

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 110/19

In the matter between:

<b>SPEAKER OF THE NATIONAL ASSEMBLY</b>	First Applicant
<b>CHAIRPERSON: NATIONAL COUNCIL OF PROVINCES</b>	Second Applicant
<b>MINISTER OF HOME AFFAIRS</b>	Third Applicant

and

<b>NEW NATION MOVEMENT NPC</b>	First Respondent
<b>CHANTAL DAWN REVELL</b>	Second Respondent
<b>GRO</b>	Third Respondent
<b>INDIGENOUS FIRST NATION ADVOCACY SA PBO</b>	Fourth Respondent
<b>PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA</b>	Fifth Respondent

<b>ELECTORAL COMMISSION OF SOUTH AFRICA</b>	Sixth Respondent
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and

<b>COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION</b>	First <i>Amicus Curiae</i>
<b>ORGANISATION AGAINST TAX ABUSE</b>	Second <i>Amicus Curiae</i>

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**FOUNDING AFFIDAVIT: URGENT APPLICATION**

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I, the undersigned,

**NOSIVIWE NOLUTHANDO MAPISA-NQAKULA**

declare under oath:

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- 1 I am the Speaker of the National Assembly of the Republic of South Africa (“the National Assembly”) of the Sixth parliament of South Africa (“Speaker”), having been elected to the position on 19 August 2021. As the Speaker, I am the custodian and representative of the National Assembly in its collective capacity and am duly authorised to depose to this affidavit on behalf of the Assembly.
- 2 The facts contained in this affidavit are within my personal knowledge, or are contained in the records of the National Assembly which are under my control, and are all, to the best of my belief, true.
- 3 Where I make legal submissions, I do so on the advice of Parliament’s legal representatives.
- 4 In terms of section 42(1) of the Constitution, when I act in tandem with the second applicant, the Chairperson of the National Council of Provinces (“the NCOP” and “Chairperson”), we duly represent Parliament. The confirmatory affidavit by the Chairperson of the NCOP accordingly confirms that this application is brought on behalf Parliament.
- 5 The application is brought jointly by Parliament and the Minister of Home Affairs.

#### OVERVIEW OF APPLICATION

- 6 In *New Nation Movement NPC and Others v the President and Others* (CCT 110/19), this Court declared the Electoral Act 73 of 1998 to be constitutionally invalid. The only issue before this Court was whether our election system was required to make provision for independent candidates to contest elections for

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the National Assembly and provincial legislatures – as opposed to the absolute bar then put in place by the Electoral Act.

7 The Court's holding was narrow and specific – it was only that *"insofar as the Electoral Act makes it impossible for candidates to stand for political office without being members of political parties, it is unconstitutional"*.<sup>1</sup>

8 The Court made it clear that the rectified system – which would permit independent candidates to contest elections – would have to be in place for the 2024 general elections.

9 The declaration of invalidity was suspended for a period of 24 months in order for Parliament to remedy the constitutional defect in the Act. That initial period expired on 10 June 2022.

10 The Minister introduced an amendment Bill – the Electoral Amendment Bill [B1-2022] ("the Bill") – in Parliament in January 2022. The Bill was focused on remedying the constitutional defect identified by this Court by including independent candidates in the current electoral system, which is a proportional representation system. Like the Court's holding, the Bill is narrow in its scope and focused only on this issue.

11 Parliament was unable to pass legislation amending the Electoral Act to remedy the constitutional defect by the expiry of the initial deadline. It sought and obtained an extension of the period of suspension from the Court.

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<sup>1</sup> At para 120.

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12 The extended expiry date of the suspension period lapses on 10 December 2022.

13 It was anticipated by all role-players that Parliament would be able to meet this deadline. However, after considering certain concerns raised by various parties and stakeholders, the National Council of Provinces has recently (in late November 2022) proposed various amendments to strengthen the Bill.

14 These changes by the NCOP are to be welcomed and speak to the proper deliberative process followed by Parliament. Two of the proposed amendments, in particular, are substantial and material.

15 The practical consequence of these important changes is that:

15.1 The Bill has had to be referred back to the National Assembly;


15.2 There will need to be a further public consultation process on the amendments proposed – including in respect of the two proposed amendments highlighted; and

15.3 As a consequence, it will not be possible to enact the Bill by 10 December 2022 and it is therefore necessary to seek a further extension of the suspension period to 28 February 2023.

16 The two proposed amendments that particularly require further public consultation are as follows:

16.1 The first proposed amendment is made in response to contentions that there is a need for broader electoral reform – even broader than merely

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including independent candidates in the 2024 elections. While it will self-evidently not be possible for such broader reform to be implemented in time for the 2024 elections, Parliament does agree that this issue should be considered formally and expeditiously. The amendment therefore makes provision for the establishment of a statutory body to investigate, consult and report on broader reforms for the electoral system to be used in the elections after 2024.

16.2 The second proposed amendment is made in response to concerns that the Bill treats independent candidates unfavourably compared to political parties when it comes to the signatures that must be obtained for inclusion on the ballot paper. It now harmonises and renders more consistent this requirement as it applies to independent candidates and political parties.

17 These proposed amendments are weighty and material. The other amendments proposed by the NCOP are also substantive.

18 There was also no direct public participation in respect of the two proposed amendments highlighted above before the National Assembly or NCOP – because they were introduced during the NCOP process.

19 Parliament is now confronted with competing constitutional obligations:

19.1 On the one hand, it has an obligation comply with this Court's order and to remedy the defect in the Electoral Act during the period of suspension ordered by the Court;

- 19.2 On the other hand, it has an obligation to facilitate public involvement in the legislative processes – this includes in relation to the material amendments made to the Bill by the NCOP.
- 20 In light of the materiality of the amendments – and the fact that they introduce matters which the public had no opportunity to comment on – the National Assembly is obliged to facilitate further public participation.
- 21 This in turn obliges Parliament to request a further, limited, extension of the suspension of the Court's declaration of invalidity.
- 22 Parliament and the Minister accordingly approach the Court jointly to request a further extension until 28 February 2023.
- 22.1 This short extension is designed to permit adequate public participation in respect of the proposed amendments, while ensuring that the Electoral Commission has sufficient time to prepare for the 2024 elections.
- 22.2 There is no prejudice to any party should this further extension be granted.
- 23 Finally, this application is urgent. In light of the jurisprudence of this Court, I am advised that it is plain that an extension be granted before the existing period of

suspension expires.<sup>2</sup> This means that the application must be determined before 10 December 2022.

24 The application has been brought as soon as possible. It is, however, regrettably instituted close to the 10 December 2022 deadline. The applicants apologise profusely to the Court and respondents for this and it is necessary to explain why it occurred:

24.1 Up until very late November 2022, Parliament was on schedule to pass the Bill before 10 December 2022. It was anticipated that the Bill would be passed by the NCOP without amendments – this would have meant the Bill would not need to return to the National Assembly, no further public consultation process would be needed and the Bill could have been signed into law by the President by 10 December 2022.

24.2 It only became clear that the proposed amendments required further public participation once the Bill, together with the proposed amendments, was passed by the NCOP and sent back to the National Assembly at the end of November.

24.3 The NCOP passed the Bill, together with proposed amendments, on 29 November 2022 and referred it back to the National Assembly. The National Assembly Portfolio Committee on Home Affairs (“the Portfolio Committee”) then dealt with the Bill extremely expeditiously, and received urgent legal advice from Counsel and the Parliamentary Legal

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<sup>2</sup> See: *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) and *Ex Parte Minister of Social Development and Others* 2006 (4) SA 309 (CC).

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Services in respect of whether further public consultation on the proposed amendments was needed.

24.4 After having received that advice on Friday, 2 December 2022, the Portfolio Committee resolved to seek this extension. Counsel were immediately instructed to prepare this application and prepared it over the weekend.

24.5 This application is being launched on the next court day – Monday, 5 December 2022.

24.6 While I again apologise for the pressure that this puts the Court and respondents under, I respectfully submit that the explanation is adequate and makes clear that this was beyond the control of the applicants.

25 I deal with the following matters in the remainder of this affidavit:

25.1 A brief summary of how the Bill has proceeded through the National Assembly and the NCOP since 10 June 2022;

25.2 The materiality of the amendments made by the NCOP and the need for further public participation;

25.3 The reasons why an extension should, in the applicants' respectful submission, be granted.

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## SUMMARY OF THE BILL IN PARLIAMENT SINCE JUNE 2022

26 Up until the last week, Parliament was on track to pass the Bill prior to the extended expiry date of the suspension period. Due to developments of the last week, this is no longer possible.

27 In this section of the affidavit I summarise how the Bill has been deliberated on by Parliament since June 2022.

### *National Assembly*

28 Between 10 June 2022 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).<sup>3</sup>

29 In these meetings, the Portfolio Committee received input and advice from various stakeholders and parties, including the Minister and his Department, the Electoral Commission, and various legal advisors and counsel.

29.1 This advice concerned the effect of sections of the initial amendment Bill, that was introduced by the Minister, and suggested amendments to improve the Bill and the electoral system that would be adopted for the 2024 elections.

29.2 The Committee also considered and debated the views, comments and concerns expressed in the public participation process.

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<sup>3</sup> These were the meetings held on 21 June 2022, 28 June 2022, 05 July 2022, 12 July 2022, 19 July 2022, 22 July 2022, 04 August 2022, 10 August 2022, 23 August 2022, 25 August 2022, 30 August 2022, 20 September 2022, 27 September 2022, 04 October 2022, 07 October 2022, 12 October 2022.

30 On 25 August 2022, the Portfolio Committee adopted an A-List of amendments to the Bill. These amendments were material and, in some instances, broadened the scope of the Bill. For this reason, further public participation was required. The Committee called for further submissions on 2 September 2022. Two hundred and fifty six submissions were received (in addition to the 107 written submissions and 40 oral submissions received in relation to the first call for public comments in May 2022). These submissions were considered by the Committee later that month on 20 September 2022.

31 Further amendments to the Bill were debated and considered by the Committee. It adopted the Bill on 12 October 2022.

32 The amendments made to the initial Bill by the Portfolio Committee were substantial. They included *inter alia*:

32.1 replacing and overhauling the system proposed in the initial Bill (introduced by the Minister) for the allocation of seats in the National Assembly and the provincial legislatures to independent candidates and political parties.

32.2 making provision to fill vacancies in seats allocated to independent candidates; and

32.3 specifying that an independent candidate requires the signatures of voters totalling at least 20 percent of the quota for a seat in the previous comparable election, to be eligible to contest an election.

33 These are only a small fraction of the amendments made to the original Bill by the Portfolio Committee.

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

### **NCOP**

35 On receiving the Bill as passed by the National Assembly, the NCOP Select Committee on Security and Justice (“the Select Committee”) called for written submissions in respect the Bill from the public. This was done in order to give effect to the NCOP’s constitutional obligations to facilitate public participation in the legislative process.

36 The Select Committee deliberated on the Bill, received input from the Minister, Department, the Electoral Commission 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.<sup>4</sup> Twenty five public comments were made and considered by the Committee.

37 The Committee was already under pressure to process the Bill so that it could be passed ahead of the 10 December 2022 deadline. That is why it met at least twice a week during November.

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<sup>4</sup> These were the meetings held on 02 November 2022, 09 November 2022, 11 November 2022, 14 November 2022, 16 November 2022, 21 November 2022, 23 November 2022, 25 November 2022.

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38 As mentioned, the Select Committee proposed various further amendments to the Bill (some of which are more technical in nature, others more substantive). These were included *after* the public participation process. I return to the two material proposed amendments below which particularly require further public participation.

39 The NCOP passed the amended Bill on Tuesday, 29 November 2022.

***Reconsideration by National Assembly***

40 After the first extension was granted, all stakeholders anticipated that the National Assembly and NCOP would each have sufficient time to process and consider the Bill, including calling for further public comments, and to pass the Bill in time to meet the deadline of 10 December 2022.

41 Had there been no amendments proposed to the Bill by the NCOP during November, this would have been realised. The Bill would have been submitted immediately to the President for assent ahead of the 10 December 2022 deadline. The President would have had an opportunity to consider the Bill before assenting to it.

42 However, as the NCOP proposed amendments to the Bill, it has now been returned back to the National Assembly which must consider the proposed amendments and pass the Bill again before it is submitted to the President for assent.

43 The National Assembly Portfolio Committee met on 30 November 2022 and 2 December 2022 to deliberate on the amendments made to the Bill by the NCOP. On the later date, it was resolved by the Committee that due to the materiality of the amendments proposed, further public participation is necessary. The Committee resolved to call for public comment in respect of all amendments proposed by the NCOP.

44 The Committee also resolved that this Honourable Court should be approached for a further extension so this can be achieved.

45 This application has been brought as soon as possible thereafter.

**THE NCOP'S PROPOSED AMENDMENTS ARE MATERIAL AND REQUIRE FURTHER PUBLIC PARTICIPATION**

46 As mentioned, the NCOP proposed various amendments to the Bill. I highlight the following two important substantive amendments to the Bill:

46.1 first, a provision that would establish the statutory panel; and

46.2 second, provisions concerning the voter support eligibility requirement independent candidates and political parties.

47 I next explain why these amendments are material and new – and require further public participation.

## ***Electoral Reform Consultation Panel***

48 Clause 23 of the Bill, if enacted, would create an Electoral Reform Consultation Panel with statutory duties independently to investigate, consult on, report on and make recommendations in respect of potential reforms of the electoral system for the election of the National Assembly and the election of the provincial legislatures, in respect of the elections to be held after the 2024 elections.

49 As I have explained, the Minister recommended that this provision be included in the Bill by the NCOP. The NCOP decided to propose the provision against the following background:

49.1 The immediate concern following *New Nation Movement* was to bring the electoral system in line with what the Constitution requires: namely, that independent candidates be given an opportunity to run. The Bill achieves this.

49.2 Parliament has decided that any more wide ranging reforms to the electoral system, including the radically different systems suggested by some, cannot be effected before the 2024 elections. This is because there would not be time to properly debate on, consult on and implement such wide ranging reforms prior to the 2024 elections and because the 2024 election simply cannot be postponed.

49.3 Indeed, even amending the current system to include independent candidates will have taken more than two and a half years to achieve properly.

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- 49.4 Broader reform – which could include the adoption of a constituency system, moving away from the proportional representation system the country currently uses – requires more time and consideration.
- 49.5 After the Bill is enacted, there will be time for a proper opportunity to consider any large-scale changes that a constituency system would require and, if the system is adopted, to implement those changes.
- 49.6 Parliament and the public will also be able to learn from the experience of using the new electoral system put in place by this Bill. It is also inappropriate for wide-ranging and long-term decisions to be made now regarding the electoral system, because Parliament is currently only constituted by members of political parties, without any independent candidates. The debate requires the participation of independent candidates.
- 49.7 The Bill is accordingly not intended to determine what the position will be for all future elections of the National Assembly and provincial legislatures. Rather it is intended to act as a stop-gap and put a system in place for the 2024 election where independent candidates have an opportunity to run.
- 49.8 After the Bill is enacted, the public and Parliament can debate the merits of more radical electoral reform, including whether South Africa should have a constituency system.

50 Parliament seeks to ensure that the debates about broader electoral reform continue to take place after the adoption of the Bill. That is why it has included

a provision that creates a formal body – with specific statutory duties to facilitate the deliberation of these larger questions.

51 If the provision is enacted, as the NCOP has proposed, the Panel will be required to be established promptly and commence executing its mandate even before the 2024 elections – so as to enable a proper and expeditious debate of these issues following the 2024 elections.

52 This appears to be a valuable and important innovation introduced into the Bill by the NCOP.

53 But because this is a new clause that is being proposed to be inserted into the Bill, the public should be given an opportunity to comment on this additional clause before it is enacted.

#### ***Eligibility requirement***

54 The initial Bill introduced by the Minister into Parliament, specified that aspirant independent candidates would have to satisfy various requirements in order to be eligible to contest an election. The purpose of these requirements is to ensure that the elections can be run: if any citizen who wishes to run may do so without having to demonstrate, for example, some level of voter support, ballot papers could become extremely lengthy and thus impossible to use.

55 In respect of an aspirant independent candidate demonstrating voter support, the initial Bill proposed that the Electoral Commission be empowered to determine a certain number of signatures of registered voters that an independent candidate



would have to obtain in order to become eligible to contest the election concerned.

56 Political parties at present must satisfy a different requirement.

56.1 Section 15(3)(a) of the Electoral Commission Act 51 of 1996 provides that a political party's application for registration with the Electoral Commission 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."*

56.2 The Commission has prescribed that a party wishing to register with the Commission (and in order to contest elections in the whole of the country) must provide a deed with the signatures of 1 000 voters.<sup>5</sup>


57 I have already explained that one of the substantive amendments made by the National Assembly to the Bill was to specify that an independent candidate would require the signatures of voters totalling at least 20 percent of the quota for a seat in the previous comparable election, to be eligible to contest an election.

58 This number will be far higher than 1000 voters that political parties are required to submit to register to contest all elections.

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<sup>5</sup> Regulation 3(1)(a) of GNR.13 of 7 January 2004: Regulations for the Registration of Political Parties (as amended)

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59 The Select Committee considered the apparent disparity between independent candidates and political parties in respect of this eligibility requirement. It proposed amendments to the Bill to provide that:

59.1 an independent candidate who was elected to either the National Assembly or a provincial legislature as an independent candidate in the preceding election will be exempt from this eligibility requirement; and

59.2 political parties not already represented in the National Assembly or any provincial legislature must also satisfy this eligibility requirement.

60 In other words, the requirement would apply equally to any independent candidate who is not a member of a legislature or political party not already represented in the legislature.

61 This is also an important innovation proposed by the NCOP. While there were many comments made about this eligibility requirement during the public participation processes, they were focused on how it applies to and impacts independent candidates. There was no suggestion that the Bill should be amended so that political parties would also have to satisfy this requirement.

62 Both amendments proposed are accordingly material and require further public participation.

## EXTENSION UNTIL 28 FEBRUARY 2023

63 Against these facts, Parliament and Minister request that the suspension of the Court's declaration of constitutional invalidity in respect of the Electoral Act be further extended by a short period of just over two months.

64 This is the period that is required to facilitate further public participation.

64.1 The December rest period commences shortly.

64.2 While at other times of the year a single month would be sufficient, members of the public are likely to take annual leave and it would not be reasonable to require the public to make comments during this time.

64.3 Parliament also rises soon for the December break (including the members of the Portfolio Committee).

64.4 A an extension of just over two months will allow for a process that provides a reasonable opportunity for the public to comment on the Bill and for the Portfolio Committee and National Assembly to consider the comments.

65 The parties that brought the original constitutional challenge in this is matter will not be prejudiced by this slight extension. On the contrary, the extension will ensure that they have achieved their aim of allowing independent candidates to run in the 2024 elections.

66 I do appreciate that e the Electoral Commission will be placed under further pressure by the extension. This is greatly regretted. However, I do not anticipate

that this extension – provided it is the final one – will in any way delay the 2024 elections.

67 If the suspension of the order of invalidity is not further extended, then the declaration will come into effect and South Africa will not have any binding electoral system for the National Assembly and provincial legislatures. That is plainly massively undesirable. Importantly, should the suspension lapse and not be extended, the Court will no longer have the authority to suspend the declaration of invalidity again.<sup>6</sup>

68 I accordingly and respectfully submit that it would be just and equitable to extend the period of suspension of the Court's declaration of invalidity until 28 February 2023, in order for the National Assembly to facilitate public participation in relation to the material amendments made by the NCOP.

## CONCLUSION


69 For these reasons, Parliament and the Minister request an order in terms of prayers 1 and 2 of the notice of motion.

70 If for any reason, the substantive relief in prayer 2 cannot be granted by 10 December 2022, the applicants seek the alternative interim relief in prayer 3. I respectfully submit that granting that alternative interim relief cannot cause any prejudice to any party.

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<sup>6</sup> *Ex parte Minister of Social Development and Others* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at paras 38-39.



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NOSIVIWE NOLUTHANDO MAPISA-NQAKULA

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at BREMA on this the 05 day of DECEMBER 2022 the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended by Government Notice No. 1648 of 17 August 1977, as amended having been complied with.

[Signature] 7072761  
Stamini T.K.  
COMMISSIONER OF OATHS  
DESIGNATION

SOUTH AFRICAN POLICE  
2022 -12- 05  
COMMUNITY SERVICE CENTRE  
SUID-AFRIKAANSE POLISIEDIENS