

MEMORANDUM

for

MINISTER OF HOME AFFAIRS

on

ELECTORAL AMENDMENT BILL

STEVEN BUDLENDER SC

SALOME MANGANYE

MITCHELL DE BEER

MFUNDO SALUKAZANA

Chambers, Sandton & Cape Town

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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).

- 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.

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

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.

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

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.

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.

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.

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.

- 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.

- 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

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	-

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.

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

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). Party 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

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.

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...”

- 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

an amendment of the Constitution itself (as 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 follows¹¹:

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).

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.

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.

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).

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, 2021¹³ 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).

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.

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