



08 February 2020

## **ELECTORAL LAWS SECOND AMENDMENT BILL [B34-2020]: SUMMARY AND QUESTIONS**

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### **1. INTRODUCTION AND BACKGROUND**

South Africa's electoral laws have been a subject of discussion for a while regarding their eligibility in so far as who is eligible to stand for election at the national and provincial legislatures. In its current form, the Electoral Act (Act 73 of 1998) does not allow adult citizens to stand for elections at the legislatures if they do not belong to a political party. In this regard, the New Nation Movement and Others took this matter to the Constitutional Court of South Africa (henceforth Constitutional Court), and won the case.

The Constitutional Court has since declared that parts of the Electoral Act (Act 73 of 1998), with specific reference to Section 57, Schedule 1A, to be unconstitutional as they do not provide for eligible adult citizens to stand for office in the National and Provincial Legislatures.

In summary, Section 57, Schedule 1A limits participation in the national and provincial election to political parties through proportional representation. Therefore, the Act prevents individuals from contesting for seats in the national and provincial legislatures. For this reason, the Constitutional Court has agreed with the New Nation Movement and Others as it ruled that Section 57 of the Electoral Act (Act 73 of 1998) is unconstitutional; therefore, it must be amended. In this regard, the Constitutional Court has given Parliament of the Republic of South Africa (hereafter, Parliament) 24 months to amend legislation to comply with its ruling.<sup>1</sup>

In addition to the New Nation Movement and Others concern regarding the constitutionality of the parts of the Electoral Act (Act 73 of 1998), there are other concerns that the electoral regime in South Africa is not evolving with the times in light of the fourth industrial revolution. Political Parties such as Congress of the People (COPE), including the Electoral Commission of South Africa, have argued to Parliament to consider electoral voting in South Africa.

As such, the President of COPE and Member of Parliament Mr Mosiuoa Lekota has introduced a Private Members Bill (Electoral Laws Second Amendment Bill (B 34-2020)).<sup>2</sup> The Electoral Laws Second Amendment will be presented to the Portfolio Committee on Home Affairs on 9 February 2020.

The presentation of B34-2020 follows the Independent Electoral Commission's (IEC's) process to amend the Electoral Laws Amendment Bill [B22-2020] which, aims to amend three pieces of existing legislation, namely the Electoral Commission Act (No. 51 of 1996), the Electoral Act (No. 73 of 1998) and the Local Government: Municipal Electoral Act (No. 27 of 2000). The IEC's goal is to ameliorate technical glitches that continue to arise during the elections and to align the process, so the experience was not viewed according to two sets of the election. The National Assembly has since

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<sup>1</sup> New Nation Movement and Others (2020).

<sup>2</sup> Electoral Laws Second Amendment Bill [B34-2020].

passed the Electoral Laws Amendment Bill (B22-2020) and referred it to the National Council of Provinces (NCOP) for further deliberations as prescribed in Section 76 of the Constitution of the Republic of South Africa.

This brief is prepared for the Parliament, with specific reference to the Portfolio Committee on Home Affairs, where Electoral Laws Second Amendment Bill [B34-2020] will be discussed on Tuesday, 09 February 2021. The brief summarises selected sections of [B 34-2020] and highlight areas that may require further clarification.

## 2. AFFECTED PIECES OF LEGISLATION AND PURPOSE OF THE ELECTORAL LAWS SECOND AMENDMENT BILL [B34-2020]

The Electoral Laws Second Amendment Bill [B34-2020] seek to amend the following pieces of legislation:<sup>3</sup>

- **Electoral Commission Act (No. 51 of 1996)**, is amended to achieve the following:
  - To accommodate independent candidacy in relation to the powers and functions of the Commission;
  - To provide that keeping abreast with electoral technological developments be included as a function of the Commission;
  - To provide for the establishment of an Electoral Technology Committee;
  - To provide for the registration of a party in respect of all constituencies or such constituencies as selected by the party; and
  - To provide for, and regulate, the registration of independent candidates.
  
- **Electoral Act (No. 73 of 1998)**, is specifically amended to achieve the following, namely to:
  - Provide that the Commission must administer the Act in a manner conducive to free and fair elections;
  - Delete sections in the Act which allow the chief electoral officer to not register a person as a voter if that person has been declared by the High Court to be of unsound mind or mentally disordered or is detained under the Mental Health Care Act, 2002 (Act No. 17 of 2002);
  - Provide that the lists of candidates submitted by a registered party intending to contest an election must be accompanied by a personal manifesto signed by each candidate setting out how and to what extent that candidate is committed to making real the rights enshrined in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and also a list of supporters to validate the nomination of that candidate;
  - Give full effect to section 19(3)(b) of the Constitution of the Republic of South Africa, 1996, by providing for an adult citizen to stand for public office as an independent candidate without having to stand for office through his or her membership of a political party and, if elected, to hold office;
  - Promote democratic governance and electoral accountability through both an open list voting system and a constituency based system; to provide for the establishment of constituencies and the review of constituency boundaries;
  - Amend certain Schedules and to substitute Schedule 1A, and to provide for matters connected therewith.

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<sup>3</sup> Electoral Laws Second Amendment Bill [B34-2020].

### 3. CLAUSE ANALYSIS AND POSSIBLE QUESTIONS

The following is a summary of selected clauses of B34-2020 and possible questions for clarification and further consultation:

**Table 1:** Summary of Selected Clause and possible questions

Clause Serial	B 34-2020 Clauses Summary	Comments/Possible Questions
2	Section 5 of the electoral Act,1996;  Technological Improvements and creation of the Electoral Technology Committee.	(b), Has the IEC conducted any studies on the technologies which could be utilised should electoral voting be considered? <ul style="list-style-type: none"> <li>• If yes, where in the world is the best technology to conduct electoral voting?</li> <li>• What are the possible costs, challenges and advantages of electoral voting?</li> <li>• What would be the institutional changes required at the IEC should electoral voting be approved in terms of staff requirement, Information Technology requirements and annual budget, etc.?</li> </ul> (c), Who is envisaged to constitute the Electoral Technology Committee? Will this be permanent staff at the IEC, private individuals on a structure such as a Board or representatives of political parties?
3	Amendment of Section 6 of the Electoral Act of Act 51 of 1996	(d), what informs the number “10 Independent Candidates”? Why not 20 or 30 or any other number?
15	Section 16 of the Electoral Act, 1998,  •The electoral officer must, on payment of the prescribed fee, provide copies of the voter’s roll, or <b>segment thereof</b> , which includes the addresses of voters, <b>where such addresses are available</b> , to all registered parties and registered Independent Candidates contesting the election.	<ul style="list-style-type: none"> <li>• What does the word “<b>Segment thereof</b>” really mean? Does it mean that the electoral officer has a discretion of which parts of the voters roll he/she can issue to those who requested it?</li> <li>• The Electoral Court has already ruled in 2016 that every registered voter must have a registered address, therefore, shouldn’t addresses be provided at all times when requested by political parties and registered Independent Candidates? (Even if it means a description of where the voter resides considering the geospatial planning challenges in the country).</li> <li>• Will the media not be allowed to have access to the voters roll? If not, what is the reason, and where does it leave the role of media oversight?</li> </ul>
18	Substitution of section 26 of Act 73 of 1998.	<ul style="list-style-type: none"> <li>• Will it be possible for an individual to register as an Independent Candidate in a particular constituency, but still appear on a political party’s List?</li> </ul>

Clause Serial	B 34-2020 Clauses Summary	Comments/Possible Questions
	Requirements for parties and independent candidates to contest election	<ul style="list-style-type: none"> <li>If not, it should be made clear that once an individual registers as an Independent Candidate, they are prohibited from appearing on a Party List of any Political Party.</li> </ul>
39	Amendment of section 66 of Act 73 of 1998, as substituted by section 19 of Act 34 of 2003	<ul style="list-style-type: none"> <li>What would be the possible reasons that may cause the Presiding Officer to alter a determined boundary during the cause of an election?</li> <li>What happens if there is no consensus between the Presiding Officer, Party Agents and Independent Candidates Agents? Does it mean that the Presiding Officer have the last say? If yes, it must be made clear in the amendment.</li> </ul>

#### 4. CONCLUSIONS

The Electoral Laws Second Amendment Bill [B34-2020] comes when South Africa's electoral system is under tight scrutiny from the public, especially after the Constitutional Court judgment on the *New Nation Movement and Others* case. This Bill has a potential to assist Parliament to comply with the Constitutional Court ruling in respect of amending parts of the Electoral Act (No 73 of 1998), with specific reference to Section 57 in order to allow eligible adult citizens to stand for elections in the national and provincial legislatures as independent candidates.

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#### REFERENCES

*New Nation Movement NPC and others v President of the Republic of South Africa and others*. 2020. CCT 110/19 (Constitutional Court, 11 June).

Parliament (2020). *Electoral Laws Amendment Bill [B22-2020]*

Parliament (2020). *Electoral Laws Second Amendment Bill [B34-2020]*