



the **doj & cd**

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Honourable Mr MS Chabane, MP
Chairperson: Portfolio Committee on Home Affairs
Parliament of the Republic of South Africa
P.O. Box 15
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Dear Honourable Chabane

ELECTORAL AMENDMENT BILL [B1—2022]

INTRODUCTION

1. The Electoral Amendment Bill [B1—2022] (“the Bill”) is currently being deliberated by the Portfolio Committee on Home Affairs. The Bill has been drafted in response to the Constitutional Court’s judgment in *New Nation Movement NPC and Others v President of the Republic and Others 2020 (6) SA 257 (CC)* (“New Nation Movement”) where the Constitutional Court held that the Electoral Act, 1998 (Act No. 73 of 1998) (“the Electoral Act) is 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. The Constitutional Court held that the declaration of invalidity is prospective with effect from the 11 June 2020, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the invalidity.

2. The New Nation Movement judgment¹ emphasised Parliament's mandate to prescribe an electoral system, where the Constitutional Court held as follows:

"[15] Before I proceed to deal with the interpretative exercise, let 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.". (Our emphasis).

3. It is evident from the aforesaid that the Constitutional Court provided the threshold that must be met for an electoral system; i.e. Parliament is best placed to decide which electoral system will be best suited, but such electoral system must be consistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The Constitutional Court held that Parliament in terms of sections 46(1)(a) and 105(1)(a) of the Constitution is mandated to prescribe an electoral system that is best suited to the Republic and one that is consistent with the Constitution.

4. Section 19 of the Constitution provides for political rights as follows:

"Political rights

19. (1) 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.*

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right—

- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and*
- (b) to stand for public office and, if elected, to hold office."* (Our emphasis)

¹ At paragraph 15.

5. The Electoral Act regulates the elections of the National Assembly, the provincial legislatures and municipal council. The Local Government Municipal Electoral Act, 2000 (Act No. 27 of 2000) amongst other instruments, also regulates municipal elections.

DISCUSSION

6. This opinion shall be limited to the following 3 issues which arose during the Portfolio Committee deliberations on the Bill:

- (i) Is the definition of “region” sufficiently clear as compared to a province?
- (ii) Is there a need to redefine “Party Liaison Committees” as “Liaison Committees” or “Electoral Liaison Committee’s” along with the inclusion of such in amendments to Sections 20, 62 and 64 of the Electoral Act as well as related Clauses in the Electoral Commission Act to allow for the inclusion of Independents Candidates in these consultative bodies?
- (iii) Should amendments to 31A(1)(a) and 31B(3)(f) , be removed to bring independents in line with political party candidates in terms of not being required to be ordinarily resident in the region in which they are registered to stand in an election?

Clause 1

Is the definition of “region” sufficiently clear as compared to a province?

7. Clause 1 of the Bill defines “region” as follows:

“region” means the territorial area of a province;”.

8. We note that the same definition for “region” is contained in Schedule 1A to the Electoral Act.

9. The expression “province” is defined in the Bill as follows:

“‘province’ means a province referred to in section 103 of the Constitution;

10. Chapter 6 of the Constitution provides for provinces and section 103 reads as follows:

“Provinces

103. (1) *The Republic has the following provinces:*

- (a) *Eastern Cape;*
- (b) *Free State;*
- (c) *Gauteng;*
- (d) *KwaZulu-Natal;*
- (e) *Limpopo;*
- (f) *Mpumalanga;*
- (g) *Northern Cape;*
- (h) *North West;*
- (i) *Western Cape.*

(2) *The geographical areas of the respective provinces comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A.*

(3) (a) *Whenever the geographical area of a province is re-determined by an amendment to the Constitution, an Act of Parliament may provide for measures to regulate, within a reasonable time, the legal, practical and any other consequences of the redetermination.*

(b) *An Act of Parliament envisaged in paragraph (a) may be enacted and implemented before such amendment to the Constitution takes effect, but any provincial functions, assets, rights, obligations, duties or liabilities may only be transferred in terms of that Act after that amendment to the Constitution takes effect.”*

11. Concern was raised in the Parliamentary deliberations with regards to the use of the expression “region” when referring to the territorial area of a province.

12. The Department of Home Affairs (“the Department”), in its responses to the Public Hearings Report from the Committee² provided the following response:

“ The definition of region is properly defined in the Amendment Bill. The Department is of the view that there is no confusion thereto.

The term region was also maintained from the current Schedule 1A to the Electoral Act – “region” is chosen instead of “province” to avoid confusion between elections for the National Assembly and elections for the provincial legislatures”.

13. The Independent Electoral Commission (“the IEC”) in its submission to the National Assembly’s Portfolio Committee on Home Affairs³ on the proposed wording, proposes the following:

² Report by the Department of Home Affairs: Public Hearings Report from the Portfolio Committee on Home Affairs- Responses by the Minister of Home Affairs, report dated 28 April 2022. NB. The issue of the definition of “region” was not addressed by the Department in Counsel’s memo dated 12 May 2022.

³ Submission to the National Assembly’s Portfolio Committee on Home Affairs (“IEC submission”)

“ To procure maximum clarity, it is proposed that the regions be given a more descriptive nomenclature. Pertinently, it is proposed that regions be referred to as multi-member regional constituencies”.⁴

14. We note that this proposal by the IEC is made in respect of the discussions relating to the number of ballots (paragraph F of the submission), and the proposed changes are made to Item 25 of Schedule 1A to the Electoral Act.

15. We also note that the IEC has retained the expression “region” in certain places, by means of example, the proposed Item 25(2) still uses “region”.

16. The use of the expressions “region” and “multi-member regional constituencies” appear to be used interchangeably in the Bill and the proposed amendments to the Schedule 1A to the Act. In order to provide legal certainty, we propose that clarity is provided as to whether it is the intention to substitute “region” wherever it is proposed in the Bill and Schedule 1A to the Act, with the expression “multi-member regional constituencies”.

17. If the definition of region as provided for in the Bill is retained, it will be equally applicable to the schedule to the Act and the definition of “region” in the Schedule can be deleted. This will be a consequential amendment to the Bill.

Is there a need to redefine “party liaison committees” as “liaison committees” or “electoral liaison committee’s” along with the inclusion of such in amendments to Sections 20, 62 and 64 of the Electoral Act as well as related Clauses in the Electoral Commission Act to allow for the inclusion of Independents Candidates in these consultative bodies?

18. Consequential amendments as a result of the proposed amendments, such as where the Electoral Act refers to “Party” will need to be effected to accommodate independent candidates. For example, section 20 of the Electoral Act, which provides for election timetables, provides that the Commission must after consultation with the party national liaison committee, perform certain functions related to the election timetable. The IEC has provided clarity as to how it intends

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⁴ IEC submission at para 30.3.

accommodating independent candidates in this regard. Furthermore, factoring in independent candidates will necessitate the amendment of the definition in the Electoral Act, the Electoral Commission Act, 1996 (Act No. 51 of 1996), as well as the Regulations made thereunder.

19. The IEC has proposed the substitution of the definition of “party liaison committee” with “political liaison committee” which means a committee established in terms of the Regulations on Party Liaison Committees published in terms of the Electoral Commission Act;”.

20. We note that the Regulations on Party Liaison Committees, published under GN R824 in GG 18978 of 19 June 1998, are specific to political parties. By substituting the definition of “political liaison committee” in the Bill so as to include independent candidates, it must be ensured that the amendment is consistent with the intention of including the application of liaison committees to independent candidates and that it must cater for independent candidates. It should not merely be an amendment of the expression. The IEC is advised that it may choose to repeal the existing regulations and enact new regulations that includes independent candidates.

Clauses 2, 3 and 4: Requirements for independent candidates and candidates of political parties in respect of residence and voter registration ⁵

21. Clause 2 of the Bill seeks to amend section 27 of the Electoral Act. Section 27 of the Electoral Act provides for the submission of the lists of candidates by a registered party intending to contest an election and reads as follows:

“Submission of lists of candidates.

27. (1) *A registered party intending to contest an election must nominate candidates and submit a list or lists of those candidates for that election to the chief electoral officer in the prescribed manner by not later than the relevant date stated in the election timetable.*

(2) *The list or lists must be accompanied by a prescribed—*
(a) *undertaking, signed by the duly authorised representative of the party, binding the party, persons holding political office in the party, and its representatives and members, to the Code;*
(b) *declaration, signed by the duly authorised representative of the party, that each candidate on the list is qualified to stand for election in*

⁵ Should amendments to 31A(1)(a) and 31B(3)(e), be removed to bring independents in line with political party candidates in terms of not being required to be ordinarily resident in the region in which they are registered to stand in an election?

terms of the Constitution or national or provincial legislation under Chapter 7 of the Constitution and has signed the prescribed acceptance of nomination;

(c)

(d) undertaking signed by each candidate, that that candidate will be bound by the Code; and

(e) deposit.

(3) (a) The Commission may prescribe the amount to be deposited in terms of subsection (2) (e).

(b) The amount to be deposited by a registered party contesting an election of a provincial legislature, must be less than the amount for contesting an election of the National Assembly.

(4) Upon request by the Commission, a party must, in the prescribed manner and form, submit an acceptance of nomination signed by a candidate appearing on a party list submitted by that party.”.

22. Clause 2 of the Bill inserts paragraph (cA) in section 27(2) of the Electoral Act to provide that each candidate appearing on the party’s regional list of candidates or provincial list of candidates referred to in Schedule 1A, must submit a signed declaration, confirming that he or she is registered to vote within the region or province in which the election will take place.

23. The content of section 27(2)(cA) is similarly provided for in clause 4 of the Bill, which proposes the insertion of sections 31A(1) and 31B(3)(e) . It provides that, in respect of independent candidates, the person nominated must be ordinarily resident in the region or province concerned and be registered as a voter on the segment of the voters' roll for the region or province concerned. It also provides that in respect of independent candidates, the prescribed nomination form must be accompanied by a signed declaration, confirming that the independent candidate’s residential address is situated within the region or province in which the election will take place that he or she intends contesting.

24. The proposed section 31B of the Bill provides for the requirements and qualifications for independent candidates to contest elections. The proposed section 31B(3)(e) requires that a nomination of an independent candidate must contain certain attachments which includes the following:

“(e) a prescribed declaration, signed by the candidate, confirming that his or her residential address is situated within the region or province in which the election will take place that he or she intends contesting;”.

25. The effect of this is that an independent candidate must be a resident within the region or province in which the election will take place.

26. The distinction between the proposed section 27(2)(cA) which applies to political party candidates, and the proposed sections 31A(1) and 31B(3)(e) which applies to independent candidates, is that in the case of political parties, political party candidates only need to show that they are registered to vote within the region or province in which the election will take place (i.e. on the voters roll in the region or province), but by virtue of the proposed sections 31A(1)(a), (b) and 32B(3)(e), independent candidates must show that they are ordinarily resident in the region or province and that they are registered to vote on the segment of the voters roll for the region or province concerned.

27. Section 16 of the Electoral Act provides for the publication and copies of voters' roll, as follows:

"Publication and copies of voters' roll

16. (1) *A copy of the voters' roll as it exists at any time must be available for inspection during office hours at the Commission's head office, and the provincial and municipal segments of the voters' roll must be available for inspection at the times and venues mentioned in a notice published by the chief electoral officer in the Government Gazette.*

(2) *The chief electoral officer must provide a certified copy of, or extract from, a segment of the voters' roll as it exists at that time, to any person who has paid the prescribed fee, if the chief electoral officer is satisfied that—*

(a) the person requires that information—

(i) to monitor the voters' roll for election purposes;

(ii) for statistical or research purposes; or

(iii) any other purpose that is prescribed; and

(b) providing that information would not involve the unlawful processing of personal information in terms of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).

(2A) Any person who uses the information obtained under subsection (2), for a purpose other than that specified in that subsection, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding one year or to both a fine and such imprisonment.

(3) Notwithstanding subsection (2), the chief electoral officer must, on payment of the prescribed fee, provide copies of the voters' roll, or a segment thereof, which includes the addresses of voters, where such addresses are available, to a registered party and an independent candidate contesting the elections.

(4) The information obtained in terms of subsection (3) may only be used by a registered party and an independent candidate for election purposes and any person using such information for other purposes is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding one year or to both a fine and such imprisonment.

(5) For the purposes of subsection (2) and (3), the chief electoral officer may only provide the digits of the identity numbers of voters, which indicate the voters' date of birth and citizenship, except

where the person who requires the information satisfies the chief electoral officer that—

(a) exceptional circumstances require that additional digits of the voters' identity number be disclosed; and

(b) providing that information would not involve the unlawful processing of personal information in terms of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).” (Our emphasis)

28. The initial case relating to this matter is *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) (“the Kham judgement”), in which the applicants challenged the validity of the 2013 by-elections in the Tlokwe Local Municipality. The dispute centred on the fact that the segment of the voters’ roll they had received from the IEC did not reflect any voters’ addresses. The Constitutional Court held that since the elections take place in wards, it is vitally important and a legal requirement for the chief electoral officer, when registering a voter on the voters’ roll, to register that voter in the voting district in which they are ordinarily resident. In addition, the IEC has an obligation to provide all electoral candidates with a copy of the relevant segment of the voters’ roll containing the addresses of voters in the ward with their addresses (“where such addresses are available”).

29. In *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) (“the Mhlope judgement”), the IEC appealed against a judgement of the Electoral Court which postponed by-elections in the Tlokwe Local Municipality because the IEC had not recorded all the voter’s addresses in terms of section 16(3) of the Electoral Act. The respondents had successfully challenged the freeness and fairness of the by-elections on the basis that voters’ addresses were not recorded in the voter’s roll and many people were registered in wrong voting districts.

30. The Constitutional Court pronounced itself on the political rights guaranteed by section 19 of the Constitution, and stated that the right to free, fair and regular elections for legislative bodies established by the Constitution, the right of every adult citizen to vote in such elections and the right to stand for public office.

31. The Constitutional Court interpreted section 16(3) of the Electoral Act, which provides that the chief electoral officer must, on payment of the prescribed fee, provide copies of the voters’ roll, or a segment thereof, which includes the addresses of voters, where such addresses are available, to all registered political parties contesting the elections, and endorsed the Kham judgement and stated that the IEC is obliged to obtain sufficient particularity of the voter’s address to enable it to ensure that the voter is at the time of registration ordinarily resident in that voting district.

32. Since the Electoral Act is being amended, it may be prudent to provide consistency by expressly providing equally for independent candidates as well as political party candidates.

33. The IEC has proposed the following:

“Nomination of independent candidate

31A. (1) A person may be nominated to contest an election as an independent candidate in a region for the National Assembly or for a provincial legislature **[if that] by a person who is—**

- (a) ordinarily resident in the region or province concerned; and
- (b) registered as a voter on the segment of the voters’ roll for the region or province concerned.

(2) Provided the other provisions of this Act are complied with, a person nominated in terms of subsection (1) stands as an independent candidate in that election.

(3) An independent candidate may be nominated for more than one region for the National Assembly or provincial legislature but may be elected only to one seat in the National Assembly or provincial legislature.”

34. The effect of the amendment to section 31A(1), as proposed by the IEC, is that a person nominating an independent candidate would need to be ordinarily resident in the region or province concerned; and registered as a voter on the segment of the voters’ roll for the region or province concerned.⁶

35. Whilst this remains a policy decision, a concern that arises is that should this amendment by the IEC be effected, then it would be necessary to consider if clause 2 of the Bill which amends section 27(2)(cA) and requires a political party candidate to show that they are registered to vote within the region or province in which elections will take place, may need to be omitted, as this requirement no longer will apply to independent candidates.

⁶ The Constitutional Court emphasised in the Mhlope judgment that for an election to be fairly conducted it is necessary that the participants have available to them not simply a list of voters’ names and identity numbers but also some means of identifying and contacting them, of which the voters’ addresses is the most obvious. The IEC was in breach of its obligations under section 16(3) of the Electoral Act in not furnishing segments of the voters’ roll with addresses where those were available. In our view the importance of the availability of addresses in the voter’s roll cannot be diminished.

36. We note that the IEC has proposed the inclusion of section 31A(3) which provides for independent candidates to be nominated for more than one region for the National Assembly or provincial legislature. We note that this is a policy shift from the Bill.

37. Clause 31B(3)(e) will also need to be amended should the Commission's proposal be accepted.

Yours sincerely

A handwritten signature in black ink, appearing to be 'S Govender', written in a cursive style.

**FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
S GOVENDER / S WILLIAMS / A JOHAAR**