Annexure B

AMENDING THE ELECTORAL ACT

CONSTITUTIONAL BOUNDARIES,
WITH REFERENCE TO THE JUDGMENT IN
New Nation Movement NPC v President of the Republic of South Africa
[2020] ZACC 11

1. INTRODUCTION

1.1 In the above case (referred to below as the *NNM* case), the Constitutional Court declared the Electoral Act 73 of 1998 to be "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" [par 128]. Elsewhere in the judgment the reason for this finding is explained, namely that insofar as the Electoral Act fails to provide for independent candidates to contest national and provincial elections the Act limits in an unconstitutional way the right of every adult citizen in section 19(3)(b) of the Constitution "to stand for public office and, if elected, to hold office" [par 112, 180, 157-158, 172, 191].

1.2 The Court allowed Parliament 24 months to amend the Electoral Act to give effect to the judgment [128]. The question addressed in this document is what guidance Parliament can derive from the judgment when engaging with the amendment of the Act. More specifically, the question is whether the judgment contains guidelines, requirements or other information that can form a checklist for Parliament to use in determining whether possible amendments comply with the judgment.

1.3 Besides obvious constitutional provisions/requirements that must be observed when amending the Electoral Act, the judgment contains very little in the nature of guidelines or requirements that Parliament must follow or against which

possible amendments to the Act must be measured. The Court limited its enquiry to the question of whether the right in section 19(3)(b) is being limited by the failure of the Electoral Act to provide for independent candidates. (To some extent the Court also dealt with section 18 – the right to freedom of association – insofar as the Electoral Act fails to provide for candidates who prefer not to associate with any political party.) In this regard a few observations can be made:

(a) The Court did not discuss or refer to any specific provisions of the Electoral Act. This is probably due to the Court's unwillingness to venture into Parliament's legislative domain. But it could also be indicative of an awareness of the possibility of wide-ranging amendments to the Act.

(b) Without giving reasons the Court did not conduct a justification enquiry [119]; in other words it did not enquire in terms of section 36 of the Constitution whether the limitation of the right in section 19(3)(b) is reasonable and justifiable in an open and democratic society. Consequently, the Court did not consider questions such as the purpose of the limitation on the right, the relationship between the limitation and its purpose, and whether less restrictive means to achieve the purpose exist (section 36 of the Constitution).

(c) The Court did not offer any possible solutions to the deficiency in the Electoral Act, or possible alternatives for the present electoral arrangement. As will be shown below (par 2.4) there are many different systems of proportional representation of which some may be more suitable to accommodate independent candidates than others, but the Court left all of that to Parliament to figure out.

1.4 The Constitution is the supreme law of the Republic (section 2), and any amendments to the Electoral Act to give effect to the *NNM* judgment will be subject to the Constitution. Below I briefly discuss below the constitutional boundaries within which the Electoral Act should be amended. Where appropriate I refer to statements by the Court that endorse or confirm those

boundaries, or that refer to other provisions of the Constitution that may be relevant to the amending process. Providing for independent candidates as required by the NNM judgment is specifically dealt with in par 2.5.

2. CONSTITUTIONAL BOUNDARIES FOR AMENDING THE ELECTORAL ACT

2.1 SECTION 1(d): MULTI-PARTY SYSTEM OF DEMOCRATIC GOVERNMENT

Section 1(d) of the Constitution provides for a multi-party system of democratic government as one of the founding values of the Republic. The Court confirmed this value and stated that although this does not prescribe the electoral system the country must choose, it prescribes that South Africa must never be a one-party state [71]. Amendments to the Electoral Act may not violate or overlook this value and should instead support and strengthen it.

2.2 SECTION 19(3)(a): THE RIGHT TO VOTE

The right to vote guaranteed in *section 19(3)(a)* of the Constitution includes that the right is –

* *general* (voting rights for all adults who comply with certain minimum requirements prescribed by electoral laws);
* *equal* (the votes of some do not weigh more than the votes of others, which affects the details of the electoral system);
* *direct* (the vote of every voter has a direct influence on the outcome, which affects the details of the electoral process); and
* *secret* (the right is being exercised voluntarily with no coercion, which affects the details of the electoral process).

Amendments to the Electoral Act to provide for independent candidates may not restrict any of these elements of the right to vote in an unconstitutional way. For example, provision for independent candidates in the electoral process should not result in the votes for independent candidates carrying more or less weight than for

political parties. The threshold for seats should also not be higher or lower for independent candidates than for political party candidates, as that would imply a different weight allocated to the votes for the respective candidates.

2.3 SECTION 19(2): THE RIGHT TO FREE, FAIR AND REGULAR ELECTIONS

Regular elections mean the legislature has a fixed term, ensuring elections at regular intervals. Free elections mean that voters must be free to participate in the elections without interference or coercion. Fair elections mean every party or candidate has an equal opportunity to contest elections. The Constitution ensures free, fair and regular elections through an independent Electoral Commission (section 190). Amendments to the Electoral Act to provide for independent candidates may not restrict the right to free, fair and regular elections in an unconstitutional way. Exactly how equal opportunities to contest elections should be ensured for parties as well as independent candidates must be explored.

2.4 SECTIONS 46 AND 105: PROPORTIONAL REPRESENTATION

According to *section 46(1)(d)* of the Constitution the electoral system for the National Assembly must be prescribed by national legislation and must result, in general, in proportional representation. *Section 105(1)(d)* provides the same in respect of provincial legislatures. Proportional representation (PR) as the chosen electoral system is therefore a constitutional imperative, and amendments to the Electoral Act may not undermine this principle.

A few observations are in order here:

(a) As will be confirmed by others, the electoral system provided for in the Electoral Act is not the only PR system South Africa could have adopted. There are many different PR systems employed by nations across the globe. Arguably, none of these systems are excluded by sections 46 and 105, as long as a system is retained that results, in general, in proportional representation. When

amending the Electoral Act, it seems this allows considerable leeway to Parliament to adjust the present PR system when considering amendments to provide for independent candidates.

(b) Given that there are so many different PR systems, the question may be asked what we understand under the term. Does PR always refer to proportionality of political parties, or could it also refer to proportionality of voter preferences? Voter preference could be expressed with reference to political parties, but it could also be expressed with reference to individual party candidates and even candidates with no political party affiliation.

(c) Indeed, over time PR systems have evolved that provide for such possibilities. As a result, PR systems can be categorised broadly into list systems and preferential systems. In terms of *list systems*, of which there are several variations, voters cast a single vote for the party of their choice and each party receives the same percentage of seats as the percentage of votes it has secured in the election. According to *preferential systems*, of which there are even more variations, the voters vote for individual candidates by arranging them in order of preference. Voters can be bound to vote for the candidates of one party only, but there are systems in which voters can indicate their preference for individual candidates across party lines. In the end proportional representation is retained because seats are still being allocated in accordance with the percentage of votes each party received.

(d) As mentioned, the Court gave no indication in this regard, but in the opinion of many scholars the preferential system is more responsive to voter preferences and therefore constitutes an even more democratic form of PR than the list system. This seems to widen the possibilities Parliament may consider when amending the Electoral Act to provide for independent candidates.

(e) The Court did explain that the combined system of proportional representation and wards provided for at municipal level does not necessarily apply to the national and provincial levels [185]. However, a combined system of PR and

constituencies is indeed employed in Germany, and it provides yet another possibility for accommodating independent candidates.

2.5 SECTION 19(3)(b): THE RIGHT TO STAND FOR PUBLIC OFFICE

This is the crux of the NNM judgment. According to both majority judgments *section 19(3)(b)* [the right of every adult citizen to stand for public office and, if elected, to hold office] renders the Electoral Act unconstitutional insofar as the Act requires every adult citizen to channel the exercise of this right through political parties. Insofar as the Act only allows political parties to contest elections, the Act denies the right of every adult citizen in terms of section 19(3)(b) [172]. The Act is "inconsistent with the Constitution by failing to ensure that adult South Africans may contest elections as individuals and if elected, hold office" [180]. Furthermore, section 19(3)(b) requires that express provision must be made in the Electoral Act for *independent candidates* to be able to stand in national and provincial elections. (The Court states: "Thus insofar as the Electoral Act makes it impossible for candidates to stand for political office without being members of political parties, it is unconstitutional" [120; also 112, 177].)

In order to comply with the judgment of the Court, amendments to the Electoral Act must give effect to these findings.

2.4 SECTION 18: FREEDOM OF ASSOCIATION

According to the Court the right to freedom of association in *section 18* includes the right not to associate [58]. A person who desires to stand in an election for Parliament or a provincial legislature, but not for any political party may therefore not be compelled to join a party or stand as a party candidate. The freedom not to associate requires, in other words, that provision be made in the Electoral Act for adult citizens to contest elections as independent candidates.

2.5 OTHER RELEVANT CONSTITUTIONAL PROVISIONS

In the *NNM* case the Court was referred to various other provisions of the Constitution that may indicate a constitutional preference for a PR system that only allows political parties to contest elections. The Court rejected this contention in every case. For the sake of completeness I briefly deal with these provisions below.

2.5.1 SECTIONS 46(1)(a) AND 105(1)(a): ELECTORAL SYSTEM PRESCRIBED BY NATIONAL LEGISLATION

The Court argued that even though the Constitution leaves the selection of an electoral system for South Africa to Parliament, the legislation Parliament makes remains subject to the Constitution [74]. If the Constitution (section 19(3)(b)) requires a system that allows independent candidates to contest elections, the national electoral legislation adopted by Parliament must comply with that requirement.

2.5.2 SECTIONS 47(3)(c) AND 106(3)(c): LOSS OF MEMBERSHIP WHEN LOSING MEMBERSHIP OF POLITICAL PARTY

According to the Court these paragraphs only deal with loss of membership of a legislature by members of political parties, they do not apply to loss of membership in general, and they have no bearing on the question of independent candidates or members [77]. These provisions will probably play no role when amending the Electoral Act to provide for independent candidates.

2.5.3 SECTIONS 57(2), 178(1)(h), 193(5) AND 236: PARTICIPATION BY POLITICAL PARTIES IN LEGISLATURES

The Court held that the purpose of these provisions is to strengthen multi-party government (see par 2.1 above), and they do not negate the possibility of participation by independent members in the legislatures [85]. Of course, when

amending the Electoral Act, these provisions may not be undermined. (With reference to section 236 it may be noted that the inclusion of independent candidates in the electoral system may impact the Public Funding of Represented Political Parties Act 103 of 1997.)

2.5.4 SECTION 157(2)(a): MUNICIPAL ELECTORAL SYSTEM

Much has been said in the *NNM* case about the fact that section 157(2)(a) provides for alternative electoral systems at municipal level which may include a system of exclusive political party participation, which would constitute an untenable inconsistency between section 157(2)(a) and sections 19(3)(b) and 18. The Court held that section 157(2)(a) provides a special limitation in respect of municipalities which does not apply to the other spheres and that section 157(2)(a) does not derail the norm created by section 19(3)(b) [99]. (In the other majority judgment Justice Jafta disagreed that section 157(2)(a) is a special limitation on section 19(3)(b) [190], but held that section 157(2)(a) does not affect the position at national and provincial levels [183].) The Court's struggle to reconcile section 157(2)(a) with section 19(3)(b) is unnecessary, as section 36(2) explicitly provides for limitations to fundamental rights elsewhere in the Constitution.

2.5.5 SCHEDULE 6 ITEMS 6(3)(a) AND 11(1)(a): NOMINATIONS BY POLITICAL PARTIES FOR FIRST ELECTIONS

The Court pointed out that these provisions in Schedule 6 were transitional in nature to provide only for the *first* elections under the Constitution of 1996, and that they do not apply anymore. Having fulfilled their purpose they have no force anymore and do not dictate a PR system based only on political parties [68].

3. CONCLUSION

3.1 Besides the order of the Court that the Electoral Act be amended within 24 months to provide for independent candidates, the *NNM* judgment provides little guidance as to how Parliament should go about in giving effect to the order. The judgment contains no guidelines, parameters or requirements Parliament must consider or comply with.

3.2 Any amendments to the Electoral Act giving effect to the Court order must comply with the Constitution. The provisions of the Constitution in respect of multi-party democracy, the right to vote, the right to free, fair and regular elections, proportional representation, the right to stand for public office, the right to freedom of association, and the provisions dealing with the participation of political parties in the proceedings of the legislatures probably constitute the most important parameters or boundaries within which the task must be accomplished. (See Annexure.) This implies that as long as Parliament stays within these boundaries, it has a fairly wide scope when amending the Electoral Act to provide for independent candidates as *per* the order of the Court in the *NNM* case.

RASSIE MALHERBE
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