



Dr Aaron Motsoaledi
Minister of Home Affairs
909 Arcadia Street
Pretoria
0007

06 December 2021

Dear Honourable Minister,

We write to you on behalf of concerned South Africans.

On 11 June 2020 the Constitutional Court handed down the landmark judgment of *New Nation Movement NPC v The President of the Republic of South Africa and Others*. The judgment declared the Electoral Act 73 of 1998 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*. It therefore disallows independent candidates from standing for public office. The Constitutional Court afforded Parliament 2 years to remedy the defect in the Electoral Act giving rise to the unconstitutionality.

On 7 December 2020 Honourable Member Mosiuoa Lekota lodged a draft Electoral Amendment Bill with Parliament. The Bill sought to assist Parliament in its task to accommodate independent candidates in our electoral system and proposed a multi-member constituency-based system. The salient features of the Bill were to introduce 52 multi-member constituencies whose borders would mirror those of metros and district councils, allow for surplus votes for independent candidates to be transferred to like-minded candidates if they so choose, and replace a closed list proportional representation system with an open one. Hon MP Lekota has maintained that the Bill is a 'People's Bill' which advances a better electoral system for all rather than one political party. The Bill remains before Parliament.

Parliament subsequently approved your request to form a Ministerial Advisory Committee on Electoral Reform (MAC) to help develop policy options on the electoral system that address the defects of the Electoral Act. On 9 June 2021 the MAC released its report. It could not agree on the way forward and the report therefore contains a majority and minority report.

We support the majority report. Notably, it proposes that constituencies will be demarcated by combining local government wards, it caters for excess vote transfer, and it will generally reflect proportional representation.

The minority report proposes what we believe to be a conservative modification of our current electoral system to accommodate rather than effectively include independent candidates and it fails to seize the opportunity to effect a complete overhaul of our electoral system.

A handwritten signature in black ink, appearing to be 'M. J.', located in the bottom right corner of the page.

Cabinet sat on 25 November 2021 and resolved to send the report to Parliament, but it did not make a decision on which report it favoured. Cabinet did, however, annex a draft Electoral Amendment Bill submitted by your Ministry to the report for Parliament's consideration.

We have carefully considered the Bill. We believe it seeks to give effect to the MAC's minority report. In an effort to assist Parliament and your Ministry in its consideration of the Bill, we write this open letter to you.

We have received legal opinion that the Bill is unconstitutional in at least two respects. Firstly, it seeks to exclude independent candidates from competing for the 200 compensatory seats out of the 400 total seats which make up the National Assembly. It foresees that only political parties will be able to compete for compensatory seats. The effect of this is that whilst a small political party who did not meet the requisite votes threshold to obtain a regional seat may vie for a compensatory seat, an independent candidate who did not meet this threshold but obtained more votes than the small party will not obtain a compensatory seat because it is excluded by this foreseen system. This system will also make it difficult for independent candidates to obtain a seat at all if they may only obtain one by meeting what may be a high threshold of votes.

Our Constitutional Court has interpreted the right to free and fair elections to include the right to compete on equal terms. This draft Bill denies independent candidates from fairly and equally competing for public office.

Froneman J, in his minority judgment in *New Nation*, further warned that should independent candidates be included in our electoral system, proportional representation may prove to be a constitutional issue. We believe that this provision in the Bill also violates the constitutional requirement that members to the National Assembly be elected in terms of an electoral system that results, in general, in proportional representation as Parliament will not reflect the votes cast by the electorate.

To the extent that our local elections also exclude independent candidates from competing for all seats, we believe this to also be unconstitutional for these reasons.

Secondly, the Bill explicitly discards surplus votes for independent candidates that exceed those votes required to obtain a seat in the National Assembly and the Provincial Legislatures. The effect of this is that the equal value of every vote is undermined, which affects the dignity of our citizens. The Constitutional Court has held that the vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.

These defects in the Bill violate the equality clause read with the right to vote and stand for political office, as contained in our Bill of Rights. This Bill will not be saved by the limitations clause as the limitations sought are not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In



summary, the Bill prevents a reform of our electoral system in which our representatives are truly held accountable.

We approach the Constitutional Court's deadline in approximately six months. We accordingly implore Parliament to, in the limited time left to comply with its constitutional duty, critically consider the draft executive bill, reconsider Hon MP Lekota's draft bill and give effect to the right of independent candidates to compete fairly and equally for public office in an electoral system in which every vote counts.

I look forward to your response.

Yours Faithfully,


Dr Michael Louis
Chairperson: One South Africa Movement

+27 87 012 5569 | info@osa.org.za | www.osa.org.za

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