

MEMORANDUM

for

MINISTER AND DEPARTMENT OF HOME AFFAIRS

on

ELECTORAL AMENDMENT BILL

DEFINITION OF “PERSON” IN PORTFOLIO COMMITTEE A-LIST

- 1 Our urgent advice is sought by the Minister and Department of Home Affairs.
- 2 The Portfolio Committee of the National Assembly is in the process of adopting an A-List of amendments to the Electoral Amendment Bill B1-2022.
 - 2.1 Clause 1(4) of the A-List will add the following definition: “***person***’ *means a natural person*” to the Bill.
 - 2.2 Clause 4(1) will amend section 31A of the Electoral Act 73 of 1998 to provide that: “A person may be nominated to contest an election as an *independent candidate* ...” where he or she fulfils certain eligibility requirements.

3 We are asked to consider whether the provisions should be refined so that the Act only permits citizens to stand for elections.

4 The starting point is that section 19(3)(b) of the Constitution provides that: “*Every citizen has the right ... to stand for public office and, if elected, to hold office.*” This right, along with the rest of the rights in section 19, is exclusively available to citizens.¹

5 As the Constitutional Court held:²

“It is the birthright of citizens to determine, within the bounds of the Constitution, the type of government they want and generally the people who should lead that government. Non-citizens are excluded from that process so as to insulate it from foreign interference and influence.”

6 The Constitution further specifies that it is citizens who are entitled to be elected to the legislatures.

6.1 Section 49(1) provides “*Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly ...*”;

6.2 Section 106(1) provides: “*Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature ...*”; and

¹ *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) at para 148.

² At para 148.

6.3 Section 158(1) provides: *“Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council ...”*

7 Parliament is therefore required to enact legislation which only permits citizens to contest seats in the National Assembly and provincial legislatures.

8 If the A-List were to be adopted the position would be as follows:

8.1 The Bill would not explicitly state that only citizens may contest elections for the National Assembly and provincial legislatures.³

8.2 But settled-jurisprudence requires that legislation be interpreted in a manner which is consistent with the Constitution.⁴ As we have explained, the Constitution expressly provides that only citizens may contest elections for the National Assembly and provincial legislatures.

8.3 Therefore it seems to us that, even if the definition in the A-List were adopted, properly construed it would in effect provide that only citizens may contest elections for the National Assembly and provincial legislatures.

³ Section 31A(1) of the Bill as currently formulated does explicitly do so. It provides:

“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 person 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.”

⁴ *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another 2007 (1) SA 343 (CC)* at para 72: *“It is a fundamental tenet of our constitutional jurisprudence that all law, whether statute, common law, customary law or regulation must be read in a manner that is consistent with the Constitution. This principle is not limited to consistency with the spirit, purport and objects of the Bill of Rights as required by section 39(2), it is an implied principle of the Constitution as a whole that a constitutional interpretation should always be preferred to a non-constitutional interpretation.”*

- 9 However, there is no need to risk doubt or confusion on this score.
- 10 We are therefore of the view that the exclusive right of citizens to contest these seats should be made explicit in the statute.
- 10.1 This can be achieved simply by amending the definition of ‘*candidate*’ in clause 1 of the Bill to provide:
- “**candidate**’ means a person who is a citizen contesting an election, or a person who is a citizen nominated on a list of a political party contesting an election, as the context requires;”*
- 10.2 It could also be achieved by specifying in section 31A that a person may only be nominated to contest an election as an independent candidate “if he or she is registered to vote” as only citizens are entitled to register to vote in terms of section 6 of the Electoral Act.

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