**TO:                        THE CHIEF WHIPS’ FORUM**

**COPY:                  MS. P.N. TYAWA**
**ACTING SECRETARY TO PARLIAMENT**
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**FROM:                  CONSTITUTIONAL AND LEGAL SERVICES OFFICE
[ADV Z ADHIKARIE – CHIEF LEGAL ADVISER]**

**DATE:                   22 JUNE 2020**

**REFERENCE: 68/2020**

**SUBJECT:           BRIEFING ON THE NEW NATION MOVEMENT JUDGMENT**

**INTRODUCTION**

1. Our Office was requested to provide a legal opinion to the Chief Whips on the judgment of the Constitutional Court in the matter of *New Nation Movement NPC and Others v President of the Republic of South Africa and Others [2020] ZACC 11*(“New Nation judgment”)*.*

**LEGAL QUESTION**

1. The central question before the Constitutional Court (“Court”) was whether it is constitutionally permissible to prohibit eligible South Africans from standing for election to the National Assembly and the Provincial Legislatures other than through party lists, i.e. as independent candidates. We are required to advise on giving effect to the judgment.

**BACKGROUND**

1. The applicant sought an order declaring certain provisions of the Electoral Act, 1998 (Act No. 73 of 1998) (“the Electoral Act”) invalid insofar as the Act does not allow independent candidates to stand for election.
2. Parliament, on the authority of both the Presiding Officers, opted not to oppose the matter but to abide and file an explanatory affidavit to assist the court in the adjudication of the matter. The Minister of Home Affairs, on behalf of the executive, and the Electoral Commission opposed the application with the President abiding the decision of the court. In particular, Parliament sought to persuade the court that should it find in favour of the Applicant, it should allow Parliament a period of 36 months for it to remedy the defects in the Electoral Act, its Schedule, and possibly also the Rules of Parliament, as opposed to the standard 24 months.
3. In July 2019, the Court refused to hear the matter on an urgent basis as in its view it raised novel and far-reaching questions of constitutional law and instead enrolled the matter for a hearing in August 2019. The matter was argued in August and judgment was reserved indefinitely. The Court only delivered this judgment on 11 June 2020.

**ANALYSES OF THE JUDGMENT**

1. The Court considered the arguments of the parties related to a number of provisions of the Constitution of the Republic of South Africa, 1996 (“Constitution”):
	1. he Court held that any continued employment of an exclusive party proportional representation system can no longer be sourced from items 6(3)(*a*) and 11(1)(*a*) of Schedule 6 of the Constitution, which was aimed only at the *first* election under the Constitution. Accordingly, the system of party proportional representation that continues under the Electoral Act must comply with all the provisions of the Constitution.
	2. The Court clarified that although the choice of an electoral system is a matter that is at the discretion of Parliament in terms of section 46(1)(a) and 105(1)(a) of the Constitution, any legislation envisaged in these sections still has to be constitutionally valid.
	3. Section 46(1)(d) and 105(1)(d) require that the electoral system must result “in general, in proportional representation.” The Court was of the view that proportionality does not equate to exclusive party proportional representation.  The idea of proportional representation is not inconsonant with independent candidate representation and the sections do not refer to party proportional representation. The Constitutional Court was also of the view that proportionality may come in different forms, and it may even find application in a combination of party representation and independent candidates.
	4. The Constitution must be interpreted harmoniously to avoid a conflict within its provisions. The Court was of the view that the alternative interpretation preferred by the respondents would not only create a conflict within section 19, but also between sections 19 and 18, which guarantees the freedom of association. The Court, in essence, was of the view that the freedom of association has both a positive and negative element i.e. to choose to associate, or not to associate.
	5. Furthermore, the Court was of the view that the political choices itemised in section 19(1) are not exhaustive because of the use of the word “includes”. As such, a choice to not form, or join, a political party is a political choice that is equally deserving of constitutional protection.
	6. Section 1(*d*) of the Constitution, which deals with matters related to voting, elections and a multi-party system of democratic government, does not require an exclusively party based proportional system and does not exclude the participation of independent candidates.
	7. Sections 47(3)(c) and 106(3)(c) stipulate that a member of a House ceases to be a member, if he or she ceased to be a member of the party that nominated her or him for such membership. The Court was of the view that these sections simply deal with membership of members nominated by parties.  It does not deal with members who were not sponsored by parties, nor does it exclude individuals from membership of a House.
	8. Sections 57(2), 178(1)(h), 193(5) and 236 provide for the participation of minority parties in committees; assistance to and funding of parties; recognition of the leader of the largest opposition party; and references to members from opposition parties being part of a Commission. The Court found that these sections must be read in light of section 1, which expressly decrees that the Republic is founded on the value of a multi-party system of democratic government. These sections do not negate the possibility of the participation of independent candidates in either House. Section 1 also deliberately did not make party proportional representation a founding value.
	9. The Court found that in respect of membership of Municipal Councils, a narrow limitation is specifically prescribed by Section 157(2)(a) in respect of the local government sphere on the political rights entrenched in sections 18 and 19.  In this regard, the Constitutional Court noted that during the negotiations process for the attainment of democracy, there were issues that uniquely affected municipalities and it make sense that the framers of the Constitution may have seen a need to introduce in the Constitution a discrete, internal limit only to the system of election of members of Municipal Councils.
2. The Court indicated that it could not conceive any reason to hold that the limitations caused by the Electoral Act are justified and thus declared the Electoral Act unconstitutional insofar as it makes it impossible for candidates to stand for political office without being members of political parties.
3. The Court considered the proposal by the Speaker for the period of suspension to be 36 months rather than 24 months. Although the Court accepted that the request by the Speaker is reasonable, it felt that the new electoral system must be in place well ahead of the next elections to enable the Electoral Commission to set up its systems. Furthermore, those who intend to contest the elections must be afforded sufficient time to campaign and this can only happen once the systems are in place. On this basis, the Court decided that 24 months is still a reasonable period for remedial action by Parliament.
4. Justice Jafta wrote a separate judgment, but although his reasoning differs, he reached the same conclusion as the judgement discussed above.
5. Consequently, the Court upheld the appeal by the Applicant and ordered that:
	1. Leave to appeal is granted and the appeal is upheld.
	2. The order of the High Court of South Africa, Western Cape Division, Cape Town is set aside and it is 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 and Provincial Legislatures only through their membership of political parties.
	3. This declaration of unconstitutionality is prospective with effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the defect that gives rise to the unconstitutionality.
6. The date by which the defect must be corrected and legislation addressing the New Nation Movement case must be passed and assented to is **10 June 2022**.Should such legislation not be passed and assented to by such date, the Constitutional Court order will come into effect and the Electoral Act will be unconstitutional and unenforceable 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.

**LEGISLATIVE PROCESS**

1. To correct the defect, the whole of the Electoral Act must be reviewed. The process will require the development of policy and the devising of an electoral system that can accommodate independent candidates.
2. Making provision for independent candidates under the current electoral system is not a matter that can be executed by simply adding the phrase “independent candidate” to wherever the Electoral Act refers to a party.
3. The entire existing electoral system will have to be reconsidered: making provision for an independent candidate will entail amongst others—
	1. considering how they are nominated;
	2. how they are registered;
	3. who would be responsible for compiling the list of independent candidates;
	4. how ballot papers are drawn up and whether there should be separate ballot papers for independent candidates;
	5. how the allocation of seats in the National Assembly and Provincial Legislatures will work;
	6. what will happen when an independent candidate no longer qualifies for the seat that they won, or dies during his or her term and the seat becomes vacant, or conversely wins a number of votes equivalent to multiple seats;and
	7. amongst others, whether a constituency system or a hybrid system would be better suited to the inclusion of independent candidates.
4. It is thus necessary that the Independent Electoral Commission, together with the executive, urgently put together a team to research and consider the policy changes required to include independent candidates into the South African electoral system, which may require a review of the whole system. Only once that policy position is clear, can consideration be given to whether to amend the existing electoral laws, or to develop a new Electoral Bill. Besides, the courts have confirmed that the Constitutional design envisages that policy development is the domain of the executive. Because of the expertise and the extent of the policy development required, the electoral commission would have to play a major role in the process.

**CONCLUSION**

1. The proposal is that the Portfolio Committee on Home Affairs (“Committee”) invites the Minister of Home Affairs to, as soon as possible, to address the Committee on the steps that the Department proposes to take to address the judgment and correct the defect.
2. It is further recommended that the executive and Parliament collaborates on a timeline for the development of the Bill and the subsequent processing of the Bill in Parliament in order to ensure that the Bill is sent for assent prior to the 10 June 2022 deadline.
3. It is also recommended that there be a clear and co-ordinated division of labour and roles between the executive and Parliament, bearing in mind that the deadline is imposed on Parliament, but the larger portion of work to be done, namely the development of policy and the development of a Bill, will rest with the executive.

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**Adv Zuraya Adhikarie
Chief Legal Adviser**

   Section 193(5) provides that the National Assembly must recommend persons, who are nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly, to the President to be appointed as the Public Protector, the Auditor-General and as members of the various Commissions referred to in section 193(4).

   Paragraph 125 New Nation judgment.