

OPINION

for

INDEPENDENT CANDIDATE ASSOCIATION

on

**CONSTITUTIONALITY OF ELECTORAL AMENDMENT BILL:
THE PROPORTIONALITY REQUIREMENT**

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(Ref: IND119/0001/AKHOZA/DD)

TABLE OF CONTENTS

INTRODUCTION.....	3
THE NEW NATION JUDGMENT.....	4
THE PROPORTIONALITY REQUIREMENT	6
THE BILL IS UNCONSTITUTIONAL FOR FAILURE TO COMPLY WITH THE PROPORTIONALITY REQUIREMENT.....	8
The policy choice behind the Bill.....	8
Critical provisions in the Bill	10
The practical effects of the Bill	13
Independent candidates are excluded from being awarded compensatory seats	13
Quota for regional seat allocation manifested in rounds is higher for independent candidates.....	14
Omission of droop quota in first and second allocation rounds.....	15
Disproportionate vote-to-seat allocation	17
Wasted votes and surplus seats	21
The content of the proportionality requirement.....	22
The Bill does not comply with the Constitution	28
CONCLUSION	30

INTRODUCTION

- 1 We have been instructed by Strauss Daly on behalf of the Independent Candidate Association (**ICA**) ("**the Client**") to provide an opinion on whether the Electoral Amendment Bill¹ ("**the Bill**") is unconstitutional insofar as it does not provide for an electoral system that results, in general, in proportional representation, as required by the Constitution of the Republic of South Africa, 1996 ("**the Constitution**").
- 2 We have further been advised that the Client intends to incorporate our opinion in its submissions on the Bill to the Portfolio Committee on Home Affairs, which submissions are due by the public on 21 February 2022.
- 3 This opinion is structured as follows:
 - 3.1 First, we briefly summarise the judgment which led to the publication of the Bill;
 - 3.2 Second, we discuss the constitutional requirement that South Africa have an electoral system that results, in general, in proportional representation;
 - 3.3 Third, we examine whether the Bill complies with this requirement.
- 4 In summary, we are of the opinion that the Bill does not comply with the Constitution for the reasons set out herein.

¹ B1 of 2022.

THE NEW NATION JUDGMENT

5 On 11 June 2020, the Constitutional Court (CC) handed down an order in **New Nation Movement**² *inter alia*:

5.1 declaring the Electoral Act 73 of 1998 (“**the Electoral Act**”) 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; and

5.2 suspending the declaration of unconstitutionality for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality (“**the Order**”).

6 The Bill is the first step in Parliament’s attempt to comply with the Order.

7 In essence, the CC declared the Electoral Act unconstitutional to the extent that it disallows independent candidates from standing for public office in violation of section 19(3)(b) of the Constitution.³

8 Madlanga J, for the majority, based his judgment on an interpretation of section 19(3)(b) together with the other provisions of the Constitution. He found that section 19(1)⁴ provides for *some* of the political choices a citizen may make – it is not a closed list – which choices may include the decision *not* to form a political party. He found that

² *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC).

³ Every adult citizen has the right to stand for public office and, if elected, to hold office.

⁴ 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.

such a reading is consonant with section 19(3)(b) and gives full effect to the rights contained in section 19.⁵ He also found that section 19(3)(b) necessarily implicates section 18 (the right to freedom of association),⁶ which includes the right *not* to associate.⁷ If the state compels a citizen to associate when he or she does not want to, that limits the right to freedom of association.⁸ He further found that such a limitation would implicate section 10 (the right to dignity) and section 15 (the right to freedom of conscience).⁹

9 Therefore, all these rights are pitted against the section 19(3)(b) right.¹⁰ As it must be assumed that the provisions in the Constitution are not contradictory, Madlanga J proceeded to interpret section 19(3)(b) harmoniously with these provisions,¹¹ finding that section 19(3)(b) does not compel citizens to stand for public office only through the vehicle of political parties.¹²

10 The Minister of Home Affairs and the Independent Electoral Commission opposed the application and argued that various provisions in the Constitution require a *party* proportional-representation system. This argument was rejected by Madlanga J.¹³

11 Therefore, the Order seeks to provide for independent candidates to stand for public office, whilst leaving the design of such an electoral scheme to Parliament.¹⁴ The

⁵ *New Nation* (fn 2) paras 17-18.

⁶ Everyone has the right to freedom of association.

⁷ *New Nation* (fn 2) paras 20 & 22.

⁸ *Ibid* paras 58-59.

⁹ *Ibid* paras 60 & 62.

Everyone has inherent dignity and the right to have their dignity respected and protected.

¹⁰ *Ibid* para 62.

¹¹ *Ibid* para 63.

¹² *Ibid* para 112; see further *ibid* paras 106 – 111.

¹³ See *ibid* paras 64 – 105. Note: the Respondents did not engage in a limitations argument (paras 113 – 120).

¹⁴ *Ibid* para 15.

Constitution imposes few constraints on such a scheme; however, it must provide for universal adult suffrage, a national common voters roll, regular elections, a multi-party system of democratic government, and – notably – proportional representation.¹⁵ Froneman J, in his dissenting judgment, foreshadowed a challenge to Parliament’s legislative choice should it fail, generally, to yield proportional representation.¹⁶

12 We will subsequently set out the constitutional requirement of proportional representation.

THE PROPORTIONALITY REQUIREMENT

13 Sections 46(1)(d)¹⁷ and 105(1)(d)¹⁸ of the Constitution require that persons elected to the National Assembly and the Provincial Legislature be elected in terms of an electoral system that “*results, in general, in proportional representation*” (“**the proportionality requirement**”).¹⁹

14 A proportional-representation system may be defined as “*an electoral system that allocates legislative seats to each political group in proportion to its popular voting strength*” (own emphasis).²⁰ *Majority systems* and *proportional-representation systems* can accordingly be distinguished on the basis that *majority systems* aim at assisting a party or alliance of parties in forming a majority in the legislature, whereas *proportional-representation systems* aim to bring about, as closely as possible, a reflection of social

¹⁵ Sections 1(d), 46(1)(d) and 105(1)(d) of the Constitution.

¹⁶ *New Nation* (fn 2) para 230.

¹⁷ The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that...results, in general, in proportional representation.

¹⁸ A provincial legislature consists of women and men elected as members in terms of an electoral system that...results, in general, in proportional representation.

¹⁹ See also section 157(3) of the Constitution in respect of Municipal Councils.

²⁰ Garner, “Black’s Law Dictionary” 8th ed *Thomson West* 1255.

forces in the legislature.²¹ Further, while majority systems require *equal numerical values* (each vote must carry the same weight when votes are being counted) and an *equal chance of success*, proportional-representation systems require *equal numerical values* and *equal success values* (every vote, fundamentally, has the same value in the allocation of seats).²²

15 Whilst the CC has not authoritatively interpreted the proportionality requirement mandated by the Constitution (it was not necessary to do so in **New Nation Movement** for the purposes of the conclusion reached), it is clear that sections 46(1)(d) and 105(1)(d) lay down a broad-spectrum requirement that South Africa have a proportional-representation electoral system and that they exclude majoritarian systems where ‘the winner takes all’. It is further clear why these sections require that our electoral system must result “*in general*” in proportional representation – no proportional electoral system would be able to allocate a number of seats *exactly* to the proportion of votes that the party (or individual) received because there are only a limited number of seats and individual seats cannot be split to a half or third of a candidate. Therefore, seat allocations will always have to be rounded up or down accordingly to a formula that results ‘in general’ in proportional representation.²³

16 These sections do not, however, prescribe the nuts and bolts of our proportional-representation electoral system, for example whether it should be a purely proportional or mixed proportional system, have open or closed lists, or the seat allocation method.

²¹ De Ville & Chohan-Khota, “What is a system of proportional representation?” *SALJ* Vol 113 (1996) 400 405.

²² *Ibid.*

²³ Wolf, “Practical implications for the electoral system: *New Nation Movement NPC v The President of the Republic of South Africa*” *SALJ* Vol 138 Issue 1 (2021) 58 73.

In **New Nation Movement**, the CC expressly left this task to Parliament,²⁴ leading to the culmination of the Bill.

17 We will subsequently examine whether the Bill is constitutionally-compliant and in accordance with **New Nation Movement**.

18 The attempt in the Bill to comply with the Order is unsuccessful and the Bill remains unconstitutional.

THE BILL IS UNCONSTITUTIONAL FOR FAILURE TO COMPLY WITH THE PROPORTIONALITY REQUIREMENT

The policy choice behind the Bill

19 The Minister of Home Affairs established a Ministerial Advisory Committee (“**the MAC**”) to assist in developing policy options that addressed the defects in the Electoral Act identified in **New Nation Movement**.

20 The MAC could not reach a consensus on a single proposed option and accordingly delivered a report containing a majority and minority report supported by 4 and 3 committee members respectively.²⁵ The minority report advocated for a slightly modified multi-member constituency (referred to as ‘the minimalist option’), which would accommodate independent candidates in the national and provincial elections with few changes to the Electoral Act (“**the Minority Report**”). The majority report advocated for a mixed-member model incorporating 200 single-member

²⁴ *New Nation Movement* (fn 2) para 15.

²⁵ One member abstained.

constituencies, resembling the local government electoral system (“**the Majority Report**”).

- 21 The Minority Report *inter alia* proposed that constituencies remain delineated based on provincial boundaries, whereas the Majority Report proposed that constituencies be demarcated by combining local government wards.²⁶
- 22 Furthermore, the Minority Report envisages that independent candidates will only be able to compete for the 200 regional seats in the National Assembly – not the 200 compensatory seats in the National Assembly.²⁷ The MAC was of the opinion that this would satisfy the proportionality requirement.²⁸ Comparatively, the Majority Report envisages that independent candidates will be able to compete for a seat in the 200 single-member constituencies and in the 200 single national multi-member constituencies (together with associates) in the National Assembly.²⁹ This would, they suggested, satisfy the proportionality requirement as they could then compete on both lists on the basis of either geographically-concentrated support or on the basis of support from the whole country.³⁰
- 23 Curiously, the Bill was drafted in furtherance of the Minority Report on the instructions of the Minister of Home Affairs.³¹ The Minister’s preference for the Minority Report is unexplained in the memorandum that accompanies the Bill (“**the Memorandum**”).

²⁶ Report of the Ministerial Advisory Committee on Electoral Systems Reform (9 June 2021), p 19 para 5.1.1 & p 25 para 5.2.5.

²⁷ *Ibid* p 19 para 5.1.2.

²⁸ *Ibid*.

²⁹ *Ibid* pp 22-23 para 5.2.1.

³⁰ *Ibid* p 25 para 5.2.3.

³¹ Memorandum for Minister of Home Affairs on Electoral Amendment Bill (25 November 2021) p 2 para 5.

Critical provisions in the Bill

24 Schedule 1A to the Bill (“**the Schedule**”) sets out how the foreseen electoral system will actually operate. Various provisions in this Schedule pose a problem to the proportionality requirement. They will be set out in turn.

25 Firstly, section 1 of the Schedule states that:

“National Assembly

1 The seats in the National Assembly are allocated as follows:

(a) half the seats are filled by independent candidates and candidates from lists of candidates of political parties contesting the nine regions – regional seats; and

(b) half the seats are filled by candidates from lists of candidates of political parties – compensatory seats” (own emphasis).

26 Therefore, in line with the Minority Report, independent candidates are excluded from competing for 200 out of the 400 seats in the National Assembly. This exclusion is confirmed in section 11 of the Bill, which deals with compensatory seats. This is unexplained in the Memorandum.

27 Secondly, the Bill foreshadows that regional seats in the National Assembly will be allocated in three rounds:

27.1 In the **first round**, a quota of votes per seat is determined in respect of each region by dividing the total number of votes cast in a region by the total number of seats allocated to that region and the result, disregarding fractions, is the first quota of votes per seat. Each independent candidate who receives enough votes to meet the first quota is awarded a seat.

27.2 In the **second round**, a second quota of seats is determined in each region by:

27.2.1 disregarding the independent candidates who were allocated seats in the first round;

27.2.2 disregarding the votes cast for independent candidates who were allocated seats in the first round;

27.2.3 disregarding the number of seats allocated to independent candidates in the first round;

27.2.4 dividing the remaining number of votes cast in a region by the remaining number of seats allocated to that region,

and the result, disregarding fractions, is the second quota of votes per seat.

Each remaining candidate who receives enough votes to meet the second quota is awarded a seat.

27.3 In the **third round**, a third quota of seats is determined in each region by:

27.3.1 disregarding all independent candidates;

27.3.2 disregarding all votes cast for independent candidates;

27.3.3 disregarding all number of seats allocated to independent candidates in the first and second rounds;

27.3.4 dividing the number of votes cast in a region, by the remaining number of seats allocated to that region, plus one,

and the result plus one, disregarding fractions, is the third quota of votes per seat.

- 28 Three rounds are also similarly utilised in the award of seats in the Provincial Legislatures, but there is no separation of lists or seats as in the National Assembly.³²
- 29 Therefore, independent candidates only compete in the first two rounds of seat allocation according to quota determined in each round. A quota is effectively how many votes translate into the allocation of one seat.
- 30 The use of rounds is justified in the Memorandum as striking an appropriate balance between the interests of independent candidates and political parties.³³ It goes no further.
- 31 Thirdly, a droop quota is inexplicably only utilised in the third round. A droop quota is a formula used in most if not all proportional-representation systems around the world. It is: (the total votes received) divided by (the total seats to be allocated +1). By ensuring that the seats allocatable are always more than the votes received, the '+1' accounts for mathematical anomalies. A droop quota is, however, utilised in the Bill in the award of compensatory seats, for which independent candidates cannot compete, and for which there is only one round of quota determination and seat allocation.
- 32 Fourthly, the provisions regulating the third round also state that any surplus yielded by the calculation to award seats, namely the total number of votes divided by the third quota, is awarded to the party or parties concerned in the sequence of the highest

³² Sections 19-22 of the Bill.

³³ Memorandum (fn 31) p 9 para 24.

surplus. The calculation to award seats plus the surplus is the party's allocation of seats for the region.³⁴ Surplus votes in the award of compensatory seats are also awarded to parties only.³⁵

33 Finally, the Bill does not provide for 'wasted votes' for independent candidates (namely, those votes for independent candidates discarded in the third round); only the award of surplus votes to be allocated to parties, as set out above. The Memorandum simply dismisses this consequence as a product of virtually any system of this sort.³⁶ This, in addition to the other provisions, poses a constitutional shortcoming.

34 We will subsequently illustrate the practical effects of these provisions and examine whether the Bill is consequently constitutionally-compliant.

The practical effects of the Bill

Independent candidates are excluded from being awarded compensatory seats

35 The practical effects of the provision in the Bill that independent candidates can only stand for 200 out of the 400 regional seats in the National Assembly speak for themselves. The result of this provision is that despite there being a cap on seats, there is no cap on votes. Therefore, the votes cast for independent candidates will not translate into the seats allocated to them.

³⁴ Sections 5-8 of the Bill.

³⁵ Section 13 of the Bill. The Bill awards surplus seats up to a maximum of 5 seats and unawarded remaining seats are then awarded to those parties having the highest average number of votes per seat already awarded. This method is also unexplained in the Memorandum.

³⁶ Memorandum (fn 31) p 7 para 22.

Quota for regional seat allocation manifested in rounds is higher for independent candidates

36 The quotas that are used in the calculation for regional seat allocation to independent candidates in the National Assembly will be approximately double the effective quota that applies to parties for seat allocation in the National Assembly as a whole. The reason for this is that the same number of votes is being divided by 200 seats, rather than by 400, for independent candidates.

37 To illustrate, the following are the effective quota calculations for the 2019 National Election for the parties contesting the National Assembly as a whole:

Valid Votes	17 437 379
Seats	400
Quota	43 485

38 The quota is calculated by utilising the following formula, set out above:

$$\frac{17437379}{400 + 1} + 1, \quad \text{disregarding fractions}$$

39 The regional seat quotas for each of the regions (provinces) in this same election are as follows:

	Total Valid Votes	Seats	Quota	%
Eastern Cape	2 020 527	25	77 713	3,85%
Free State	907 212	11	75 602	8,33%
Gauteng	4537402	48	92 601	2,04%
KwaZulu-Natal	3 652 577	41	86 967	2,38%
Limpopo	1 510 568	19	75 529	5,00%
Mpumalanga	1 271 979	15	79 499	6,25%
North West	994 220	13	71 016	7,14%

Northern Cape	410 842	5	68 474	16,67%
Western Cape	2 112 170	23	88 008	4,17%

40 Therefore, independent candidates must exceed a quota for election to the National Assembly that is between 57% and 113% higher than the effective quota for parties. This cannot pass constitutional muster.

41 The effect of this is that the votes cast have a different outcome on the seats allocated for independent candidates versus those for parties, undermining the equal value of every vote and their equal representation in Parliament.

Omission of droop quota in first and second allocation rounds

42 The Bill fails to utilise a droop quota in the first and second rounds of quota determination and seat allocation for regional seats in the National Assembly and in the allocation of seats in the Provincial Legislature. The result of this is, naturally, that without the inclusion of '+1', the fraction of total seats allocatable by which the total votes cast is divided is smaller, leading to a higher quota in both rounds for seat allocation for independent candidates compared to the quota utilised in respect of parties (who benefit from the droop quota in the third round).

43 This may be illustrated as follows:

Regional Seat Calculations for National Assembly in 2019

Regional	Votes	Seats	Bill Quota	Droop Quota	Difference	%
Eastern Cape	2 020 527	25	80 821	77 713	3 108	4,0%
Free State	907 212	11	82 473	75 602	6 871	9,1%
Gauteng	4 537 402	48	94 529	92 601	1 928	2,1%

KwaZulu-Natal	3 652 577	41	89 087	86 967	2 120	2,4%
Limpopo	1 510 568	19	79 503	75 529	3 974	5,3%
Mpumalanga	1 271 979	15	84 798	79 499	5 299	6,7%
North West	994 220	13	76 478	71 016	5 462	7,7%
Northern Cape	410 842	5	82 168	68 474	13 694	20,0%
Western Cape	2 112 170	23	91 833	88 008	3 825	4,3%

Calculations for Provincial Legislatures in 2019

Province	Votes	Seats	Bill Quota	Droop Quota	Difference	%
Eastern Cape	1 974 181	63	31 336	30 847	489	1,6%
Free State	885 677	30	29 522	28 571	951	3,3%
Gauteng	4 319 937	73	59 177	58 378	799	1,4%
KwaZulu-Natal	3 598 281	80	44 978	44 424	554	1,2%
Limpopo	1 452 158	49	29 635	29 044	591	2,0%
Mpumalanga	1 216 522	30	40 550	39 243	1 307	3,3%
North West	954 836	33	28 934	28 084	850	3,0%
Northern Cape	396 679	30	13 222	12 797	425	3,3%
Western Cape	2 057 212	42	48 981	47 843	1 138	2,4%

44 It is clear from the above two tables that the quota determined by the Bill – the “**Bill Quota**” – is higher than the ordinary “**Droop Quota**” (if it were utilised). Therefore, this calculation imposed by the Bill makes it more difficult for independent candidates to be awarded seats than parties. The quota will also be lower for political parties in the third round of quota determination and seat allocation as the droop quota is then utilised, rendering the fraction of total seats remaining by which the remaining votes cast is divided larger.

45 Therefore, whilst parties benefit from the lower droop quota to be awarded a seat in the third round, independent candidates do not in the first and second rounds.

Disproportionate vote-to-seat allocation

46 The table below represents a hypothetical calculation of seat allocation in terms of the formula proposed by the Bill. It represents the following figures:

46.1 In column 1, the actual votes cast for each party in the 2019 National Election for the National Assembly.

46.2 In column 2, the actual seats awarded to each party in this election.

46.3 In column 3, it has been assumed that 10% of the total votes cast (in column 1) were for independent candidates, slightly amending the votes cast for each party in the election in this column.

46.4 In column 4, based on the adjustment in column 3, the actual seats awarded to each party.

2019 National Assembly

Party	2019 Actual Votes	2019 Actual Seats	2019 Bill Votes	2019 Bill Seats
AFRICAN CHRISTIAN DEMOCRATIC PARTY	146 262	4	131 336	3
AFRICAN INDEPENDENT CONGRESS	48 107	2	43 299	
AFRICAN NATIONAL CONGRESS	10 026 475	230	9 021 894	235
AFRICAN TRANSFORMATION MOVEMENT	76 830	2	69 143	1
AL JAMA-AH	31 468	1	28 298	
CONGRESS OF THE PEOPLE	47 461	2	42 555	
DEMOCRATIC ALLIANCE	3 622 531	84	3 246 961	84

ECONOMIC FREEDOM FIGHTERS	1 882 480	44	1 693 549	44
GOOD	70 408	2	63 273	1
INKATHA FREEDOM PARTY	588 839	14	529 942	14
NATIONAL FREEDOM PARTY	61 220	2	55 098	1
PAN AFRICANIST CONGRESS OF AZANIA	32 677	1	29 384	
UNITED DEMOCRATIC MOVEMENT	78 030	2	70 124	3
VRYHEIDSFRONT PLUS	414 864	10	372 563	9
IND EC N 2			133 343	1
IND GP N 1			451 025	1
IND KZN N 4			111 692	1
IND KZN N 5			105 001	1
IND LP N 1			146 325	1
IND EC N 1			56 076	
IND FS N 1			81 041	
IND KZN N 1			48 622	
IND KZN N 3			53 517	
IND MP N 1			80 863	
IND NW N 1			74 133	
IND WC N 1			72 421	
IND WC N 3			80 026	
IND WC N 4			45 953	

- 47 The above table demonstrates that independent candidates receive a disproportionate amount of seats to vote. For example, Independent Candidate in the Eastern Cape No 2 (IND EC N2) received 133 343 votes in the Bill calculation, yet he or she only received 1 seat. Comparatively, the African Christian Democratic Party received 3 seats even though it only received 131 336 votes – 2007 votes less than the independent candidate.
- 48 Overall, in the above table, independent candidates received only 5 out of 400 seats, despite receiving 10% of the votes. This equates to 1.25% of the seats allocated. This is clearly disproportionate to the votes received.
- 49 The cause of this is a combination of the fact that independents are excluded from the third round of seat allocation, the failure to use the droop quota in the first and second

rounds, the failure to allocate ‘wasted votes’ to independent candidates, and the allocation of surplus votes to parties.

50 The table below again utilises the votes cast and seats allocated but in the 2019 National Election to the Gauteng Provincial Legislature in the same way as the above table, but instead of allocating 10% of the votes to independent candidates, 361 seats have simply been added to the “**Bill Seats**”. Note that the Gauteng Legislature has 73 seats.

2019 Gauteng Provincial Legislature

Party	2019 Actual Votes	2019 Actual Seats	2019 Bill Votes	2019 Bill Seats
AFRICAN CHRISTIAN DEMOCRATIC PARTY	30 605	1	30 605	
AFRICAN CONTENT MOVEMENT	1 251		1 251	
AFRICAN COVENANT	2 528		2 528	
AFRICAN DEMOCRATIC CHANGE	918		918	
AFRICAN INDEPENDENT CONGRESS	9 016		9 016	
AFRICAN NATIONAL CONGRESS	2 168		2 168	
	253	37	253	37
AFRICAN PEOPLE'S CONVENTION	3 128		3 128	
AFRICAN RENAISSANCE UNITY	927		927	
AFRICAN TRANSFORMATION MOVEMENT	10 861		10 861	
AGANG SOUTH AFRICA	3 158		3 158	
AL JAMA-AH	7 606		7 606	
ALLIANCE FOR TRANSFORMATION FOR ALL	1 401		1 401	
AZANIAN PEOPLE'S ORGANISATION	3 516		3 516	
BETTER RESIDENTS ASSOCIATION	525		525	
BLACK FIRST LAND FIRST	5 773		5 773	
CONGRESS OF THE PEOPLE	10 197		10 197	
DEMOCRATIC ALLIANCE	1 185		1 185	
	743	20	743	20
ECONOMIC EMANCIPATION FORUM	1 700		1 700	
ECONOMIC FREEDOM FIGHTERS	634 387	11	634 387	11
GAZANKULU LIBERATION CONGRESS	672		672	
GOOD	8 544		8 544	
INDEPENDENT CIVIC ORGANISATION OF SOUTH AFRICA	1 470		1 470	

INKATHA FREEDOM PARTY	38 263	1	38 263	1
INTERNATIONAL REVELATION CONGRESS	722		722	
LAND PARTY	511		511	
NATIONAL FREEDOM PARTY	3 177		3 177	
NATIONAL PEOPLE'S FRONT	1 125		1 125	
PAN AFRICANIST CONGRESS OF AZANIA	10 534		10 534	
PATRIOTIC ALLIANCE	1 773		1 773	
POWER OF AFRICANS UNITY	470		470	
SOCIALIST REVOLUTIONARY WORKERS PARTY	5 465		5 465	
SA NATIONAL CONGRESS OF TRADITIONAL AUTHORITIES	367		367	
UNITED DEMOCRATIC MOVEMENT	9 267		9 267	
VRYHEIDFRONT PLUS	153 844	3	153 844	3
WOMEN FORWARD	2 050		2 050	
ZENZELENI PROGRESSIVE MOVEMENT	190		190	
Independent 1			220 000	1
Independent 2			57 000	
Independent 3			54 000	
Independent 4			20 000	
Independent 5			10 000	
		73		73

- 51 The above table also demonstrates that parties with less votes than an independent candidate will receive more seats than an independent candidate. For example, the Inkatha Freedom Party (**IFP**) received 38 263 votes and it would be allocated one seat under the Bill, but Independent 2, who received 57 000 votes – 18 737 more votes than the IFP – will not receive a seat at all under the Bill.
- 52 Under this example, independent candidates have received 7.7% of the votes, and yet would be allocated only a single seat.
- 53 Therefore, again, the Bill calculation has resulted in a disproportionate vote-to-seat allocation, caused by the same factors identified above.

54 Specifically, utilising the Gauteng Provincial Legislature example above, the result of the method employed by the Bill is that many parties will enjoy a seat share that is larger than their vote share (particularly larger parties):

Party	Vote Share	Seat Share	Deviation
AFRICAN CHRISTIAN DEMOCRATIC PARTY	0,65%	0,00%	-0,65%
AFRICAN NATIONAL CONGRESS	46,32%	50,68%	4,36%
DEMOCRATIC ALLIANCE	25,33%	27,40%	2,07%
ECONOMIC EMANCIPATION FORUM	0,04%	0,00%	0,04%
ECONOMIC FREEDOM FIGHTERS	13,55%	15,07%	1,52%
INKATHA FREEDOM PARTY	0,82%	1,37%	0,55%
VRYHEIDSFRONT PLUS	3,29%	4,11%	0,82%
Independent 1	4,70%	1,37%	-3,33%
Independent 2	1,22%	0,00%	-1,22%
Independent 3	1,15%	0,00%	-1,15%
Independent 4	0,43%	0,00%	-0,43%
Independent 5	0,21%	0,00%	-0,21%

55 Therefore, independent candidates will often be allocated less seats than their vote share (Independents 1, 2 and 3), whilst political parties will often be allocated more seats than their vote share (ANC, DA and EFF).

56 Therefore, votes do not translate equally into seats under the Bill.

Wasted votes and surplus seats

57 Because many more people can vote for an independent candidate than their share of the seats, those excess votes are removed from the calculations under the Bill entirely. These become 'wasted votes'. Moreover, the seat shares of political parties are inflated

as a result of their receipt of surplus votes. Consequently, the seat shares of a party may be above their vote share. This does not result in proportional representation.³⁷

The content of the proportionality requirement

58 Do the above deficiencies in the Bill violate the proportionality requirement? In order to answer this question, the content of the requirement must be interpreted.

59 Notably, the CC held in **New Nation Movement** that the idea of proportional representation is not inconsonant with independent candidate representation.³⁸

60 A textual interpretation of the proportionality requirement may divide the requirement into two parts:

60.1 What are the requirements of a proportional-representation system; and

60.2 What are the requirements of a proportional-representation system result.

61 As stated above, a proportional-representation system requires that each vote must carry the same weight when votes are being counted and every vote must, fundamentally, have the same value in the allocation of seats.

62 The CC held in **New Nation Movement** that the focus of the sections requiring a proportional-representation system is on the result, namely whoever the participants may be, the system must be one that results, in general, in proportional

³⁷ See Atkins, "Electoral Amendment Bill – An Analysis of the Bill, and of the Memorandum Thereto" (16 February 2022), attached hereto.

³⁸ *New Nation Movement* (fn 2) para 78.

representation.³⁹ It did not flesh out this finding, however, the requirement was given content in **Louw**.⁴⁰

63 In this case, the Johannesburg High Court considered whether the members of the executive committee of the Greater Johannesburg Transitional Metropolitan Council were elected in terms of a system of proportional representation, as required by section 16(6) of the Local Government Transition Act 209 of 1993 and section 177⁴¹ of the Constitution of the Republic of South Africa, 1993 (“**the Interim Constitution**”).

64 The Court set out the purpose of a proportional-representation system:

“[t]he underlying purpose of a system of proportional representation is to ensure the equitable representation of minorities in the organs of government. It seems to me that if that objective is to be achieved it must be honestly pursued. Moreover, the purpose of section 16(6) of the Act, as well as section 177 of the Constitution, is to accommodate as effectively as possible the diversity of the South African society”.⁴²

65 The Court proceeded to set out what a proportional-representation system requires:

“[t]he real question, it seems to me, is whether the election yielded a result which was broadly proportional to the interests of those who participated therein. Because of the inherently flexible nature of the process I would be prepared to hold that a broadly proportionately representative election had occurred if it could be demonstrated that the results were representative of the society whose interests were intended to served thereby”.⁴³

³⁹ *New Nation Movement* (fn 2) para 78.

⁴⁰ *Louw v Matjila and Others* 1995 (11) BCLR 1476 (W).

⁴¹ A council of a local government shall elect, according to a system of proportional representation as may be prescribed by a law, from among its members an executive committee to exercise such powers and perform such functions as may be determined by such council.

⁴² *Louw* (fn 40) 1482.

⁴³ *Louw* (fn 40) 1483. See further *Nasionale Party in die OosKaap and another v Die Port Elizabeth Oorgangraad en andere* 1998 (2) BCLR 141 (SE).

66 Therefore, a proportional-representation system must yield a result which is broadly proportional to the interests of those who participated therein.

67 Next, a historical interpretation of the requirement may assist in giving it content.

68 The CC held in **Ramakatsa**⁴⁴ that:

“During the apartheid order, the majority of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Nor could they vote for those who were eligible to be members of Parliament. Differently put, they were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them”.⁴⁵

69 Therefore, an interpretation of the proportionality requirement must be cognisant of our past and the injustices it seeks to counter.

70 A contextual interpretation of the proportionality requirement must take place in light of the Constitution as a whole,⁴⁶ recognising that constitutional provisions are interconnected, must be construed purposively and consistently with the entire Constitution,⁴⁷ and that constitutional provisions that could potentially conflict must be interpreted consistently with one another.⁴⁸

71 Therefore, the requirement that our electoral system must result “*in general, in proportional representation*” must be interpreted harmoniously with at least, the following provisions in the Constitution:

⁴⁴ *Ramakatsa v Magashule* [2012] ZACC 31 (CC).

⁴⁵ *Ibid* para 64.

⁴⁶ *Matatiele Municipality and Others v President of the RSA and Others (No 2)* 2007 (6) SA 477 (CC) para 36.

⁴⁷ *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC) para 31.

⁴⁸ *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC) para 12.

- 72 The Preamble to the Constitution states that “*The People of South Africa Believe that South Africa belongs to all who live in it, united in our diversity*” and that the Constitution was adopted so as to “*Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law*”. Therefore, the composition of an elected government must reflect the will of *all* South Africa’s people.
- 73 Section 1(a) of the Constitution states that “*The Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms*”. These are our founding values. Our electoral system must accordingly promote these values.
- 74 Section 1 must be read with Section 9(1) of the Constitution, which states that “*Everyone is equal before the law and has the right to equal protection and benefit of the law*” and Section 10 of the Constitution which states that “*Everyone has inherent dignity and the right to have their dignity respected and protected*”.
- 75 Whilst Froneman J wrote the dissenting judgment in **New Nation Movement**, he recognised that a proportional-representation electoral system prioritises *equality in representation* and that every vote counts *equally* in such a system.⁴⁹ The CC similarly held in **August**⁵⁰ that “*the vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts*” (own emphasis).⁵¹ The CC

⁴⁹ *New Nation Movement* (fn 8) paras 221 – 224.

⁵⁰ *August v Electoral Commission* 1999 (3) SA 1 (CC).

⁵¹ *Ibid* para 17.

also confirmed in **Dawood**⁵² that the right to dignity informs all other constitutional rights.⁵³

76 Therefore, our electoral system must give equal value to every vote and provide for those votes to be equally translated into representation in furtherance of the rights to equality and dignity.

77 Resultantly, the rights to equality and dignity are interrelated to political rights. Section 19(3) of the Constitution states that “*Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and to stand for public office and, if elected, to hold office*”. These rights must be enjoyed equally.

78 These political rights are themselves interdependent. In **My Vote Counts II**⁵⁴ the CC held that “[t]he right to stand for public office is tied up to the right to ‘vote in elections for any legislative body’”.⁵⁵

79 Section 39(1) of the Constitution contains an interpretive provision itself, stating that “*When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom*”.

80 Therefore, there is no doubt that equality and dignity are imperative values in any interpretive exercise of the proportionality requirement. These constitutional

⁵² *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

⁵³ *Ibid* para 35.

⁵⁴ *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 (5) SA 380 (CC).

⁵⁵ *Ibid* para 29.

entitlements must be read generously and purposively in order to give the right-holders the full protection afforded by the guaranteed right⁵⁶ and must not be ignored by Parliament in its design of our electoral scheme. In **Mazibuko**,⁵⁷ the CC declared that Chapter 4 of the Constitution, in which section 46 is located, does not empower Parliament to make legislation or rules that render constitutional entitlements worthless. Specifically, Moseneke DCJ held that:

“Lobbying, bargaining and negotiating amongst political parties represented in the assembly must be a vital feature of advancing the business and mandate of parliament conferred by chapter 4 of the Constitution. However, none of these facilitative processes may take place in a manner that unjustifiably stands in the way of, or renders nugatory, a constitutional prescript or entitlement. That is so because our Constitution is supreme and demands that all law and conduct must be consistent with it. We may not hold that an entitlement that our Constitution grants is available only at the whim or discretion of the majority or minority of members serving on the programme committee or any other committee of the assembly”.⁵⁸

81 Finally, Froneman J, in his dissenting judgment in **New Nation Movement**, spoke to the purpose of a proportional-representation system, which assists in a purposive interpretation of the proportionality requirement:

“The entrenchment of proportional representation, and its achievement through the vehicle of political parties, flows from the prioritisation of equality in political voice (every vote counts equally) over the accountability that might be better secured through a constituency-based system or a mixed system. The “never again” impulse of section 19 is therefore not merely that whole categories of citizens must not be disenfranchised, but also that never again must some people’s voices count more than others in our representative democracy. The rationale thus goes beyond disenfranchisement, to the distortion of equality in political voice”.⁵⁹

⁵⁶ *Ramakatsa* (fn 44) para 17.

⁵⁷ *Mazibuko N.O. v Sisulu N.O* 2013 (6) SA 249 (CC).

⁵⁸ *Ibid* para 58.

⁵⁹ *New Nation Movement* (fn 2) para 221.

82 Therefore, the legislative scheme envisaged by Parliament must give effect to this purpose.

83 The rhetorical question, “Is the Bill constitutionally-compliant?”, must be answered in the negative.

The Bill does not comply with the Constitution

84 The CC in **New Nation Movement** held that the legislative electoral scheme Parliament prescribes must be constitutionally valid: “*For as long as section 2 of the Constitution, our supremacy clause, provides that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid, Parliament cannot have carte blanche*”.⁶⁰

85 It went on to quote the following from **New National Party**:⁶¹

“It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose. A second constraint is that the electoral scheme must not infringe any of the fundamental rights enshrined in chapter 2 of the Constitution” (own emphasis).⁶²

⁶⁰ *Ibid* para 75.

⁶¹ *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

⁶² *Ibid* paras 19-20.

- 86 After an analysis of the content of the proportionality requirement, the Bill, its accompanying Memorandum and the practical effects of the Bill, it is clear that there is no rational connection between the electoral scheme adopted by Parliament in the Bill and a legitimate government purpose. The glaring omissions to justify many of the legislative choices in the Memorandum attest to this.
- 87 As set out above, proportional representation requires that all votes are counted equally and that all votes lead to the equal allocation of seats. The practical effects of the Bill illustrated above demonstrate that the Bill does not give effect to these two requirements.
- 88 Specifically, its results will not be representative of the society whose interests were intended to be served thereby as required by **Louw**. Often, the Bill's calculation formula will result in parties being allocated more seats than votes received and independent candidates with less seats than votes received. As stated above, this is as a result of the fact that independents are excluded from the third round of seat allocation, the failure to use the droop quota in the first and second rounds, the failure to allocate 'wasted votes' to independent candidates, and the allocation of surplus votes to parties.
- 89 The Bill moreover does not give effect to the purpose of a proportional-representation system, namely to give minorities a political voice; rather it disenfranchises a substantial portion of our population. This is clearly unconstitutional.
- 90 Frighteningly, the Bill goes further than not giving meaningful effect to the right of independent candidates to stand for office (as heralded by the CC in **New Nation Movement**), and gives greater representation to large political parties.

- 91 The Bill also infringes numerous fundamental rights, including our founding values, the rights to dignity, equality, and our political rights. If votes are not counted equally and do not equally translate into seats, the rights to dignity and equality are undermined. Moreover, the right to vote and to stand for public office is rendered meaningless.
- 92 Therefore, the Bill does not provide for a system that will result in general, in proportional representation. The Bill is accordingly constitutionally non-compliant.

CONCLUSION

- 93 We are of the opinion that the Bill fails to comply with the constitutional requirement that our electoral system result in general in proportional representation. As a result, it does not meaningfully give effect to the clarion call for the rights of independent candidates to stand for public office to be recognised, as forcibly determined by the CC in declaring the Electoral Act unconstitutional in **New Nation Movement**.
- 94 We advise accordingly.

R SOLOMON SC

C LOUIS

Chambers, Sandown

18 February 2022