Minister and Department of Home Affairs.

2 In this memorandum, we provide broad responses to the public comments received by the National Council of Provinces Select Committee on the Electoral Amendment Bill [B1B—2022] ("**the Bill**").

3 We do not respond to every comment, but deal with broad themes arising from the comments.

RESERVING 200 SEATS IN THE NATIONAL ASSEMBLY FOR POLITICAL PARTIES

4 Comments were made that 200 seats only for political parties and excluding independent candidates from contesting those seats is unfair.[1]

5 We have previously expressed a view that reserving half the seats in the National Assembly for political parties – for purposes of achieving overall proportionality in generally – is not unfair and will likely be found to the constitutionally permissible.

6 This is because section 157(2) and (3) of the Constitution expressly contemplates an electoral system at local government level that balances

[1] Right 2 Know Campaign p 2.

MSC WB

participation of independent candidates and proportional party representation in a similar fashion.

6.1 Subsection (2) requires that national legislation must prescribe a system for the election of members of a municipal council:

> *"(a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference;* ***or***
>
> *(b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll."* [Emphasis added.]

6.2 Subsection (3) requires that an "*electoral system in terms of subsection (2) must result, in general in proportional representation.*"

7 In *New Nation Movement*,[2] Madlanga J commented on this provision when considering whether the participation of independent candidates in national and provincial elections would undermine the proportionality requirements of the Constitution. He held as follows:[3]

> *"[I]t is quite plain from the provisions of section 157(3) of the Constitution that proportional representation is quite possible where there is a combination of representation through party lists and representation by individuals who need not be attached to political parties. Here is why I say so. In respect of the election of members of a Municipal Council, section 157(2) empowers Parliament to pass legislation that prescribes a*

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[2] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC).

[3] At paras 79-80.

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system: where members are exclusively elected through party lists (section 157(2)(a)); or where membership is drawn from a combination of party lists and ward representation (section 157(2)(b)). Read in the context of section 157(2)(a), which is specific on exclusive party representation, ward representation under section 157(2)(b) certainly does admit of independent candidate representation. That is so because in respect of ward representation the section is silent on party participation. It matters not that in ward representation some – even most – individual candidates may, in fact, be sponsored by political parties.

Section 157(3) then requires that an electoral system under section 157(2) (meaning either exclusively party based or comprising a combination of party lists and ward representation) "must result, in general, in proportional representation". This is the clearest possible statement that dispels the notion that proportional representation is consonant only with representation through political parties."

8 Thus, the Constitution recognises that a mixed system – of political party proportional- and independent candidate-representation – can still satisfy the requirements that an electoral system must generally result in proportional representation.

9 Parliament enacted a mixed system at local government level.

10 Section 22 of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act) provides the following in respect of the election of councillors to metropolitan and local municipalities:

> *"(1) The council of a metropolitan or local municipality consists of councillors elected in accordance with Schedule I—*

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(a) *by voters registered on that municipality's segment of the national common voters roll, to proportionally represent the parties that contested the election in that municipality; and*

(b) *by voters registered on that municipality's segment of the national common voters roll in the respective wards in that municipality, to directly represent the wards.*

(2) The number of ward councillors in a metropolitan or local council referred to in subsection (1) (b) must be equal to 50 per cent of the number of councillors determined for the municipality in terms of section 20 the number of councillors determined in terms of section 20 is an uneven number, the fraction must be rounded off upwards.

(3) The number of proportionally elected councillors in a metropolitan or local municipality referred to in subsection (1) (a) is determined by subtracting the number determined in terms of subsection (2) from the number of councillors determined for the municipality in terms of section 20."

11 Two ballots are used to determine the seats allocated for ward councillors and proportional representation councillors respectively.

12 In our view, mirroring a similar system for elections of the National Assembly – including the use of two ballots – strikes a balance between permitting independent candidates to contest the election, while at the same time ensuring overall proportionality.

13 While the Structures Act has never been challenged, we are of the view that it is constitutionally permissible. It provides a justification for the position taken in the Bill.

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14 The fact of the matter is that independent candidates by their nature have the potential to skew proportionality in the system (as they can only ever obtain a single seat no matter how large or small their proportional support is amongst the voters). It is therefore entirely appropriate for the system to take measures to ensure that proportionality can be achieved. Of course, political parties are the prime bodies through proportionality is achieved in any electoral system.

15 The Constitution recognises the role of political parties in our political and electoral system. Section 1(d) provides that the Republic is founded on the value of *inter alia* a "*multi-party system of democratic government, to ensure accountability, responsiveness and openness.*" The Constitutional Court has emphasised that om "*our system of democracy political parties occupy the centre stage and play a vital part in facilitating the exercise of political rights*".[4]

16 The exact proportion of how many seats should be used to achieve overall proportionality (the compensatory seats), and how many should be available to be contested by independent candidates and political parties (the regional seats) is something that is pre-eminently that Parliament must decide. We accept that an extreme skewing may be found to irrational (say if independent candidates could only contest 1 or 2 seats out of 400), but reserving half the seats as compensatory seats is rational.

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[4] *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) at para 65.

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WASTED VOTES AND PROPORTIONAL REPRESENTATION FOR INDEPENDENT CANDIDATES

17 Concerns were again raised with the fact that votes may be forfeited by independent candidates who receive an excess of votes to be allocated a seat.

18 We reiterate that in virtually any electoral, there is always the occurrence of what might be termed "wasted" votes.[5]

18.1 If Candidate X stands as an independent and receives 50 000 votes, whereas the threshold for election to a seat is only 40 000 votes, there is nowhere else for these excess 10 000 votes to go. Some might say that they are then "wasted".

18.2 Even in the current pure PR electoral system, if a political party receives 40 000 votes, and the quota for a seat is 45 000 votes, then the party will not obtain a seat at all and those 40 000 votes will be "wasted". Or if a party were to received 85 000 votes, they would only receive a single seat, and the additional 40 000 votes would be "wasted".

18.3 In a single member constituency or first-past-the-post system, there are always wasted votes. This is because the election turns not on overall proportionality, but the extent to which a party or candidate wins the majority of votes within a single constituency. The overall balance of power in the legislature is not determined by the proportional number

[5] Some of the public comments recognised this, see Inclusive Society Submission p 5.

MSC WB

of votes received, but rather by the number of constituencies that are won. Because it is impossible to demarcate perfectly proportional constituency boundaries, a party may receive the majority of votes overall, but their candidates may not have won the majority of constituencies, and so many votes are wasted because a minority of voters would have chosen the majority of representatives in the legislature. This system gives rise to gerrymandering and all sorts of other problems.

18.4 The point we wish to make is that in <u>any</u> electoral system wasted votes is a possibility

19 We have previously expressed the view that the fact that there may be wasted votes, does not render the system impermissible or unconstitutional on its own.

19.1 As we have said, "wasted" or "lost" votes are a common feature of other election systems, including single member constituency systems.

19.2 Moreover, the reality is that the votes cannot truly be said to be "wasted" or "lost". If Independent Candidate X runs for the National Assembly as an independent and is elected, then both Independent Candidate X and the voters have achieved their objective. The mere fact that she might have been elected with fewer votes (40 000) does not change that.

19.3 And, of course, if Candidate X considers that she will get so many votes that they will cover two more seats, then she has the right to form her

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own political party to run for multiple seats, rather than running for a single seat as an independent.

20 In addition to the question of "wasted" votes, some public comments also bemoaned the fact that the system in the Bill would not provide for proportional representation by independent candidates, if they were to receive votes in excess of two quotas for a seat in the election concerned.[6]

21 Again, this is a result inherent in any system which allows for independent candidates to run and requires overall proportionality. An independent candidate is defined by their choice (which the Constitutional Court has held is constitutionally protected) to contest an election by not associating with others. An independent candidate cannot expect to contest an election as an individual not associating with others– a constitutional choice they are entitled to make – while at the same time, being able to contest as a group. If independent candidate A is convinced they are extremely popular and as a result will receive votes in excess of the quota, the solution from them is simple: register a political party called "Candidate A Party" and run as a group, where the party can put forward a second or third or fourth candidate and so on for any additional votes.

22 The suggestion of permitting the transferring of votes by independent candidates to one another is in our view not required by the Constitution. There are in actually serious concerns about a system which allows an individual candidate to pass over excess votes to other candidates or parties: there is no way to know

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[6] See for example, Afriforum's comment paras 10-23.

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whether those who voted for the candidate would want their vote to go to such other candidate or party. It would also potentially concentrate an enormous amount of power in an individual, which would undermine the founding principle of a multi-party system and the value of proportionality.

LONG-TERM AND BROADER ELECTORAL REFORM

23 In some of the public comments, criticisms are levied against the Bill for not undertaking major electoral reform.[7] The reasons why the Bill addresses the inclusion of independent candidates into the current electoral system, and does not change the system as a whole are numerous.

23.1 First, the relatively short period of time in which the amending act needs to be passed – both in light of the deadline prescribed by the Constitutional Court and the fact that the next elections must be held in 2024 – meant that it would not have been possible to amend the entire system (for example, to include the creation of new constituencies) for the election to run.

23.2 Second, the current Parliament has no representation from independent candidates, as the system did not permit them to contest elections for the National Assembly and Provincial Legislatures.

24 We are of the firm view that the new system proposed in the Bill should be adopted only for the 2024 elections, and that the Bill should specify the creation

[7] See for example the submission by the Helen Suzman Foundation.

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of a body of experts – broadly representative of society – to undertake a more thorough and long-term investigation into the electoral system, and propose more long-term and larger reforms to the system (should they be appropriate).

25 That would give Parliament, the Department, the Electoral Commission and society as a whole a much longer period of time to consider the issues raised by including independent candidates in the electoral system, and how best to balance this with the constitutional requirements of proportional representation in the system. The 2024 elections will provide concrete evidence of any merits or demerits of the proposed system. And the elected Parliament which provides the long-term electoral reform will be the result of a system which permits independent candidates to contest elections.

26 We are currently considering precisely how to achieve this in the Bill.

ALLOCATION OF SEATS IN NATIONAL ASSEMBLY VERSUS THE PROVINCIAL LEGISLATURES

27 In some of the public comments, it was pointed out that the system for allocating seats in the National Assembly and provincial legislature now differs, in that for the provincial legislature no seats are reserved for political parties as compensatory seats.

28 How this came about was the current system allocates seats on a national-to-national basis and provincial-to-national basis for the National Assembly, but no similar process is used for the provincial legislatures. This was, it seems, to

MSC WB

enable a spread of National Assembly members from the different nine provinces – whereas no similar spread was deemed necessary within a provincial legislature.

29 Dividing the seats in the National Assembly to be allocated in accordance with regional lists and national lists submitted by political parties in this manner – to enable a spread of representatives from the provinces – was adopted initially in Schedule 2 of the Interim Constitution of the Republic of South Africa Act 200 of 1993.[8] The allocation of seats in the provincial legislatures did not follow this approach in the Interim Constitution – indeed all the seats were allocated in the same manner.[9] This system, as modified, was what was eventually adopted as Schedule 1A of the Electoral Act.

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[8] Schedule 2 clause 2:

"*The 400 seats in the National Assembly referred to in section 40 (1), shall be filled as follows:*

(a) 200 seats from regional lists submitted by the respective parties, with a fixed number of seats reserved for each region as determined by the Commission for a particular election, taking into account available scientifically based data in respect of voters, representations by interested parties and the following proposed determination in respect of the various regions:

Western Cape - 21 seats

Eastern Cape - 26 seats

Northern Cape - 4 seats

Natal - 40 seats

Orange Free State - 15 seats

North-West - 17 seats

Northern Transvaal - 20 seats

Eastern Transvaal - 14 seats

Pretoria-Witwatersrand-Vereeniging - 43 seats; and

(b) 200 seats from national lists submitted by the respective parties, or from regional lists where national lists were not submitted."

[9] See Schedule 2 clauses 10-14.

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30 The Bill follows the minimalist approach in respect of the MAC report, which was to use the current system and include independent candidates.

31 Mirroring this system of allocating seats in the provincial legislatures may cause practical difficulties. It would, for example, require a second ballot for the provincial legislatures (resulting in four ballots used in the elections for the National Assembly and provincial legislatures).

VACANCIES

32 Many public comments were directed at the provision which dealt with the filling of vacancies.

32.1 In respect of seats allocated to political parties, vacancies would be filled by the parties' lists as it currently is.

32.2 The initial Bill proposed that vacancies in seats of independent candidates should be filled only at the next election. Holding by-elections would not be workable or financially feasible across an entire region or province whenever a vacancy arises.

33 The B Bill currently being considered by the NCOP Select Committee adopts a system that the votes from the previous election will be used to fill the vacancy as follows:

33.1 the votes and seat allocated to the independent candidate causing the vacancy will be disregarded;

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33.2 the votes and seats allocated to the independent candidates already in office will be disregarded;

33.3 the result for the region or provincial legislature would be recalculated, respectively;

33.4 the vacant seat would be awarded to an eligible independent candidate or party that contested the preceding election.

34 This addresses the concerns that were raised in the public participation process concerning section 47(4) of the Constitution that provides: "*Vacancies in the National Assembly must be filled in terms of national legislation*". It was said that this requires the vacated seat to be filled, even before the next general election.

35 While it is true that a seat allocated to an independent candidate that is vacated could be allocated to a political party and not another independent candidate, that is the system that best reflects the will of the voters. If, for example, the seat were to go to the next eligible independent candidate, that could in theory be a candidate who only received one or two votes, instead of a party that receive many thousands. That would evidently not fulfil the requirements of proportionality.

36 Of course, there is a downside to this approach. Those voters who chose a specific independent candidate on their one ballot and who won a seat, would have their votes removed from the reallocation of the seat concerned. There are two answers to this:

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36.1 One: that is the nature of the system of independent candidates and a voter must vote knowing the limitations of the person they vote for;

36.2 Two: the voter in any event still had and presumably exercised their opportunity to vote for the compensatory seats on their other ballot, so their vote still impacts on make-up of the National Assembly.

INDEPENDENT CANDIDATES CONTESTING MORE THAN ONE REGION

37 The Bill permits independent candidates to participate in more than one region for election in the National Assembly (this was not permitted in the original Bill).

38 We have previously advised that such a system would be constitutionally compliant.

39 We repeat what we have previously stated:

39.1 The Bill provides that "*if ... an independent candidate stands to be allocated a seat in more than one region, he or she is only allocated a seat in the region where he or she received the most number of votes and shall forfeit any additional seats.*".

39.2 We fully support the inclusion of a rule which governs the seat that would be allocated to an independent candidate in the event that they receive a seat in more than one region. It would be patently inappropriate to leave that to the individual discretion of the candidate.

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39.3 In our view consideration should however be given to stating that the candidate would be awarded the seat in the region where he or she received the highest proportion of votes, rather than the greatest number of votes *per se*.

39.3.1 This is because in some regions a candidate may receive a large number of votes, but proportionally receive less support (in regions with larger populations, like Gauteng or KwaZulu-Natal).

39.3.2 In other regions with smaller populations (like the Northern Cape) the candidate may receive fewer votes numerically, but a larger proportion of support from the electorate.

39.4 In our view, a rule that awards the seat with the greater proportion of votes better gives effect to the voice of the voters.

40 There is a downside to allowing independent candidates to contest more than one region.

40.1 There will likely be more wasted votes.

40.2 A candidate may obtain enough votes for a seats in both region A and region B.

40.3 They can only get a single seat however.

40.4 So, the voters in the region where the candidate does not take up a seat will lose out.

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40.5 There is of course no way to avoid this problem.

40.6 One could not, for example, permit votes to be aggregated across regions.

40.7 That is because different regions will be allocated a different number of seats depending on the size of the population in each region (more seats will be available in regions with larger populations) and aggregating votes across regions would completely upend that principle.

40.8 As we see it, the wasted votes problem is one that is inherent in any system that allows independent candidates to contest elections.

41 However, ultimately these are calls for Parliament to make.

THE SIGNATURE REQUIREMENT

42 Section 31B(3)(a) of the B Bill provides:

> *"The following must be attached to a nomination when it is Submitted … A completed prescribed form confirming that the independent candidate has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear on the segment of the voters' roll for that region or province in which the independent candidate is standing for election and who support his or her candidature, totalling at least twenty percent of the quota for a seat that was required for a seat in the previous comparable election;"*

43 In principle, we repeat that we are of the view that using a formula to determine the voter support eligibility requirement would be a rational approach.

44 The previous quota for a seat in the National Assembly was approximately 44 000.[10] Assuming that a similar quota would occur in future, it would require an independent candidate to demonstrate the support of 8 800 voters in order to contest an election.

45 It would be more difficult for an independent candidate to satisfy the eligibility requirement for each and every election, than it would be for a political party to register with the Commission for any election.

45.1 Section 15(3)(a) of the Electoral Commission Act 51 of 1996 provides that a political party's application for registration for purposes of contesting all elections "*shall be accompanied by ... that party's deed of foundation which has been adopted at a meeting of, and has been signed by the prescribed number of persons who are qualified voters*";

45.2 The Commission is empowered to prescribe the number concerned.

45.3 The relevant regulation currently provides:[11]

> *"The deed of foundation referred to in section 15 of the Act must be signed by—*

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[10] Droop quota calculated using the results of the 2019 election, see the Commission's Electoral Report available at https://www.elections.org.za/pw/Downloads/Documents-National-And-Provincial-Election-Reports.

[11] Regulation 3(1)(a) of GNR.13 of 7 January 2004: Regulations for the Registration of Political Parties (as amended).

msc

(i) *1, 000 registered voters for an application in respect of the entire Republic;*

(ii) *500 registered voters for an application in respect of a particular province; and*

(iii) *300 registered voters for an application in respect of a particular district or metropolitan municipality."*

45.4 Accordingly, political parties require at most 1 000 voters to register to contest an election.

46 It is obvious that a political party would have a greater ability to motivate voters to assist it register to contest the elections, than an independent candidate would. Requiring an independent candidate to obtain eight times the number of votes to contest one election than a political party does to contest all elections strikes us as arbitrary and unfair.

47 The Electoral Commission has proposed a way to address these issues that we believe should be incorporated into the Bill.

47.1 First, to introduce a requirement that a registered party not presently represented in a legislative body, must provide form demonstrating that the party has the support of voters in each region or province in which the party has nominated candidates, totalling at least 20 percent of the quota for a seat in the previous comparable election – thus mirroring the requirement for independent candidates; and

47.2 Second, to add a proviso to the signature requirement for independent candidates, that a candidate who was elected to the National Assembly

MSC

or a provincial legislature as an independent candidate in the preceding election is be exempted from the requirement.

48 These changes would treat the political parties and independent candidates on a more equal footing and should in our view certainly be adopted.

STEVEN BUDLENDER SC
MITCHELL DE BEER

Chambers, Sandton & Cape Town
13 November 2022

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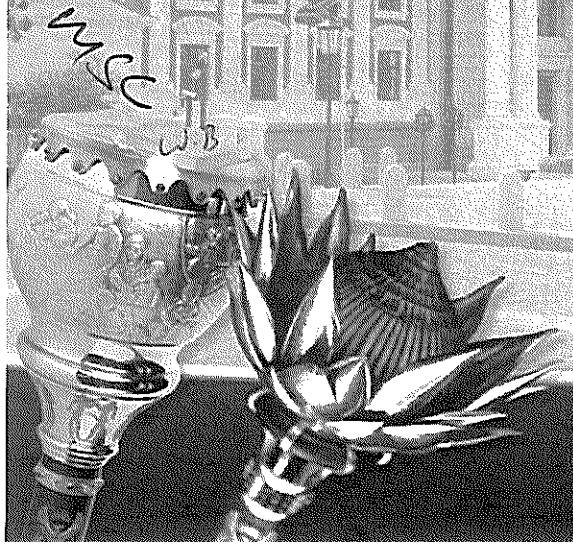
PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

PRESENTATION TO THE SELECT COMMITTEE ON SECURITY AND JUSTICE

RE: ELECTORAL AMENDMENT BILL, B1-2022

Legal Issues raised in Submissions made to the NCOP



3th ANNIVERSARY
OF THE RELEASE OF

INTRODUCTION

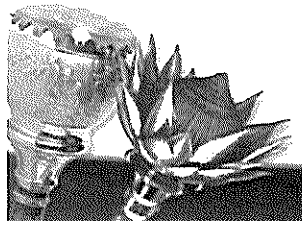
- The CLSO has considered the written submissions received and has extracted the legal and constitutional issues therein.
- CLSO has divided the contents of the submissions into overarching themes and have summarized the legal and constitutional issues raised by submitters under the said themes.
- The submissions have raised many technical issues, for example the effect of recalculations, how seats are allocated, why there is only one ballot for the provincial legislature etc. which have been addressed by the IEC and the Department.
- The purpose of this presentation is therefore limited to addressing certain legal issues.

DEFINITIONS

SUBMISSIONS:

Clause 1 of the Bill – Definitions

1. "person" should be defined as citizen, as per the CC Judgment of New Nation Movement
2. Reconsider use of word "independent candidate" – as no such thing in the political sphere, replaced with "non-aligned candidate" to mean "independent candidate means a person contesting an election in a local, provincial and/or national election nominated by the electorate or eligible voters".
3. Not correct to define and "independent candidate" in juxtaposition to a political party.
4. Reference to "region" is a contradiction
5. The inclusion of "political liaison committee" after the deletion of definition "party liaison committee" seems incorrect



Response

1. Definition of Person:

- The Bill does not contain a definition for "person".
- Proposal discussed in the PC on Home Affairs but when it became clear that the intention was not to include a definition for "person", but rather that a candidate and an independent candidate can only be a "natural person", the proposal to include the definition for "person" was not included.
- The definition of "candidate" and "independent candidate" was then amended to include a reference to "South African citizen" which both clarifies that such candidates can only be natural persons and that they must be South African citizens.

KJB MSC

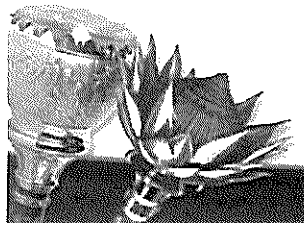
PARLIAMENT

2. "independent candidate" be replaced with "non-aligned candidate"

- The New Nation judgment, which this Bill seeks to address, uses the term "independent candidates" and hence the Bill has followed through with the use of this terminology.
- Other Acts also uses similar terminology. For example, the Local Government: Municipal Electoral Act, 2000 (Act No. 27 of 2000) uses the term "independent ward candidate"
- It is therefore best to use a familiar term in the Bill.

3. Independent candidate should not be used in juxtaposition to Party:

- The Bill defines "independent candidate" as "a South African citizen contesting an election and who is not nominated on a list of a party".
- The Bill distinguishes between 2 types of candidates: namely, those that are nominated on a list of a party contesting an election (party candidates) and those that are independent candidates.
- By defining "independent candidates" in this manner is to make clear that these are candidates that are not "party candidates".



4. Definition of "region" is contradictory:

- The Bill defines "region" as "means the territorial area of a province". It must be noted that the term "region" is currently defined as is in Schedule 1A of the Electoral Act, 1998.
- The term "region" is defined for the purposes of allocating **regional seats** in the National Assembly. Filled by either Party candidates or ICs.
- A provincial area would serve as a region (or constituency).
- Parties would be required to submit "regional lists" which is defined as "means a list of candidates in respect of a region prepared by a party for an election of the NA to reflect that party's order of preference of candidates in respect of the allocation of regional seats in respect of each region".
- Item 2 of Schedule 1A provides that the Commission must prepare a list of independent candidates contesting an election of the NA in each region in accordance with the Act.
- Therefore, it is our opinion that the definition is not contradictory.

5. Bill deletes "party liaison committee" and inserts "political liaison committee" after the deleted definition:

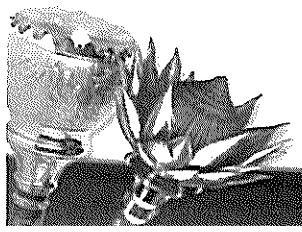
- It may appear to be incorrect, but this is how this is done as per drafting conventions in Bills which are amending a principal Act (in this case the Electoral Act, 1998).
- It is to show exactly where the new definition will be inserted into the principal Act in alphabetical order.
- Also, the consolidated version of the Act, which incorporates the amendments will still show the deleted definition with a note saying which Act has deleted the definition.
- This assists in keeping track of all amendments made to the principal Act.

IC's contesting Multiple Regions & Non-Aggregation of Votes

SUBMISSION:

Clause 6 of the Bill – section 31A (a) read with Clause 21 of the Bill - Item 5(k) of Schedule 1A

- Unconstitutional as ICs contest multiple regions, but prevents ICs from gaining national support across regions as votes are not aggregated.
- Why should ICs be representative of a region, if it is a National Seat?
- Hinders ICs in obtaining the vote quota in order to obtain a seat.
- Limits proportionality by contributing to the discarding of votes.
- Limitation of ICs rights.
- Against the principle of every vote counts – total votes don't reflect the total seats allocated or the will of the people.
- Arbitrarily discriminates against ICs – Parties are allowed to essentially aggregate.
- Should not be allowed to contest multiple regions as it disenfranchises the voter.



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Response

- Initially the Bill provided for an IC to only contest **one region**, (ordinary resident in).
- During deliberations it was pointed out that regardless of their place of ordinary residence, party candidates could appear on a party's regional list for the NA or party's provincial list for the provincial legislature. However, IC's were only permitted to stand for elections in one region (region of residence).
- Civil Society argued that as it was a National Seat - no justifiable reason as to why an IC was required to be an ordinary resident of the region & restricted to one region.
- Therefore section 31A(1) of the Bill was amended to allow IC's to contest more than one region but only be elected to one seat in the NA & where an IC contested more than one region- votes could not be aggregated.
- This could arguably be interpreted as infringing upon section 19 (3) of the Constitution, in that it prevents an IC from standing for public office and that any such infringement or limitation of a right would require a rational connection to a legitimate government purpose or it could be deemed unconstitutional.
- As the IEC has explained:
  - An IC contests for a seat in the NA via a region.
  - There are 9 regional elections, each region will have its own quota for obtaining a seat.
  - A seat quota for ICs and Parties are determined only by votes cast in that region

  (ALL valid votes in the region ÷ 200 seats + 1).
  - Therefore, votes from other regions may not be used to influence the outcome in a different multi-member constituency (region) as it will distort the calculations.

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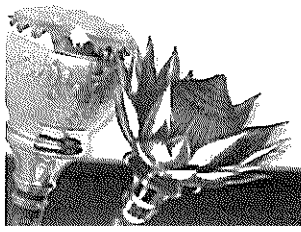
Deposits

SUBMISSION

(Clause 6 – section 31B(3)(b) and 31B(6))

- Do away with deposits as they are the gates of corruption;
- Deposits for ICs should be the same as that paid by parties as they are going to the same parliament or provincial legislature;
- it is unfair for ICs to pay the same deposit as political parties.



Response:

- This Bill is in line with section 27(3)(a) of the Electoral Act, provides that the Commission may prescribe the amount of the deposit that must be paid by a registered party.
- Section 27(3)(b) of the Act then states that the amount to be deposited by a registered party contesting an election of a provincial legislature, must be less than the amount for contesting an election of the NA.
- Similarly, in Local Government elections deposits for Parties and ICs are prescribed by the IEC. - S14(1)(b) & 17(2)(d) of the Local Government: Municipal Electoral Act.
- Our Courts have also pronounced on the issue:
  - ***EFF v Electoral Commission*** - confirmed the legitimacy of deposits as a requirement to participate in Elections.
  - ***African Christian Democratic Party v Electoral Commission*** – confirmed that deposits evidence the seriousness of a Party's intention in contesting elections & that such participation is not frivolous.

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SIGNATURE REQUIREMENT

- **SUBMISSION:**

Clause 6 of the Bill – section 31B (3)(a)

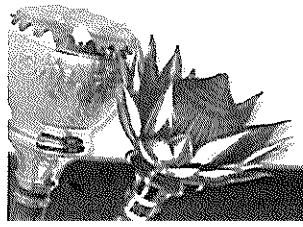
- ICs essentially will be required to submit 18000 signatures, but Parties are only required to submit 1000 signatures (i.t.o the Electoral Commission Regulations)
- The length of ballots papers should not be the justification to create barriers of entry for ICs
- Violates s 19 (3)(b) of the Constitution

Response

- In terms of the *Richter v Minister of Home Affairs,* electoral law must aim at enfranchisement and should not unduly restrict the rights of citizens to vote and stand for elections.
- Although a signature requirement may be necessary to determine the seriousness of an IC to contest an election and to avoid a lengthy ballot paper, it should not be a barrier to stand for election and the number of signatures should be reasonable.
- It is acknowledged that there is a disparity between ICs and Parties regarding the requirement for signatures.
- However, proposals have now been put forward to this Committee to address the issue of the signature requirement and ICs:

1. Insertion to **section 27 of the principal Act** in order to provide that registered parties who are not represented in a legislative body, should also provide an indication of support in the **form of signatures, names and ID numbers of registered voters totaling at 20% of the quota** for a seat in the previous election (similar to the requirement of ICs)
2. Substitution to the Bills' **s31B(3)(a)** with a proviso that an IC who has been elected to the NA or provincial legislature as an IC is exempt from this requirement.

- A decision is required from this Committee regarding the aforementioned.



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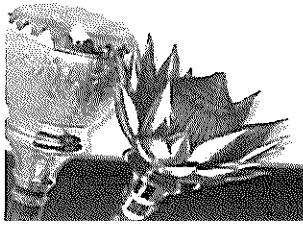
REGIONAL SEATS vs COMPENSATORY SEATS

- **SUBMISSION:**

Clause 21 of the Bill – Item 1 of Schedule 1A

- Parties have an additional 200 seats, gives Parties an advantage over ICs
- Affects the seat allocation system as the Quota to obtain seats for Parties uses the full 400 seats in NA, whereas ICs quota only uses 200 regional seats.
- No such differentiation in the Provincial Legislature
- Propose 300 regional seats and 100 PR seats
- Compensatory Seats violates proportionality as ICs are not taken into account.



RESPONSE

- The purpose behind the compensatory seat allocation system is to correct disproportionality in representation in the results of an election.
- To make up imbalances in the results of a plurality/majority voting system.
- Section 46(1) of the Constitution does not provide for a detailed mechanism in which the electoral system of South Africa must be constructed, but provides for a guideline, including that the electoral system must result in general proportional representation
- Although proportional representation is not exclusively limited to political parties, it is practically difficult to provide for proportional representation with ICs only holding 1 seat, even though they may indeed receive more votes than a Party.
- As we understand from the deliberations to date, allowing ICs to contest compensatory proportional representation seats would distort the proportional representation requirement and also run the risk of the NA seats being unfilled.
- Furthermore, the Committee has received a detailed opinion from the Department's counsel who has indicated that reserving half the seats as compensatory seats is constitutionally permissible and rational.

DISCARDING EXCESS VOTES

SUBMISSION:

- Will of the voters not reflected as IC may have more votes than a smaller Party but once they obtain their seat, the rest of their votes are discarded.
- Option to introduce a Single Transferable Vote
- Contesting more than one region increases possibility of wasted votes and distorts proportional representation

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PARLIAMENT

Response

- The very nature of an IC is that they may only occupy one seat at a time.
- Once the minimum number of votes required to secure a seat is determined all additional votes may not practically be utilised.
- On the face of it this may appear to be "wasted votes" but in effect it gives an expression to the will of those voters who voted for the IC.
- The dignity and personhood of those voters who voted for an IC are not infringed, as the will of their votes manifests in the occupation of a seat by their chosen IC, regardless of whether their vote counted towards the appointment of an IC or whether their vote forms part of the excess votes that went towards the appointment of that IC, but were discarded due to the IC gaining a seat.
- In terms of other jurisdictions, where the plurality system is used such as India, UK and Canada, discarded votes are inevitable.
- MOREOVER, both the Department and the IEC have explained that there is no electoral system that does not result in discarded votes

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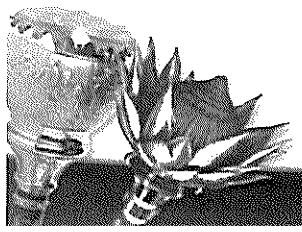
VACANCIES

- **SUBMISSION:**

Item 23 of Schedule 1A – replace a vacating IC by

> "(a) disregarding the votes
>
> (b) disregarding the votes & seats allocated to the ICs in office,
>
> (c) recalculating the result for the region or provincial legislature"

- Calculation ignores seats cast for ICs, disenfranchises those who voted for the particular IC
- Benefits larger parties
- Suggestions for a running mate system as cost effective and simple and allows for succession



RESPONSE:

- In terms of section 47(4) of the Constitution – *"Vacancies in the National Assembly must be filled in terms of national legislation"*.
- The filling of vacancies through a by-election was considered not to be a workable solution as it is costly and impractical.
- Therefore in order to address the filling of vacancies, a forfeiture calculation was proposed.
- The running-mate option was not encouraged, as voters may not want their candidate replaced as they voted for that particular person. This may not reflect the will of the people.
- The IEC has explained that while it is true that a seat allocated to an independent candidate that is vacated could be allocated to a political party and not another independent candidate, that the system set out in Item 22 and 23 is one that best reflects the will of the voters.
- However, more recently the IEC has suggested that **Item 23 (3) (a), (f) and (g)** and **24 (c)** require amendment as the Vacancy Calculation should not reference the forfeiture calculation of **item 7 and 12,** but should rather reference **Item 24**, which speaks to a recalculation.
- A decision would need to be made regarding this proposal.

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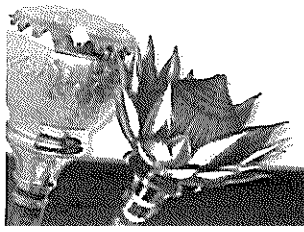
Recall of members/public representatives

SUBMISSION:

- one major shortcoming in the Electoral Act and the Bill is that the South African public does not have a right to recall public representatives where they no longer serve in the interest of the public.



Response:

- Sections 47(3) and 106(3) of the Constitution specifically sets out the circumstances as to when a person loses membership of the National Assembly and Provincial Legislatures respectively;
- These circumstances are:
  - when such person ceases to be eligible as per section 47(1) and 106(1);
  - when he or she is absent from the NA or PL without permission in the circumstances for which the rules and orders of the NA/PL prescribe loss of membership; or
  - he or she ceases to be a member of the party that nominated that person as a member of the NA/PL.
  - These constitutional provisions provide a closed list of circumstances under which a member can lose membership of the respective legislature.
  - These provisions also do NOT provide that national legislation may provide for other circumstances as to how members may lose membership of either of the legislatures.
- In order to provide for the Bill to provide that the public may "recall" its representatives from either the NA or PLs, it is submitted that a constitutional amendment would be required.
- It is submitted that the Bill **CANNOT** provide for such "recall".

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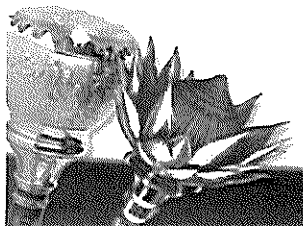
WAY FORWARD

- New amendments are being proposed by the Department and the IEC which requires consideration and decisions by the Committee.
- However, we wish to reiterate that the Constitutional Court deadline by which this Bill must be passed is **10 December 2022** and any additional amendments would need to go back to the Portfolio Committee on Home Affairs for consideration and this could possibly impact on the deadline not being met.



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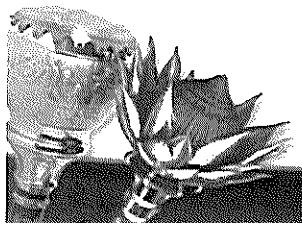

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SELECT COMMITTEE ON SECURITY AND JUSTICE

THE ELECTORAL AMENDMENT BILL: COMMISSION RESPONSES TO SUBMISSIONS

1. Conception of Proportionality

1.1. The Constitutional Court ordered the amendment of the Electoral Act, to facilitate participation of independents. The participation of independents is still within a constitutional scheme that results in general, proportional representation.

1.2. Proportional representation systems are subject to distortions with the introduction of elements such as the participation of independents. The only way to include independents in our current two-tier compensatory system is to allow them to obtain seats that they win and to regard that as a component, with proportionality in respect of the remaining seats applying to the parties that gain representation. This will grant representation to independents and maintain intra-party proportionality.

1.3. The "in general" element permits a legal threshold that allows the allocation of only five seats not initially allocated based on the "largest remainders" method. From seat six onwards, parties already allocated a seat gain representation based on the highest average number of votes for seats provisionally allocated. This is to prevent absurd situations of a party with very little support gaining representation.

1.4. The Commission is of the view that the Bill meets the requirements of election results yielding, in general, proportional representation. The models illustrating the basis of the conclusion are discussed in turn.

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2. The Present System

2.1. To assess the outcomes of the Electoral Amendment Bill, it is best to, in the first instance, reflect on the outcomes of the current electoral system.

2.2. Annexure 1 reflects the official results of the 2019 national election. It will be noted that only the largest party is accurately represented and that all the other parties are slightly overrepresented. This variation comes about due to the 309 727 "wasted" votes cast for 34 parties that did not gain representation. In all cases, the minor variance is, however, less than 0,25%, that being the threshold for gaining a seat.

2.3. Annexure 2 reflects the percentage support each represented party received in the 2019 election if the votes for unrepresented parties are discarded. The two largest parties are underrepresented and the rest are slightly overrepresented.

2.4. The discarding of some votes does not apply to the present system and this example is only included to illustrate that the discarding of some votes influences outcomes. The principle that it illustrates affects any model that may be constructed in respect of the Bill. With those models, all votes are taken into account to determine outcomes in the regions. But, with the determination of the compensatory element, the votes for independent candidates are excluded. This exclusion leads to a lower quota than would otherwise have applied and to allocating a larger number of provisional seats during the first round of allocations.

3. Implementation of the Electoral Amendment Bill

3.1. Annexures 3 and 4 reflect situations where three and six independents, respectively, gain seats. The results of the 2019 elections were used with the data relating to three and four parties, respectively, to construct the two models. They are parties that gained regional representation (where independents would be competing), and in the models, their votes are attributed to independent candidates.

MSC WB

3.2. To accommodate the introduction of two ballot papers in the models, it had to be accepted, with the available data, that a similar number of votes were cast regionally and nationally. This is an anomaly, but not big enough to disturb the validity of the trend that is being illustrated. The totals for party and total votes differ in the two models depending on the number of votes for independents discarded in the list compensatory calculations.

3.3. The result is not a pretence of an actual situation but is accurate enough to discern trends and is intended only for that purpose. The results of the 2019 regional elections were not recalculated and the official IEC published information was used since the Bill does not change anything there. With the subsequent list compensatory calculations, all steps were included in the models to illustrate that the mathematically most possible proportional outcome is arrived at.

3.4. In the model (Annexure 3) where three independents gain seats (all with the largest remainder method), there are relatively minor variations with the current position. The biggest party gained three seats compared with the current situation, with other consequential adjustments following. The largest party is still slightly under-represented based on its share of the votes for parties. Again, the calculation for the 57.5% of the vote it gained in the 2019 election included the 309 727 votes for parties that did not gain representation. If that is disregarded for comparison purposes and only the proportion of the votes for successful parties is considered, it gained 58,5% of the party vote in 2019. The difference between intra-party and overall support represents at least three seats in a 400-member Assembly and probably enables a comparison of apples with apples.

3.5. In the model (Annexure 4), where six independents gain seats (once again, all with the largest remainder method), the variation becomes bigger; the largest party gains seven seats compared with the current system and

MSC 12B

position with other consequential adjustments following. The largest party remains under-represented based on its share of the party vote.

3.6. *It is important to understand why some parties in the models gained seats compared with the 2019 election outcome. It is a mathematical inevitability with the necessity to deal with independents and their votes in a compartmentalised manner. The quota used in 2019 to determine the overall composition of the National Assembly was 43 485, whilst in the model, it is 43144. The reduction is due to discarding the votes for independent candidates, which includes those for unsuccessful independent candidates (and could, in some models, have excess votes for successful independents) Fact is that more votes are discarded than the number of votes that were required for the independents to win their seats. The reduction in the number of votes to take into account is, thus, larger than the reduction in the number of remaining seats to be filled, leading to a lower quota. The lower quota, in turn, leads to some parties gaining more seats in the first round of the allocation of seats compared with the situation in 2019, and the rest follows in sequence based on mathematical logic.*

3.7. In whatever model one constructs, intra-party proportionality will always be attained. However, it is clear that the better independent candidates fare, the more the overall outcome, whilst mathematically logical and correct, may become, politically speaking, muddy and, for the electorate, more challenging to follow. The Bill follows most of the concepts that apply to the municipal electoral system. There the presence of independent candidates has not stirred the water. That is mainly because independent candidates have received little support and have not distorted outcomes significantly enough to raise questions.

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4. Alternative Models

4.1. Single-Member Constituencies

4.1.1. It is important to consider whether alternative models would result in what could be regarded as more proportional outcomes. To this end, refer to Annexures 5 and 6. They deal with the notion that 200 seats in the National Assembly should be filled from single-member constituencies as proposed as an option in the Ministerial Advisory Committee. That introduces the first past the post element where the winning candidate does not require an absolute majority - only more votes than the other candidates.

4.1.2. The two Annexures attempt to construct models reflective of the outcome for single-member constituencies. The results of the 2021 municipal elections were used for that purpose, as it is also a two-tier compensatory system. The number and percentage of wards a party won are as close an approximation as could be made to arrive at the likely number of constituencies a party would win. Wards reflect geographic areas of support that are, primarily due to past and present spatial anomalies, areas of concentrated support. This phenomenon would likely also be reflected in constituency elections. The outcomes in this model can naturally not be directly compared with those in the other annexures since it uses a different dataset.

4.1.3. The votes for independent candidates have been grouped in Annexure 5 even though their votes would be spread and the number of votes required to win a single member constituency would be much higher than the number they needed to win the 52 wards they did, based on the first past the post method, in the municipal elections. This aims at illustrating the maximum theoretical impact independent candidates could have - based on this dataset. The votes for other participating parties have also been grouped. They all have less than

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0,25% of the party vote (some are local parties), and individually, none would qualify for a seat in the National Assembly. However, the votes they received must be considered when a quota is determined for allocating the compensatory list seats - only the votes for independents are excluded.

4.1.4. The results arrived at in the model marked Annexure 5 (single-member constituencies) could be seen as more proportional than those achieved with the results arrived at in Annexure 3 (the Bill). The represented parties are all slightly, but not widely, overrepresented. However, the picture changes radically with the model marked Annexure 6. The same assumptions are used as in the model marked 5. Here the votes for a party with broad support but with it not geographically concentrated (it won fewer wards than the actual independent participants did) are now marked as the participation of independent candidates. The discarding of this large number of votes when the compensatory element has to be calculated leads to a much lower quota and an outcome, although mathematically sound, that will not be acceptable since a minority of votes leads to a majority of seats.

4.1.5. A single-member constituency system is thus potentially at least as vulnerable in perceptions of proportionality as any other.

4.2. **Proportionality Determined by Party Ballot Only**

4.2.1. Annexure 7 contains a model where the votes on the first ballot determine the outcomes in the regions, and the second so-called party compensatory ballot is used to restore overall proportionality. For this model, the identical dataset is used to the model in Annexure 4. In this model, the regional votes are not considered when the compensatory list allocations are determined. Overall proportionality for 400 seats, minus those attained by independent candidates in the regional

MSC WB

elections, must be filled. The regional seats are those attained in the 2019 election.

4.2.2. The outcome of this model is not different from that resulting from the implementation of the provisions of the Electoral Amendment Bill and the largest party gains, in both instances, the same number of seats.

4.2.3. Also, the largest parties are still underrepresented compared to their share of the party vote. To an extent, the party votes in the regional component that, in terms of the Bill, must be combined with the second party vote to determine overall party support may, with the assumptions in the model in Annexure 4, have been overstated in favour of the largest parties. Had actual data been available, the larger parties could even have gained fewer seats in the model in Annexure 4.

4.2.4. The model's outcome in Annexure 7 does not correspond with the expectations of this approach as expressed in the public domain.

5. Provincial Elections

5.1. Annexure 8 contains a model, including votes attributed to independents, and it is based on the 2019 provincial legislature election in Gauteng. It yielded the same outcome. The number of parties represented in Provincial Legislatures is far less than the case of the National Assembly. It varies between four and seven, with five legislatures having only four represented parties. Thus far, smaller parties seem to have played a lesser role in provincial elections despite the quotas mostly being lower and even substantially lower than at the national level. It is only in Gauteng and the Western Cape that substantial quotas have been used in the past.

5.2. The scenarios constructed in submissions to the Portfolio Committee and the NCOP about provincial elections are based on hypothetical data and assume great support for independent candidates. From a mathematical

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perspective, the conclusions reached in the scenarios are correct. At the same time, they contain assumptions for an independent winning a seat in more than one region and a provincial legislature with significant consequential effects on perceptions of proportionality.

5.3. However, whether these scenarios are likely to occur is not the point. These extremes can only be avoided if an independent candidate is limited to standing in only one election. A two-ballot system with sub-regions is not the answer either. It will yield the same outcomes as the comparison in section 5 above.

6. Comments on the Atkins Submission to the NCOP

6.1. The submission correctly states that the Bill "is based on the entirely illogical idea of individuals) independent candidates being on the same ballot as parties" and that "every problem with the Bill arises as a consequence of the fundamental problem". These statements are correct. The reality of the inclusion of independents in proportional systems induces distortions to proportions.

6.2. The submission proceeds from the premise that for the Bill to be fair and constitutionally compliant, it should result broadly in the same outcome as in 2019 if the same dataset is used for calculation purposes. This is logically and mathematically not possible. The reason is simple. If independents are (finally) awarded the seats they win in regional elections, and you exclude both those seats and the votes for independents from further calculations, then inevitably, the quota would be lower than it was in 2019 based on all the votes cast. Different quotas cannot give you the same results and the lower quota benefits parties. Not because parties are given an advantage but because of the practical consequences of introducing independents.

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6.3. The submission proposes the following solution to restore a so-called acceptable level of proportionality: "The proportional representation seat allocation (400 seats, less the number won by independent candidates in regional elections) should be carried out solely on the basis of the proportional representation ballot, with the regional ballots excluded " (own emphasis). The proposition for creating such a model is logical and correct. It is only the outcome that is not correctly projected. The reason is explained in the previous paragraph and the outcome is illustrated in Annexure 7.

6.4. It is clear from the contents of the previous point that using two ballots cannot mitigate the distortions to complete proportionality that the participation of independents brings along. It does, however, deal with the issue of voters supporting an independent and having a second choice to support a party if they so choose. Every ballot cast influences the component (tier) of the electoral system it relates to.

6.5. An individual cannot be elected more than once in the same legislature; thus, discarding excess votes for successful independents is a logical consequence. That parties do not have single but multiple candidates and that excess votes can therefore be "pooled" for other candidates is an equally logical consequence. It is a choice to stand as an individual or to represent a party.

6.6. The submission is correct insofar as parties with more votes will mostly gain more seats with the first provisional allocation of seats than in the current system. It should, however, also be kept in mind that in both the models in Annexures 3 and 4, some smaller parties also benefit, albeit not to the same extent. In none of the models, except single-member constituencies, does the largest party gain more seats than its share of the party vote. The perceived advantage is a logical mathematical consequence that cannot be avoided and is not an engineered outcome.

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6.7. The submission is correct that the outcomes in provincial elections could be largely distorted in the event of multiple simultaneous successes by an independent candidate in more than one region and a provincial election. The proposal that a person may only stand in one election and region is also sound. If the accommodation for independents to have multiple candidacies is permitted to stand, then the potential outcomes are mathematically unavoidable.

7. General Responses

7.1. Payments of Deposit and Signatures to Evidence Support

7.1.1. The requirement for a monetary deposit to evidence serious intent to contest is well established. The Bill also makes it clear that a deposit paid by an independent must be less than that paid by a party that submits a list of candidates.

7.1.2. In respect of signatures as a minimum requirement for candidacy, drafting that achieves parity in the treatment of candidates was proposed to the Select Committee. If it is accepted, it will impose similar requirements on unrepresented political parties to demonstrate support at the point when they nominate candidates. This is over and above the requirements for signatures that they must meet when they register as parties.

"(c) In the case of a registered party not represented in a legislative body, a completed prescribed form confirming that the party has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear on the segment of the voters' roll for each region or province in which the party has nominated candidates and who support the party, totalling at least 20 percent of the quota for a seat in the previous comparable election;"

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7.2. **Electoral Reform**

7.2.1. The Commission reiterates that the choice of an electoral system involves a national policy choice that cannot be relegated to an election management body. Rather, that the decision must be that of Parliament as a body representative of the people.

7.2.2. The Commission remains available to contribute in a manner consistent with its constitutional obligations and as determined by Parliament.

7.2.3. The exact nature of the national policy conversation on electoral reform is a matter whose institutional and operational modalities have to be worked out.

7.3. **Whether it is possible to introduce constituencies in the time remaining before 2024 general elections**

7.3.1. The position of the Commission is that it is not possible implement constituencies before 2024. Furthermore, it is not possible to use the "66 districts model constituencies". This is so, because constituencies are required to have similar numbers of voters. It is also not possible to fit constituencies within the present municipal or district council boundaries without leading to so-called cross-border boundaries.

7.3.2. Moreover, the boundaries for provincial constituencies could not correspond with the regional constituency boundaries for the National Assembly since there are more provincial seats than regional seats. The potential confusion for voters and administrators apart, this process will take time - mainly if an opportunity for objections is provided for proposed constituencies, which should be the case.

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WB

7.4. **There is an error in the method to award a seat left vacant by an independent who had been elected to more than one legislative assembly**

7.4.1. The Commission had on 9 November proposed a re-draft that ameliorates this. The proposed drafting implicates item 7 and 12 of Schedule 1A. If the re-draft is accepted, there will be consequential adjustments to item 23 and 24 of the same Schedule.

7.5 Item 23(3)(g) of Schedule 1A is redundant

The Commission accepts the submission and thus proposes deletion of item 23(3)(g) and 24(g).

8. Conclusions

8.1. There is no alternative system that provides a more proportional outcome than that in the Bill. Smaller multi-member constituencies, whilst logistically not an option in the short term, would probably limit variations from complete proportionality but hold the same inherent problem that independents would still be a separate component with distortion impacts.

8.2. While the compartmentalised nature of independents, their votes and seats may have a distorting effect on proportionality, intra-party proportionality is nonetheless maintained. The Bill thus ensures an outcome as proportional as mathematically possible.

"PA11"

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

The State Attorney
Die Staatsprokureur
iGqweta likaRhulumente

4th FLOOR / 4de VERDIEPING
22 Long Street
Langstraat 22
CAPE TOWN/KAAPSTAD
8001

Postal address/Posadres
Private Bag
Privaatsak X 9001
CAPE TOWN
KAAPSTAD
8000

Docex: 156

TEL: (021) 441- 9200 / 9228
FAX: (021) 421-9364
EMAIL: RNaidoo@justice.gov.za

OUR REF: 3488/23/P17 **YOUR REF: Case Number: CCT 144/23**

Wednesday, 26 July 2023

THE REGISTRAR
Constitutional Court
BRAAMFONTEIN

Email: generaloffice@concourt.org.za

Dear Stephen Cindi

INDEPENDENT CANDIDATES ASSOCIATION SOUTH AFRICA NPC / PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & FIVE OTHERS: CASE NUMBER: CCT 144/23

1. I refer to the Directions dated 11 July 2023 that were issued in respect of case number CCT 144/23 ("**the Directions**").

2. In terms of the Directions, the opposing parties who wish to file answering affidavits were required to do so by Tuesday, 25 July 2023.

3. I placed myself on record as the State Attorney, Cape Town on behalf of the Second and Third Respondents ("**Parliament**") and filed a notice of intention to oppose on 20th June 2023. This notwithstanding, I did not receive the Directions.

MSC

LJB

4. The first time that I became aware of the Directions was on the afternoon of 25 July 2023 when one of the Counsel on my team forwarded it to me. She had received it from Counsel for one of the other Respondents on the afternoon of 25 July 2023 who has also just received the Directions. Accordingly, the first time that Parliament and its legal team became aware of the Directions was on the afternoon of 25 July 2023.

5. In light of the aforegoing, Parliament was not in a position to file its answering affidavit Case number CCT144/23 by 25 July 2023.

6. Parliament does however intend filing answering affidavits in this matter. While its legal team is working hard on Parliament's answering affidavit, the issues raised in the application are complex and carry far reaching consequences. This, of necessity requires a reasonable time in which to file the answering affidavits.

7. Parliament therefore seeks an indulgence from this Court to file its answering affidavit by no later than **Tuesday, 8 August 2023** which will be accompanied by an application for condonation. This timeframe will afford Parliament no more time than this Court considered to have been reasonable in its Directions (i.e. two weeks).

Kind regards

Naido

MS. R. NAIDOO
for STATE ATTORNEY

MSC

WB

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC (Registration Number: 2021/616521/08)	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITCAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

---

NOTICE OF INTENTION TO OPPOSE

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

WSC

WB

BE PLEASED TO TAKE NOTICE THAT that the Second and Third Respondents hereby give notice of their intention to Oppose the Applicant's Application and has appointed the Office of the State Attorney, 4th Floor, Long Street, Cape Town at which they will accept service of all documents in these proceedings.

DATED AT CAPE TOWN ON THIS 9TH DAY OF JUNE 2023

STATE ATTORNEY

Per: Naidoo

R. NAIDOO

2nd & 3rd Respondents' Attorney

4th Floor

22 Long Street

Cape Town

(REF: Ramona Naidoo/23/P17)

TO: **THE REGISTRAR**

CONSTITUTIONAL COURT OF SOUTH AFRICA

1 Hospital Street

Constitutional Hill

BRAAMFONTEIN

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

MSC

WB

AND TO: **STRAUSS DALY INCORPORATED**

Applicant's Attorneys

9th Floor, Strauss Daly Place

41 Richefond Circle

Ridgeside Office Park

UMHLANGA

Ref: IND119/0001/AK/DD/CP

Email: ddeeplal@straussdaly.co.za

Copy: cphillips@straussdaly.co.za

CARE OF: **STRAUSS DALY INCORPORATED**

Unit 801, 8th Floor

Illovo Point

68 Melville Road, Illovo

JOHANNESBURG

Ref: Dinesha Deeplal / Chad Phillips

Email: ahiralall@straussdaly.co.za

AND TO: **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

First Respondent

CARE OF: **OFFICE OF THE STATE ATTORNEY, PRETORIA**

316 Thabo Sehume Street

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

MSC

LB

PRETORIA

Email: malebo@presidency.gov.za

Copy: presidentrsa@presidency.gov.za

vincentm@presidency.gov.za

AND TO: **MINISTER OF HOME AFFAIRS**

Fourth Respondent

CARE OF: **OFFICE OF THE STATE ATTORNEY, PRETORIA**

316 Thabo Sehume Street

PRETORIA

Email: mamokolo.sethosa@dha.gov.za

Copy: phuti.rammutla@dha.gov.za

Siyamthanda.skota@dha.gov.za

nadasen@dha.gov.za

AND TO: **INDEPENDENT ELECTORAL COMMISSION**

Fifth Respondent

Election House

Riverside Office Park

1303 Heuwel Avenue

Centurion

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

MSC

WB

JOHANNESBURG

Email: kunenev@elections.org.za

Copy: rambaum@elections.org.za

AND TO: **ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY**

Sixth Respondent

Filed by:
Per: R. Naidoo
Tel: 021 441 9200 / 9228
Email: RNaidoo@justice.gov.za

MSC

WB

Cedras Ilse

From: Cedras Ilse
Sent: Friday, 09 June 2023 15:37
To: 'ddeeplal@straussdaly.co.za'; 'cphillips@straussdaly.co.za'; 'ahiralall@straussdaly.co.za'; 'malebo@presidency.gov.za'; 'presidentrsa@presidency.gov.za'; 'vincentm@presidency.gov.za'; 'mamokolo.sethosa@dha.gov.za'; 'phuti.rammutla@dha.gov.za'; 'siyamthanda.skota@dha.gov.za'; 'nadasen@dha.gov.za'; 'kunenev@elections.org.za'; 'rambaum@elections.org.za'
Cc: Naidoo Ramona
Subject: INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPS // SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS - CASE NO: CCT 144/23
Attachments: INDEPENDENT CANDIDATE ASSOCIATION - Notice to Oppose (scnd).pdf

Tracking:

Recipient	Delivery
'ddeeplal@straussdaly.co.za'	
'cphillips@straussdaly.co.za'	
'ahiralall@straussdaly.co.za'	
'malebo@presidency.gov.za'	
'presidentrsa@presidency.gov.za'	
'vincentm@presidency.gov.za'	
'mamokolo.sethosa@dha.gov.za'	
'phuti.rammutla@dha.gov.za'	
'siyamthanda.skota@dha.gov.za'	
'nadasen@dha.gov.za'	
'kunenev@elections.org.za'	
'rambaum@elections.org.za'	
Naidoo Ramona	Delivered: 2023/06/09 15:37

Dear Sir/Madam

We refer to the abovementioned matter.

Please find herewith, by way of service, the Second & Third Respondents' Notice to Oppose

Kindly acknowledge receipt hereof.

Kind regards

Ilse Cedras
Obo Ms. R. Naidoo
Office of the State Attorney
021 – 441 9200

MSC WB

Cedras Ilse

From:	Cedras Ilse
Sent:	Tuesday, 20 June 2023 15:01
To:	generaloffice@concourt.org.za
Cc:	Naidoo Ramona
Subject:	INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPS // SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS - CASE NO: CCT 144/23
Attachments:	INDEPENDENT CANDIDATE ASSOCIATION - Notice to Oppose (scnd).pdf

Tracking:

Recipient	Delivery
generaloffice@concourt.org.za	
Naidoo Ramona	Delivered: 2023/06/20 15:01

Dear Sir/Madam

Please find herewith, by way of Filing, the Second & Third Respondents' Notice to Oppose.

Kindly acknowledge receipt hereof.

Kind regards

Ilse Cedras
Obo Ms. R. Naidoo
Office of the State Attorney
021 – 441 9200

From: Cedras Ilse
Sent: Friday, 09 June 2023 15:37
To: 'ddeeplal@straussdaly.co.za' <ddeeplal@straussdaly.co.za>; 'cphillips@straussdaly.co.za' <cphillips@straussdaly.co.za>; 'ahiralall@straussdaly.co.za' <ahiralall@straussdaly.co.za>; 'malebo@presidency.gov.za' <malebo@presidency.gov.za>; 'presidentrsa@presidency.gov.za' <presidentrsa@presidency.gov.za>; 'vincentm@presidency.gov.za' <vincentm@presidency.gov.za>; 'mamokolo.sethosa@dha.gov.za' <mamokolo.sethosa@dha.gov.za>; 'phuti.rammutla@dha.gov.za' <phuti.rammutla@dha.gov.za>; 'siyamthanda.skota@dha.gov.za' <siyamthanda.skota@dha.gov.za>; 'nadasen@dha.gov.za' <nadasen@dha.gov.za>; 'kunenev@elections.org.za' <kunenev@elections.org.za>; 'rambaum@elections.org.za' <rambaum@elections.org.za>
Cc: Naidoo Ramona <RNaidoo@justice.gov.za>
Subject: INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPS // SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS - CASE NO: CCT 144/23

Dear Sir/Madam

We refer to the abovementioned matter.

Please find herewith, by way of service, the Second & Third Respondents' Notice to Oppose

Kindly acknowledge receipt hereof.

Kind regards

Ilse Cedras

MSC
KB

19:25 4G

-----Original Message-----
From: Sabelo Ntuli <ntuli@concourt.org.za>
Sent: Tuesday, July 11, 2023 4:17 PM
To: info@vl.co.za; nkopane.bnh@gmail.com;
OLEFIl.emoloa@gmail.COm; jtswanepoel@vodamail.co.za;
info@wl.org.za; warnick.october@gmail.com;
youthofoumation@outlook.com; info@capitalist.org.za;
at@htpesa.co.za; noubesd@gmail.com;
wasfiehassiem@gmail.com; FedexChair <fedexchair@da.org.za>
Cc: Generaloffice <generaloffice@concourt.org.za>
Subject: FW: [Directions for issuance] CCT 144/23 Independent Candidate Association v President of the Republic and Others

Dear All

Kindly find the attached direcions

Please acknowledge receipt of this email

Kind Regards
Sabelo Ntuli

Constitutional Court of South Africa
Private Bag x1, Braamfontein, 2017
Tel (Switchboard): (+27) 11 359 7400)
Tel (direct): (011 359 7465)
Email: ntuli@concourt.org.za
Website: https://eur03.safelinks.protection.outlook.com/?

Reply to All

Email Calendar Feed Apps

MSC
WB

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

---

CONFIRMATORY AFFIDAVIT

I, the undersigned,

SHAHIDABIBI SHAIKH

do hereby make oath and state:

1. I am an adult female and the elected Chairperson of the Select Committee on Security and Justice.

2. The facts in this affidavit fall within my personal knowledge, save where the context indicates otherwise, and are true and correct to the best of my knowledge.

3. I have read the answering affidavit of **MOSES STEVE CHABANE** filed on behalf of the Second and Third Respondents. I confirm its contents insofar as it relates to the Select Committee on Security and Justice and its processes in respect of the Electoral Amendment Act No 1 of 2023.

SHAHIDABIBI SHAIKH

I CERTIFY THAT:

1. The Deponent has acknowledged to me that:

   1.1 She knows and understands the contents of this declaration;

   1.2 She has no objection to taking the prescribed oath;

   1.3 She considers the prescribed oath to be binding on his conscience;

2. The Deponent thereafter uttered the words: *"I swear that the contents of this declaration are true, so help me God".* The Deponent signed this declaration in my presence at the address set out hereunder on this day of **2023.**

SOUTH AFRICAN POLICE SERVICE
UNIT COMMANDER
RONDEBOSCH STATIC PROTECTION
PSS: WESTERN CAPE
2023 -08- 07
EENHEIDS BEVELVOERDER
RONDEBOSCH STATIESE STASIE BEWAKING
PSS: WES-KAAP
SUID-AFRIKAANSE POLISIEDIENS

COMMISSIONER OF OATHS

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

---

CONFIRMATORY AFFIDAVIT

I, the undersigned,

NOSIVIWE NOLUTHANDO MAPISA-NQAKULA

do hereby make oath and state:

1. I am an adult female and the Speaker of the National Assembly. I have been elected to this position in terms of section 52(1) to (3) read with Part A of Schedule 3 of the Constitution of the Republic of South Africa, 1996. I have been cited as the Second Respondent in this application.

2. The facts in this affidavit fall within my personal knowledge, save where the context indicates otherwise, and are true and correct to the best of my knowledge.

3. I have read the answering affidavit of **MOSES STEVE CHABANE** filed on behalf of the Second and Third Respondents. I confirm its contents insofar as it relates to the National Assembly and its processes in respect of the Electoral Amendment Act No 1 of 2023.

NOSIVIWE NOLUTHANDO MAPISA-NQAKULA

I CERTIFY THAT:

1. The Deponent has acknowledged to me that:

   1.1 She knows and understands the contents of this declaration;

   1.2 She has no objection to taking the prescribed oath;

   1.3 She considers the prescribed oath to be binding on his conscience;

2. The Deponent thereafter uttered the words: *"I swear that the contents of this declaration are true, so help me God"*. The Deponent signed this declaration in my presence at the address set out hereunder on this day of **2023**.

SOUTH AFRICAN POLICE SERVICE
UNIT COMMANDER PARLIAMENT
PROTECTION AND SECURITY SERVICES
WESTERN CAPE
2023 -08- 07
PRIVATE BAG X1 STALPLEIN 8015
CAPE TOWN
SOUTH AFRICAN POLICE SERVICE

0460245-5
M/O T. Cornelius

COMMISSIONER OF OATHS
0460245
M/O T. Cornelius

T.C

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

---

FILING NOTICE

KINDLY TAKE NOTICE that the Second and Third Respondents hereby file the following documents:

DOCUMENTS: NOTICE OF MOTION: SECOND AND THIRD RESPONDENTS APPLICATION FOR CONDONATION FOR THE LATE FILING OF THEIR ANSWERING AFFIDAVITS

SECOND AND THIRD RESPONDENTS ANSWERING AFFIDAVIT

CONFIRMATORY AFFIDAVIT: SHAHIDABIBI SHAIK

CONFIRMATORY AFFIFDAVIT: NOSIVIWE NOLUTHANDO MAPISA- NQAKULA

CONFIRMATORY AFFIDAVIT: NKOSIYAKHE AMOS MASONDO

DATED at **CAPE TOWN** on this the 8TH day of August 2023.

Naidoo

OFFICE OF THE STATE ATTORNEY, CAPE TOWN
Per: R Naidoo
Second and Third Respondents' Attorney
4th Floor,22 Long Street
Cape Town
Email: RNaidoo@justice.gov.za/ICedras@justice.gov.za
(Ref: Ramona Naidoo 3483/23/P17)

TO **THE REGISTRAR OF THE CONSTITUTIONAL COURT**
BRAAMFONTEIN

AND TO: **STRAUSS DALY INCORPORATED**

AND TO: **STRAUSS DALY INCORPORATED**
Applicant's Attorneys
9th Floor, Strauss Daly Place
41 Richefond Circle
Ridgeside Office Park
UMHLANGA
Ref:IND119/0001/AK/DD/CP
Email: ddeeplal@straussdaly.co.za
Copy: cphillips@straussdaly.co.za

C/O: **STRAUSS DALY INCORPORATED**
Unit 801, 8th floor
Illovo Point
68 Melville Road, Illovo
JOHANNESBURG
Ref: Dinesha Deeplal/ Chad Phillips
Email: ahiralall@straussdaly.co.za

AND TO: **OFFICE OF THE STATE ATTORNEY,CAPE TOWN**
Attorneys for the First and Fourth Respondents
5th Floor, 22 Long Street
Cape Town
Ref: S Karjiker 3495/23/P27
Email: SKarjiker@justice.gov.za / CVisagie@justice.gov.za

C/O: **OFFICE OF THE STATE ATTORNEY, JOHANNESBURG**
Room 1320
11th Floor, North State Building
95 Market Street
Johannesburg
Tel: 011 330 7600
Email: VDhulam@justice.gov.za

AND TO: **MOETI KANYANE INCORPORATED**
Attorney for the Fifth Respondent
Second Floor, Building B
Westend Office Park
250 Hall Street
Centurion
Docex 003, Centurion
Tel: 012 003 6471
Ref: M Kanyane/BC/M00496
Email: moeti@kanyane.co.za
bridget@kanyane.co.za

C/O **RAMS INCORPORATED**
9th Floor, Fredman Towers
Sandton
Tel: 011 883 2234/6
Ref: W Moeketsane

AND TO: **ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY**

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

---

NOTICE OF MOTION

KINDLY TAKE NOTICE that the Second and Third Respondents intend to make application to this Honourable Court for an order in the following terms: -

1. The late delivery and filing of the Second and Third Respondents' answering affidavit be condoned.

2. That should the applicant oppose the granting of this application, it be ordered to pay the costs hereof.

3. Further and/or alternative relief.

KINDLY TAKE NOTICE FURTHER that the affidavit of **MOSES STEVE CHABANE** annexed to this application will be used in support hereof.

KINDLY TAKE NOTICE FURTHER that should the applicant wish to oppose this application, it may do so and may reply thereto by affidavit within 10 (ten) days of receipt of this application.

Kindly enrol the matter for hearing accordingly.

DATED at **CAPE TOWN** on this the 8TH day of August 2023

Naidoo

OFFICE OF THE STATE ATTORNEY, CAPE TOWN
Per: R Naidoo
Second and Third Respondents' Attorney
4th Floor,22 Long Street
Cape Town
Email: RNaidoo@justice.gov.za/ICedras@justice.gov.za
(Ref: Ramona Naidoo 3483/23/P17)

TO **THE REGISTRAR OF THE CONSTITUTIONAL COURT**
BRAAMFONTEIN

AND TO: **STRAUSS DALY INCORPORATED**
Applicant's Attorneys
9th Floor, Strauss Daly Place
41 Richefond Circle
Ridgeside Office Park

UMHLANGA
Ref:IND119/0001/AK/DD/CP
Email: ddeeplal@straussdaly.co.za
Copy: cphillips@straussdaly.co.za

C/O: **STRAUSS DALY INCORPORATED**
Unit 801, 8th floor
Illovo Point
68 Melville Road, Illovo
JOHANNESBURG
Ref: Dinesha Deeplal/ Chad Phillips
Email: ahiralall@straussdaly.co.za

AND TO: **OFFICE OF THE STATE ATTORNEY,CAPE TOWN**
Attorneys for the First and Fourth Respondents
5th Floor, 22 Long Street
Cape Town
Ref: S Karjiker 3495/23/P27
Email: SKarjiker@justice.gov.za / CVisagie@justice.gov.za

C/O: **OFFICE OF THE STATE ATTORNEY, JOHANNESBURG**
Room 1320
11th Floor, North State Building
95 Market Street
Johannesburg
Tel: 011 330 7600
Email: VDhulam@justice.gov.za

AND TO: **MOETI KANYANE INCORPORATED**
Attorney for the Fifth Respondent
Second Floor, Building B
Westend Office Park
250 Hall Street
Centurion
Docex 003, Centurion
Tel: 012 003 6471
Ref: M Kanyane/BC/M00496
Email: moeti@kanyane.co.za
bridget@kanyane.co.za

C/O **RAMS INCORPORATED**
9th Floor, Fredman Towers
Sandton
Tel: 011 883 2234/6
Ref: W Moeketsane

AND TO: **ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY**

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

---

CONFIRMATORY AFFIDAVIT

I, the undersigned,

NKOSIYAKHE AMOS MASONDO

do hereby make oath and state:

1. I am an adult male and the Chairperson of the National Council of Provinces. I have been elected to this position in terms of sections 64(1) to (5), read with Part A of Schedule 3 of the Constitution of the Republic of South Africa, 1996. I am cited in my capacity as the Chairperson of the National Council of Provinces.

2. The facts in this affidavit fall within my personal knowledge, save where the context indicates otherwise, and are true and correct to the best of my knowledge.

3. I have read the answering affidavit of **MOSES STEVE CHABANE** filed on behalf of the Second and Third Respondents. I confirm its contents insofar as it relates to the National Council of Provinces and its processes in respect of the Electoral Amendment Act No 1 of 2023.

NKOSIYAKHE AMOS MASONDO

I CERTIFY THAT:

1. The Deponent has acknowledged to me that:

   1.1 He knows and understands the contents of this declaration;

   1.2 He has no objection to taking the prescribed oath;

   1.3 He considers the prescribed oath to be binding on his conscience;

2. The Deponent thereafter uttered the words: *"I swear that the contents of this declaration are true, so help me God"*. The Deponent signed this declaration in my presence at the address set out hereunder on this 07 day of August 2023.

EK SERTIFISEER DAT HIERDIE DOKUMENT 'N WARE AFDRUK (AFSKRIF) IS VAN DIE OORSPRONKLIKE DOKUMENT WAT AAN MY VOORGELÊ IS. EK SERTIFISEER VERDER DAT, VOLGENS MY WAARNEMINGS DAAR NIE 'N WYSIGING OF VERANDERING OP DIE OORSPRONKLIKE DOKUMENT AANGEBRING IS NIE.

I CERTIFY THAT THIS DOCUMENT IS A TRUE REPRODUCTION (COPY) OF THE ORIGINAL DOCUMENT WHICH WAS HANDED TO ME FOR AUTHENTICATION. I FURTHER CERTIFY THAT, FROM MY OBSERVATIONS AN AMENDMENT OR A CHANGE WAS NOT MADE TO THE ORIGINAL DOCUMENT.

HANDTEKENING / SIGNATURE

MAGSNOMMER 04768023 RANG WO
FORCE NUMBER RANK

NAAM IN DRUKSKRIF MM MATHEYSE
NAME IN PRINT

04768023-5 WO
MM MATHEYSE

SOUTH AFRICAN POLICE SERVICE
UNIT COMMANDER PARLIAMENT
PROTECTION & SECURITY SERVICES
WESTERN CAPE

COMMISSIONER OF OATHS

2023 -08- 07

PRIVATE BAG X1 STILPLEIN 8015
CAPE TOWN

SOUTH AFRICAN POLICE SERVICE