

REPUBLIC OF SOUTH AFRICA

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# ELECTORAL AMENDMENT BILL

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*(As amended by the Portfolio Committee on Home Affairs (National Assembly (Section 75))  
(The English text is the official text of the Bill)*

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(MINISTER OF HOME AFFAIRS)

[B 1B—2022]

ISBN 978-1-4850-0818-7

No. of copies printed .....150

**GENERAL EXPLANATORY NOTE:**

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_                Words underlined with a solid line indicate insertions in existing enactments.

# BILL

To amend the Electoral Act, 1998, so as to delete a definition and insert certain definitions consequential to the expansion of this Act to include independent candidates as contesters to elections in the National Assembly and provincial legislatures; to provide that registered parties must submit a declaration confirming that all its candidates are registered to vote in the province where an election will take place; to provide for the nomination of independent candidates to contest elections in the National Assembly or provincial legislatures; to provide for the requirements which must be met by persons who wish to be nominated as independent candidates; to provide for the inspection of copies of lists of independent candidates and accompanying documents; to provide for objections to independent candidates; to provide for the inclusion of a list of independent candidates entitled to contest elections; to provide for the appointment of agents by independent candidates; to provide that independent candidates are bound by the Electoral Code of Conduct; to provide for the return of a deposit to independent candidates in certain circumstances; to amend Schedule 1; to substitute Schedule 1A; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act 73 of 1998, as amended by section 1 of Act 18 of 2013 and section 7 of Act 4 of 2021**

1. Section 1 of the Electoral Act, 1998 (Act No. 73 of 1998) (hereinafter referred to as the “principal Act”), is hereby amended—

(a) by the insertion after the definition of “agent” of the following definition:  
       “**‘candidate’** means a South African citizen contesting an election, or a South African citizen nominated on a list of a party contesting an election, as the context requires;”;

(b) by the insertion after the definition of “Commission” of the following definition:  
       “**‘Constitution’** means the Constitution of the Republic of South Africa, 1996;”;

(c) by the insertion after the definition of “identity document” of the following definition:  
       “**‘independent candidate’** means a South African citizen contesting an election and who is not nominated on a list of a party;”;

- (d) by the insertion after the definition of “list of candidates” of the following definition:  
     “**‘list of independent candidates’** means the list of independent candidates referred to in sections 31D and 31F;”;
- (e) by the deletion of the definition of “party liaison committee”; 5
- (f) by the insertion after the definition of “party liaison committee” of the following definition:  
     “**‘political liaison committee’** means a committee established in terms of the Regulations on Political Liaison Committees published in terms of the Electoral Commission Act;”;
- (g) by the insertion after the definition of “presiding officer” of the following definitions:  
     “**‘province’** means a province referred to in section 103 of the Constitution;  
     **‘region’** means the territorial area of a province;” 15

**Amendment of section 20 of Act 73 of 1998, as amended by section 9 of Act 1 of 2019**

2. Section 20 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:  
     “The Commission must after consultation with the [party] national political liaison committee—” 20

**Amendment of section 27 of Act 73 of 1998, as amended by section 10 of Act 4 of 2021**

3. Section 27 of the principal Act is hereby amended by the insertion in subsection (2) of the following paragraph after paragraph (c):  
     “(cA) declaration, signed by the duly authorised representative of the party confirming that each candidate appearing on the party’s provincial list of candidates referred to in Schedule 1A is registered to vote within the province in which the election will take place;” 25

**Amendment of section 28 of Act 73 of 1998, as substituted by section 11 of Act 1 of 2019 and amended by section 11 of Act 4 of 2021** 30

4. Section 28 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections respectively:  
     “(1) If a registered party that has submitted a list of candidates has not fully complied with section 27(2)(a), (b), (cA), (d) or section 27(4), the chief electoral officer must notify that party of its non-compliance. 35  
     (2) The notification must be given in the prescribed manner by not later than the relevant date stated in the election timetable, and must indicate that the party has an opportunity to comply with section 27(2)(a), (b), (cA), (d) or section 27(4), by not later than the relevant date stated in the election timetable.”

**Amendment of section 30 of Act 73 of 1998, as amended by section 12 of Act 4 of 2021** 40

5. Section 30 of the principal Act is hereby amended by the deletion of subsection (6).

**Insertion of Part 3A in Chapter 3 in Act 73 of 1998**

6. The following Part is inserted in Chapter 3 of the principal Act after Part 3:

**“Part 3A** 45

***Independent candidates***

**Nomination of independent candidate**

- 31A.** (1) A person may be nominated to contest an election as an independent candidate—

- (a) in one or more regions for the National Assembly but may be elected to only one seat in the National Assembly; and
- (b) for a provincial legislature in a province in which that person is registered as a voter,
- provided that the independent candidate may only be eligible to be a member of either the National Assembly or a provincial legislature.
- (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.

### **Requirements for independent candidates to contest elections**

**31B.** (1) A person may contest an election as an independent candidate only if that person is nominated on a prescribed form and that form is submitted to the Commission by not later than a date stated in the timetable for the election and complies with the requirements of subsection (3).

(2) The prescribed nomination form must be submitted in the prescribed manner by not later than the relevant date stated in the election timetable.

(3) The following must be attached to a nomination when it is submitted:

- (a) A completed prescribed form confirming that the independent candidate has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear on the segment of the voters' roll for that region or province in which the independent candidate is standing for election and who support his or her candidature, totalling at least 20 percent of the quota for a seat that was required for a seat in the previous comparable election;
- (b) a deposit equal to a prescribed amount, payable in the prescribed form and manner;
- (c) a prescribed undertaking, signed by the candidate, to be bound by the Code;
- (d) a prescribed declaration, signed by the candidate, that he or she is not disqualified from standing for election in terms of the Constitution or any applicable legislation;
- (e) if contesting an election of a provincial legislature, a prescribed declaration, signed by the candidate confirming that he or she is registered to vote within a province in which he or she intends contesting; and
- (f) a recent photograph of the candidate in such form as may be prescribed.

(4) The Commission may in the form and manner as may be prescribed request—

- (a) an acceptance of nomination signed by the candidate; and
- (b) a copy of the identity card or that page of the candidate's identity document on which the candidate's photo, name and identity number appear.

(5) The Commission must accept a nomination submitted to it and allow the nominated person to stand as a candidate in the election if the provisions of section 31A and this section have been complied with.

(6) The amount to be deposited by an independent candidate contesting an election of a provincial legislature, must be less than the amount for contesting an election of the National Assembly, and such deposits may also be different to the deposits paid by registered parties.

### **Non-compliance**

**31C.** (1) If the nomination of an independent candidate does not fully comply with section 31B(3)(c), (d), (e), (f) or section 31B(4), the chief electoral officer must notify the nominated person of the non-compliance.

(2) The notification must be given in the prescribed manner by not later than the relevant date stated in the election timetable, and must indicate that the nominated person has an opportunity to comply with section 31B(3)(c), (d), (e), (f) or section 31B(4), by not later than the relevant date stated in the election timetable.

(3) If a person has been nominated both as an independent candidate and by one or more parties for an election—

- (a) the chief electoral officer must, where possible, in writing, notify the person and such party or parties who have nominated such person about such state of affairs by no later than the relevant date and time stated in the election timetable; and
- (b) the party or parties to whom notice has been given in terms of paragraph (a) may, by not later than the relevant date and time stated in the election timetable, substitute such a candidate.

### **Inspection of copies of lists of independent candidates and accompanying documents**

**31D.** (1) By not later than the relevant date stated in the election timetable, the chief electoral officer must—

- (a) compile a draft list of independent candidates; and
- (b) give notice that copies of the draft list of independent candidates and accompanying documents submitted in terms of section 31B, as amended and supplemented in terms of section 31C, will be available for inspection.

(2) The notice referred to in subsection (1)(b) must be—

- (a) published in the *Government Gazette*; and
- (b) publicised in the media considered appropriate by the chief electoral officer so as to ensure wide publicity of the lists.

(3) The notice referred to in subsection (1)(b) must state, and the chief electoral officer must ensure, that for the relevant period stated in the election timetable—

- (a) copies of the lists for—
  - (i) an election of the National Assembly, will be available for inspection at the Commission's head office, a place in each province designated in the notice and the office of each municipality in the country; and
  - (ii) an election of a provincial legislature, will be available for inspection at the Commission's head office, a place in the province designated in the notice and the office of each municipality in that province; and
- (b) copies of the documents accompanying the lists are available for inspection at the Commission's head office.

(4) Any person may inspect a copy of the draft list of independent candidates and accompanying documents referred to in subsection (1).

(5) The chief electoral officer must provide a certified copy of, or extract from, the draft list of independent candidates or documents referred to in subsection (1), to any person who has paid the prescribed fee.

### **Objections to independent candidates**

**31E.** (1) Any person, including the chief electoral officer, may object to the nomination of an independent candidate on the following grounds:

- (a) The nominated candidate is not qualified to stand in the election;
- (b) the nominated candidate has failed to submit the prescribed acceptance of nomination signed by the candidate as contemplated in section 31B(4); or
- (c) there is no prescribed undertaking, signed by the nominated candidate, that the candidate is bound by the Code.

(2) The objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable, and must be served on the nominated candidate.

(3) The Commission must decide the objection, and must notify the objector and the nominated candidate of the decision in the prescribed manner by not later than the relevant date stated in the election timetable.

(4) The objector, or the nominated candidate, may appeal against the decision of the Commission to the Electoral Court in the prescribed manner and by not later than the relevant date stated in the election timetable.

(5) The Electoral Court must consider and decide the appeal and notify the parties to the appeal and the chief electoral officer of the decision in the prescribed manner and by not later than the relevant date stated in the election timetable.

#### **List of independent candidates entitled to contest election**

**31F.** (1) By not later than the relevant date stated in the election timetable, the chief electoral officer must—

(a) give effect to a decision of the Commission in terms of section 31E(3) and to a decision of the Electoral Court in terms of section 31E(5); and

(b) compile a final list of independent candidates entitled to contest the election concerned.

(2) The chief electoral officer must provide a certified copy of, or extract from, a list mentioned in subsection (1)(b) to any person who has paid the prescribed fee.

(3) By not later than the relevant date stated in the election timetable, the chief electoral officer must issue to each independent candidate on the list of independent candidates for an election, a certificate stating that the person is an independent candidate in that election.”.

#### **Amendment of section 39 of Act 73 of 1998, as substituted by section 12 of Act 34 of 2003**

7. Section 39 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) two agents, either from different parties or representing different independent candidates, if available.”.

#### **Amendment of section 57A of Act 73 of 1998, as inserted by section 15 of Act 34 of 2003**

8. Section 57A of the principal Act is hereby amended—

(a) by the substitution for paragraph (a) of the following paragraph:

“(a) lists of candidates and lists of independent candidates”; and

(b) by the substitution for paragraph (c) of the following paragraph:

“(c) the designation of candidates from candidate lists and lists of independent candidates as representatives **[in]** for those seats; and”.

#### **Substitution of section 58 of Act 73 of 1998, as amended by section 10 of Act 18 of 2013**

9. The following section is hereby substituted for section 58 of the principal Act:

#### **“Appointment of [party] agents**

**58.** (1) Every registered party or independent candidate contesting an election may appoint such number of agents as may be prescribed—

(a) **[two party agents]** for each voting station **[or, if voting or counting at a voting station takes place in more than one room**

or separately enclosed area, two party agents in respect of each room or area]; and

(b) [four party agents] for each venue where the proceedings provided for in Part 3 or 5 of Chapter 4 take place.

(2) [A party] An agent—

(a) must be a South African citizen; and

(b) may not be a candidate in an election.

(3) The appointment and revocation of appointment of a person as [a party] an agent must be effected in the prescribed manner.”.

**Amendment of section 59 of Act 73 of 1998, as amended by section 16 of Act 34 of 2003**

10. Section 59 of the principal Act is hereby amended by the substitution in subsection (3)(a) for subparagraph (ii) of the following subparagraph:

“(ii) the registered party or independent candidate represented by that agent; and”.

**Amendment of section 62 of Act 73 of 1998**

11. Section 62 of the principal Act is hereby amended—

(a) by the substitution for the heading of the section of the following heading:

“**Consultation with [party] political liaison committee**”; and

(b) by the substitution for paragraphs (a) and (b) of the following paragraphs, respectively:

“(a) the municipal [party] political liaison committee for the municipality within which that voting district will fall; or

(b) if no municipal [party] political liaison committee has been established in a municipality, the provincial [party] political liaison committee for the province within which that voting district will fall.”.

**Amendment of section 64 of Act 73 of 1998, as amended by section 18 of Act 34 of 2003**

12. Section 64 of the principal Act is hereby amended by the substitution in subsection (3) for paragraphs (a) and (b) of the following paragraphs, respectively:

“(a) the municipal [party] political liaison committee for the municipality within which that voting station will fall; or

(b) if no municipal [party] political liaison committee has been established in the municipality, the provincial [party] political liaison committee for the province within which the voting station will fall.”.

**Amendment of section 66 of Act 73 of 1998, as substituted by section 19 of Act 34 of 2003**

13. Section 66 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) Before the voting station opens for voting on voting day the presiding officer of a voting station must determine the boundary of the voting station after consultation with [party] agents and members of the security services who are available at that voting station at that stage.”; and

(b) by the substitution for subsection (3) of the following subsection:

“(3) The presiding officer may alter the boundary at any time if it is necessary to do so to ensure proper control and security at the voting station and after consultation with [party] agents and members of the security services who are available at that voting station at that stage.”.

**Substitution of section 94 of Act 73 of 1998**

14. The following section is hereby substituted for section 94 of the principal Act:

**“Contravention of Code**

**94.** No person, [or] registered party, or independent candidate bound by the Code may contravene or fail to comply with a provision of that Code.”.

**Amendment of section 96 of Act 73 of 1998** 5

**15.** Section 96 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (c) of the following paragraph:  
“(c) the forfeiture of any deposit paid by that person or party in terms of section 27(2)(e) or paid by an independent candidate in terms of section 31B(3)(b);”.

**Amendment of section 99 of Act 73 of 1998, as amended by section 15 of Act 4 of 2021** 10

**16.** Section 99 of the principal Act is hereby amended by the deletion in subsection (1) of the word “and” at the end of paragraph (a), the insertion of the word “and” at the end of paragraph (b), and the addition of the following paragraph:  
“(c) by every independent candidate before that independent candidate may be placed on a list of independent candidates in terms of section 31F.”.

**Amendment of section 100 of Act 73 of 1998**

**17.** Section 100 of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:  
“(2) The Commission may make regulations, after consultation with the [party] national political liaison committee, regarding any matter—”.

**Amendment of section 106 of Act 73 of 1998**

**18.** Section 106 of the principal Act is hereby amended—  
(a) by the insertion after subsection (1) of the following subsection:  
“(1A) Subject to section 96(2)(c), the Commission must refund to an independent candidate any deposit paid by such candidate in terms of section 31B(3)(b) if the candidate is allocated a seat in the legislature whose election the independent candidate contested;”; and  
(b) by the substitution for subsection (2) of the following subsection:  
“(2) A deposit that is not refundable in terms of subsection (1) or (1A) is forfeited to the State.”.

**Amendment of section 110 of Act 73 of 1998**

**19.** Section 110 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:  
“(1) Any mistake in the certified segment of the voters’ roll referred to in section 24, [or] the final list of candidates referred to in section 31, or the final list of independent candidates referred to in section 31F, does not invalidate that voters’ roll, [or] that list of candidates, or that list of independent candidates.”.

**Amendment of Schedule 1 to Act 73 of 1998, as amended by section 24 of Act 34 of 2003 and section 17 of Act 1 of 2019** 40

**20.** Schedule 1 to the principal Act is hereby amended—  
(a) by the substitution for item 4 of the following item:  
“**Cut-off date for submission of list of candidates and nominations of independent candidates**  
**4. (1)** Registered parties that intend to contest this election must nominate and submit a list of their candidates for the election to the chief electoral officer in the prescribed manner by ..... [day/month/year].”.



- (2) Nominators of independent candidates that intend to contest this election must submit their nominations to the chief electoral officer in the prescribed manner by ..... [day/month/year].”;
- (b) by the substitution for subitem 5(1) of the following subitem:
    - “(1) The chief electoral officer must notify a registered party that has submitted a list of candidates in terms of section 27 but has not fully complied with **[that]** section 27(2)(a), (b), (cA), (d) or section 27(4), of that non-compliance by ..... [day/month/year].”;
  - (c) by the insertion after subitem 5(1) of the following subitem:
    - “(1A) The chief electoral officer must notify the person nominated to be an independent candidate, who has not fully complied with section 31B(3)(c), (d), (e), (f) or section 31B(4), of that non-compliance by ... [day/month/year].”;
  - (d) by the substitution for subitem 5(2) of the following subitem:
    - “(2) If the party or person notified **[party]** in terms of subitem (1) or (1A) takes the opportunity to comply with section 27(2)(a), (b), (cA), (d), section 27(4), section 31B(3)(c), (d), (e), (f) or section 31B(4), that party or person must do so by ..... [day/month/year].”;
  - (e) by the insertion after subitem 5A(1) of the following subitem:
    - “(1A) The Commission must notify—
      - (a) a person who has been nominated both as an independent candidate and by one or more parties for an election; and
      - (b) all the parties on whose party lists such a candidate appears, of the multiple nominations by ..... [day/month/year].”;
  - (f) by the substitution for subitem 5A(2) of the following subitem:
    - “(2) If the notified party decides to act in terms of section 28(3) or section 31C(3), that party must do so by ..... (date).”;
  - (g) by the substitution for item 6 with the following item:
    - “**Inspection of lists of candidates and draft list of independent candidates and accompanying documents**

6. The chief electoral officer must give notice by ..... [day/month/year], that from the date of the notice until ..... [day/month/year], copies of the following documents will be available for inspection:

    - (a) The lists of candidates and accompanying documents submitted by registered parties in terms of section 27, as amended and supplemented in terms of section 28[.]; and
    - (b) the draft list of independent candidates and accompanying documents submitted in terms of section 31B, as amended and supplemented in terms of section 31C. ”;
  - (h) by the substitution for item 8 of the following item:
    - “**Decision of objections**

8. The Commission must decide an objection under section 30 or section 31E, and must notify the objector, **[and]** the registered party that nominated the candidate, and the nominated independent candidate, if applicable, of the decision in the prescribed manner by ..... [day/month/year].”;
  - (i) by the substitution for item 9 of the following item:
    - “**Cut-off date for appeals against decisions**

9. (1) The objector or the registered party who nominated the candidate may appeal against a decision of the Commission in terms of section **[30(3)] 30(4)** to the Electoral Court in the prescribed manner by ..... [day/month/year].

(2) The objector or the nominated independent candidate may appeal against a decision of the Commission in terms of section 31E(4) in the prescribed manner by ..... [day/month/year].”;

(j) by the substitution for item 10 of the following item:

**“Deciding appeals**

**10.** The Electoral Court must consider and decide an appeal brought under section 30(4) or 31E(4) and notify the parties to the appeal, and the chief electoral officer, of the decision in the prescribed manner by ..... [day/month/year].”;

(k) by the substitution for item 11 of the following item:

**“List of parties and candidates entitled to contest election and final list of candidates**

**11.** By ..... [day/month/year], the chief electoral officer—

(a) must give effect to a decision of the Commission in terms of section 30(3), section 31E(3), or a decision of the Electoral Court in terms of section 30(5) or section 31E(5); and

(b) must compile a list of the registered parties entitled to contest the election, **[and]** the final list of candidates for each of those parties, and the list of independent candidates contesting this election.”;

(l) by the substitution for item 12 of the following item:

**“Issue of certificate to candidates**

**12.** By ..... [day/month/year], the chief electoral officer must issue in the prescribed manner to each candidate on a final list of candidates, and to each independent candidate on the final list of independent candidates, a certificate stating that the person is a candidate in this election in terms of section 31(3) and section 31F(3).”.

**Substitution of Schedule 1A to Act 73 of 1998, as inserted by section 25 of Act 34 of 2003 and amended by section 8 of Act 55 of 2008**

**21.** Schedule 1A to the principal Act is hereby substituted for the following schedule:

**“SCHEDULE 1A**

**SYSTEM OF REPRESENTATION IN NATIONAL ASSEMBLY AND PROVINCIAL LEGISLATURES**

**(Section 57A)**

**National Assembly**

**1.** The seats in the National Assembly are as determined in terms of section 46 of the Constitution and item 1 of Schedule 3 and are allocated as follows:

(a) Half the seats are filled by independent candidates and candidates from lists of candidates of parties contesting the nine regions and these shall be referred to as regional seats; and

(b) half the seats are filled by candidates from lists of candidates of parties and these shall be referred to as compensatory seats.

**2.** The Commission must prepare a list of independent candidates contesting an election of the National Assembly in each region in accordance with this Act.

**3.** (1) Registered parties contesting an election of the National Assembly must nominate candidates on a list of candidates prepared in accordance with this Act.

(2) A party’s list of candidates must consist of—

(a) a regional list for each region that the party wishes to contest; and

(b) a national list, with such number of names on each list as the party may determine subject to subitem (3).

(3) The lists of candidates submitted by a party must together not contain more names than the number of seats in the National Assembly,

and each such list must denote the fixed order of preference of the names as the party may determine.

(4) A candidate—

- (a) may be nominated on a party's regional list for one region and the national list of a party but the same candidate's name may not appear on more than one regional list for that party; or
- (b) may be nominated as an independent candidate in more than one region.

### Regional seats

4. The Commission must determine a fixed number of seats reserved for each region for every election of the National Assembly, taking into account available scientifically based data in respect of voters and representations by interested parties.

5. The seats referred to in item 1(a) must be allocated to the parties and independent candidates contesting an election, as follows:

- (a) A quota of votes per seat must be determined in respect of each region by dividing the total number of valid votes cast in a region by the number of seats, plus one, reserved for such region under item 4.
- (b) The result plus one, disregarding fractions, is the quota of votes per seat in respect of a particular region.
- (c) The number of seats to be awarded for the purposes of paragraph (e) in respect of such region to a party or independent candidate must, subject to paragraph (d), be determined by dividing the total number of votes cast in favour of such party or independent candidate in a region by the quota of votes per seat indicated by paragraph (b) for that region.
- (d) Where the result of the calculation referred to in paragraph (c) yields seats not absorbed by the number awarded to parties or independent candidates, the surplus of votes accruing to any party, parties or independent candidates in respect of the relevant region, competes for the remaining seats in sequence of the highest surplus of votes.
- (e) The aggregate of a party's or independent candidate's awards in terms of paragraphs (c) and (d) in respect of a particular region indicates that party's or that independent candidate's provisional allocation of the seats reserved under item 4 for that region.
- (f) Where an independent candidate's award in terms of paragraph (e) exceeds one seat, the candidate is awarded one seat as his or her provisional allocation. The excess seats must be dealt with in terms of item 7.
- (g) If the same independent candidate is provisionally allocated a seat in more than one region, the candidate is awarded the seat in the region where he or she received the most votes, as his or her provisional allocation. The excess seats in other regions must be dealt with in terms of item 7.
- (h) The aggregate of a party's provisional allocations for the various regions in terms of paragraph (e), indicates its provisional allocation of the seats referred to in item 4.
- (i) If no recalculation of provisional allocations is required in terms of item 7, the provisional allocation of such seats in terms of paragraphs (e), (f), (g) and (h) becomes the final allocation of such seats to the various parties and independent candidates, and if a recalculation is required, the provisional allocation of such seats, as adjusted in terms of item 7, becomes the final allocation of such seats to the various parties and independent candidates.
- (j) Parties' seats shall be filled from its regional lists in accordance with its final allocation of seats in respect of each region.
- (k) Where an independent candidate is contesting in more than one region, the votes received across regions for that independent candidate may not be aggregated in order to obtain a seat in the National Assembly.

**Compensatory seats**

6. The seats referred to in item 1(b) must be allocated to the parties contesting an election, as follows:

- (a) A quota of votes per seat must be determined by dividing the total number of valid votes cast for parties on both the regional and compensatory ballots by the total number of seats in the National Assembly, plus one, minus seats won by independent candidates, and the result plus one, disregarding fractions, is the quota of votes per seat. 5
- (b) The number of seats to be awarded to a party for the purposes of paragraph (d) must, subject to paragraph (c), be determined by dividing the total number of votes cast on both the regional and compensatory ballots in favour of such party by the quota of votes per seat determined in terms of paragraph (a). 10
- (c) Where the result of the calculation referred to in paragraph (b) yields seats not absorbed by the number awarded to parties, the surplus of votes accruing to any party or parties competes for the remaining seats in sequence of the highest surplus of votes, up to a maximum of five seats so awarded: Provided that the subsequent award of seats still remaining must be made in sequence of the party or parties with the highest average number of votes per seat already awarded in terms of paragraph (b) and this paragraph. 15
- (d) The aggregate of a party's awards in terms of paragraphs (b) and (c) must be reduced by the number of seats provisionally allocated to it in terms of item 5(h) and the result indicates that party's provisional allocation of the seats referred to in item 1(b). 20
- (e) If no recalculation of provisional allocations is required in terms of item 7 in respect of the seats referred to in paragraph (d), the provisional allocation of such seats in terms of paragraph (d) becomes the final allocation of such seats to the various parties, and if such a recalculation is required, the provisional allocation of such seats, as adjusted in terms of item 7, becomes the final allocation of seats to the various parties. 25
- (f) In terms of paragraph (e), the seats finally allocated to a party, must be filled from its national list. 30

**Insufficient names on party lists and independent candidates provisionally allocated more than one seat**

7. (1) If a party has submitted a national or a regional list containing fewer names than the number of its provisional allocation of seats which would have been filled from such list in terms of item 5 or item 6 had such provisional allocation been the final allocation, it forfeits a number of seats equal to the deficit. 40

(2)(a) If, following the provisional allocation in item 5, an independent candidate stands to be allocated more than one seat in a region, he or she is only allocated one seat and forfeits any additional seats. 45

(b) If, following the provisional allocation in item 5, an independent candidate stands to be allocated a seat in more than one region, he or she is only allocated a seat in the region where he or she received the most number of votes and shall forfeit any additional seats. 50

(3) In the event of any forfeiture of seats in terms of subitem (1) and subitem (2) affecting the provisional allocation of seats in respect of any particular region in terms of item 5(e), such allocation must be recalculated as follows: 50

- (a) The party or independent candidate forfeiting seats must be disregarded in such recalculation, and its provisional allocation of seats in terms of item 5(e) for the region in question, minus the number of seats forfeited by it, becomes its final allocation in respect of the seats reserved for such region in terms of item 4. Independent candidates already allocated a seat must further be disregarded in such recalculation. 55

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- (b) An amended quota of votes per seat must be determined in respect of such region by dividing the total number of votes cast in the region, minus the number of votes cast in such region in favour of the party or independent candidate referred to in paragraph (a), minus the votes cast in such region in favour of independent candidates already allocated one seat, by the number of seats, plus one, reserved for such region under item 4, minus the number of seats finally allocated to the said party or independent candidate, in terms of paragraph (a), minus the seats held by independent candidates in terms of item 5(e). 5
- (c) The results plus one, disregarding fractions, is the amended quota of votes per seat in respect of such region for purposes of the said recalculation. 10
- (d) The number of seats to be awarded for the purposes of paragraph (f) in respect of such region to a party or independent candidate participating in the recalculation, must, subject to paragraph (e), be determined by dividing the total number of votes cast in favour of such party or independent candidate in such region by the amended quota of votes per seat indicated by paragraph (c) for such region. 15
- (e) Where the result of the calculation referred to in paragraph (d) yields seats not absorbed by the number awarded to parties or independent candidates, the surplus of votes accruing to any party, parties or independent candidates in respect of the relevant region, competes for the remaining seats in sequence of the highest surplus of votes. 20
- (f) The aggregate of a party's or independent candidate's awards in terms of paragraphs (d) and (e) in respect of such region, subject to subitem (5) and subitem (6), indicates that party's or independent candidate's final allocation of seats reserved under item 4 for that region. 25
- (4) In the event of any forfeiture of seats in terms of subitem (1) affecting the provisional allocation of seats in terms of item 6(d), such allocation must be recalculated as follows:
- (a) The party forfeiting seats must be disregarded in such recalculation, and its provisional allocation of seats in terms of item 6(d), minus the number of such seats forfeited by it, becomes its final allocation of the seats referred to in item 1(b). 30
- (b) An amended quota of votes per seat must be determined by dividing the total number of votes cast nationally on both the regional and compensatory ballots, minus the number of votes cast nationally on both the regional and compensatory ballots in favour of the party referred to in paragraph (a), by the number of seats in the National Assembly, plus one, minus the number of seats finally allocated to the said party in terms of paragraph (a), minus the aggregate of seats won by independent candidates. 35
- (c) The result plus one, disregarding fractions, is the amended quota of votes per seat for the purposes of the said recalculation. 40
- (d) The number of seats to be awarded for the purpose of paragraph (f) to a party participating in the recalculation must, subject to paragraph (e), be determined by dividing the total number of votes cast nationally in favour of such party by the amended quota of votes per seat indicated by paragraph (c). 45
- (e) Where the result of the calculation referred to in paragraph (d) yields seats not absorbed by the number awarded to parties, the surplus of votes accruing to any party or parties competes for the remaining seats in sequence of the highest surplus of votes, up to a maximum of five seats so awarded: Provided that the subsequent award of seats still remaining must be made in sequence of the party or parties with the highest average number of votes per seat already awarded in terms of paragraph (d) and this paragraph. 50
- (f) The aggregate of such a party's awards in terms of paragraphs (d) and (e) must be reduced by the number of seats finally allocated to it in terms of item 5(i), and the results, subject to subitem (5) 55
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indicates that party's final allocation of the seats referred to in item 1(b).

(5) In the event of a party being allocated an additional number of seats in terms of this item, and if its list in question then does not contain the names of a sufficient number of candidates as set out in subitem (1), the procedure provided for in this item must be repeated with the changes required by the context until all seats have been allocated.

(6) In the event that an independent candidate stands to be allocated more than one seat in terms of subitem (3)(f), the procedure provided for in subitem (3), must be repeated with the changes required by the context until all seats have been allocated.

### Provincial legislatures

**8.** The number of seats in each provincial legislature are as determined in terms of section 105 of the Constitution and item 3(1) of Schedule 3.

**9.** (1) Registered parties contesting an election of a provincial legislature must nominate candidates for election to such provincial legislature on a provincial list of candidates prepared in accordance with this Act, with such number of candidates on each list as the party may determine subject to subitem (2).

(2) The list of candidates submitted by a party must not contain more names than the number of seats in the provincial legislature concerned, and must denote the fixed order of preference of the names as the party may determine.

**10.** The Commission must prepare a list of independent candidates contesting an election of a provincial legislature in accordance with this Act.

**11.** The seats determined for a provincial legislature must be allocated to parties and independent candidates contesting an election, as follows—

(a) A quota of votes per seat must be determined by dividing the total number of valid votes cast in the province concerned by the number of seats, plus one, determined for such province and the result plus one, disregarding fractions, is the quota of votes per seat for such province.

(b) The number of seats to be awarded to a party or independent candidate for the purposes of paragraph (d) must, subject to paragraph (c), be determined by dividing the total number of votes cast in the province in favour of such party or independent candidate by the quota of votes per seat determined in terms of paragraph (a).

(c) Where the result of the calculation referred to in paragraph (b) yields seats not absorbed by the number awarded to parties or independent candidates, the surplus of votes accruing to any party, parties or independent candidates in respect of the relevant province, competes for the remaining seats in sequence of the highest surplus of votes.

(d) The aggregate of a party's or independent candidate's awards in terms of paragraphs (b) and (c), indicates that party's or independent candidate's provisional allocation of seats in the provincial legislature in question.

(e) Where an independent candidate's award in terms of paragraph (d) exceeds one seat, the candidate is awarded one seat as his or her provisional allocation. The surplus of seats yielded must be dealt with in terms of item 12.

(f) If no recalculation of provisional allocations for a province concerned is required in terms of item 12, the provisional allocation of seats in respect of that province in terms of paragraph (d), becomes the final allocation of such seats to the various parties and independent candidates, and if such a recalculation is required the provisional allocation of such seats as adjusted in terms of item 12 becomes the final allocation of such seats to the various parties and independent candidates.

- (g) In terms of paragraph (f) the seats finally allocated to a party, must be filled from its respective provincial lists.
- 12.** (1) If a party has submitted a provincial list containing fewer names than the number of seats provisionally allocated to it in terms of item 11(d), it must forfeit a number of seats equal to the deficit. 5
- (2) If, following the provisional allocation in item 11(d), an independent candidate stands to be allocated more than one seat in a region, he or she is only allocated one seat and forfeits any additional seats.
- (3) In the event of any forfeiture of seats in terms of subitems (1) or (2), the allocation of seats in respect of the province concerned must be recalculated as follows: 10
- (a) The party or independent candidate forfeiting seats must be disregarded in such recalculation, and its provisional allocation of seats in terms of item 11(d), minus the number of seats forfeited by it, becomes its final allocation of seats in the provincial legislature concerned. Independent candidates already allocated a seat must further be disregarded in such recalculation. 15
- (b) An amended quota of votes per seat must be determined in respect of such province by dividing the total number of votes cast in the province, minus the number of votes cast in the province in favour of the party or independent candidate referred to in paragraph (a), minus the votes cast in such province in favour of independent candidates already allocated one seat, by the number of seats, plus one, determined in terms of item 8 in respect of the province concerned, minus the number of seats finally allocated to the said party in terms of paragraph (a), minus the seats held by independent candidates in terms of item 11(d). 20
- (c) The result plus one, disregarding fractions, is the amended quota of votes per seat in respect of such province for purposes of the said recalculation. 25
- (d) The number of seats to be awarded for the purposes of paragraph (f) in respect of such province to a party or independent candidate participating in the recalculation must, subject to paragraph (e), be determined by dividing the total number of votes cast in favour of such party or independent candidate in such province by the amended quota of votes per seat indicated by paragraph (c) for such province. 30
- (e) Where the result of the calculation referred to in paragraph (d) yields seats not absorbed by the number awarded to parties or independent candidates, the surplus of votes accruing to any party, parties or independent candidates in respect of the relevant province, competes for the remaining seats in sequence of the highest surplus of votes. 35
- (f) The aggregate of such a party's or independent candidate's awards in terms of paragraphs (d) and (e) in respect of such province, subject to subitems (4) and (5), indicates that party's or independent candidate's final allocation of the seats determined under item 8 in respect of that province. 40
- (4) In the event of a party being allocated an additional number of seats in terms of subitem (3)(f) and if its list in question then does not contain the names of a sufficient number of candidates as set out in subitem (1), the process provided for in this item must be repeated with the changes required by the context until all seats have been allocated. 45
- (5) In the event that an independent candidate stands to be allocated more than one seat in terms of subitem (3)(f), the procedure provided for in subitem (3), must be repeated with the changes required by the context until all seats have been allocated. 50

### **Ballot papers**

- 13.** (1) The Commission must produce separate ballot papers for each regional election of members to the National Assembly, the compensa- 60

tory seats of members to the National Assembly and of members to each provincial legislature.

(2) The ballot paper to be used in each region for the election of members of the National Assembly shall include only parties and independent candidates standing in that region for election to the National Assembly.

(3) The ballot for a provincial legislature shall include the names of parties and independent candidates standing for elections in that province.

#### **Designation of representatives of parties**

**14.** (1) After the counting of votes has been concluded, the number of representatives of each party has been determined and the election result has been declared in terms of section 190(1)(c) of the Constitution, the Commission must, within two days after such declaration, designate from each list of candidates, the representatives of each party in the National Assembly and provincial legislature.

(2) Following the designation in terms of subitem (1), if a candidate's name appears on more than one list for the National Assembly or on lists for both the National Assembly and a provincial legislature (if an election of the National Assembly and a provincial legislature is held at the same time), and such candidate is due for designation as a representative in more than one case, the party which submitted such lists must, within two days after the said declaration, indicate to the Commission from which list such candidate will be designated or in which legislature the candidate will serve, as the case may be, in which event the candidate's name must be deleted from the other lists.

(3) If a party fails to indicate to the Commission from which list a candidate will be designated or in which legislature a candidate will serve, such candidate's name must be deleted from all the lists.

(4) The Commission must forthwith publish the list of names of representatives in the National Assembly or provincial legislatures.

#### **Supplementation of lists of candidates of parties**

**15.** A party may not supplement a list of candidates for any legislature prior to the designation of representatives in terms of item 14.

**16.** After the designation of representatives in terms of item 14 has been concluded, parties may supplement their lists of candidates by the addition of an equal number of names at the end of the applicable list, if—

- (a) a representative is elected as the President or to any other executive office as a result of which he or she resigns as a representative of a legislature;
- (b) a representative is appointed as a permanent delegate to the National Council of Provinces;
- (c) a name is deleted from a list in terms of item 14(2) or (3); or
- (d) a vacancy has occurred and the appropriate list of candidates of the party concerned is depleted.

**17.** A party may supplement a list of candidates referred to in item 14(1) on one occasion only at any time during the first 12 months following the date on which the designation of representatives in terms of item 14 has been concluded, in order to fill casual vacancies: Provided that any such supplementation must be made at the end of the list.

**18.** The number of names on lists of candidates as supplemented in terms of item 16 may not exceed the difference between the number of seats in the National Assembly or a provincial legislature, as the case may be, and the number of representatives of a party in any such legislature.



### **Review of lists of candidates by party**

**19.** A party may review its undepleted lists as supplemented in terms of items 16, 17 and 18, within seven days after the expiry of the period referred to in item 17, and annually thereafter, until the date on which a party has to submit lists of candidates for an ensuing election, in the following manner: 5

- (a) All vacancies may be supplemented;
- (b) no more than 25 per cent of candidates may be replaced; and
- (c) the fixed order of lists may be changed.

### **Publication of supplemented and reviewed lists of candidates**

**20.** The Secretary to Parliament and the Secretaries of the provincial legislatures must publish lists of candidates supplemented in terms of items 16 and 17 or reviewed in terms of item 19 within 10 days after the receipt of such lists from the parties concerned. 10

### **Designation of seats of independent candidates**

**21.** (1) If an independent candidate is finally allocated a seat in accordance with item 11(f) as well as in accordance with item 5(i), such independent candidate must within two days after the said final allocation, indicate to the Commission the seat he or she elects to retain or in which legislature the independent candidate will serve, as the case may be, in which event the independent candidate's name must be deleted from the relevant other list and the recalculation performed in terms of the forfeiture provisions in item 7 or item 12 as indicated by the context. 15 20

(2) If an independent candidate fails to indicate to the Commission from which list such independent candidate will be designated or in which legislature an independent candidate will serve, such independent candidate's name must be deleted from all the lists and both the regional and provincial calculations performed in terms of the forfeiture provisions in item 7 or item 12 as indicated by the context. 25 30

### **Vacancies**

**22.** (1) In the event of a vacancy in a legislature of a seat allocated to a party, the party which the vacating member represented must fill the vacancy by nominating a person— 35

- (a) whose name appears on the list of candidates from which that party's members were originally nominated; and
- (b) who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy must be submitted to the Speaker of the legislature in writing. 40

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of section 47(3)(c) or section 106(3)(c) of the Constitution, the seats in question must be allocated to the remaining parties with the changes required by the context as if such seats were vacated seats in terms of item 23 and item 24, as the case may be. 45

**23.** (1) In the event of a vacancy in a region or provincial legislature with respect to a seat allocated to an independent candidate, the chief electoral officer must in writing allocate the seat by recalculating the result as follows: 50

- (a) disregarding the votes allocated to the independent candidate causing the vacancy;
- (b) disregarding the votes and seats allocated to the independent candidates already in office; and
- (c) recalculating the result for the region or provincial legislature in terms of the provisions in subitem (3). 55

(2) The vacant seat is awarded to an eligible independent candidate or party that contested the preceding election in terms of subitem (1)(c).

(3) (a) An amended quota of votes per seat must be determined in respect of such region or province by dividing the total number of votes cast in the region or province, minus the number of votes cast in the region or province in favour of the party or independent candidate causing the vacancy, minus the votes cast in such region or province in favour of independent candidates already allocated one seat, by the number of seats, plus one, determined in terms of item 4 or item 8 in respect of the region or province concerned, minus the seats held by independent candidates in terms of item 5(i) or item 11(f).

(b) The result plus one, disregarding fractions, is the amended quota of votes per seat in respect of such region or province for purposes of the said recalculation.

(c) The number of seats to be awarded for the purposes of paragraph (e) in respect of such region or province to a party or independent candidate participating in the recalculation must, subject to paragraph (d), be determined by dividing the total number of votes cast in favour of such party or independent candidate in such region or province by the amended quota of votes per seat indicated by paragraph (b) for such region or province.

(d) Where the result of the calculation referred to in paragraph (c) yields seats not absorbed by the number awarded to parties or independent candidates, the surplus of votes accruing to any party, parties or independent candidates participating in the recalculation, competes for the remaining seats in sequence of the highest surplus of votes.

(e) The aggregate of such a party's awards in terms of paragraphs (c) and (d) in respect of such region or province, subject to paragraphs (f) and (g), indicates that party's or independent candidate's final allocation of the seats determined under item 4 or item 8 in respect of that region or province.

(f) In the event of a party being allocated an additional number of seats in terms of this item and if its list in question then does not contain the names of a sufficient number of candidates as set out in item 7(1) or item 12(1), the process provided for in item 7 or item 12 must be repeated with the changes required by the context until all seats have been allocated.

(g) In the event that an independent candidate stands to be allocated more than one seat in terms of this item, the procedure provided for in item 7 and item 12, must be repeated with the changes required by the context until all seats have been allocated.

24. (1) Should any party or independent candidate stand to lose a seat during the recalculation contemplated in item 23, the party or independent candidate will retain the seat.

(2) A recalculation must be done as follows:

- (a) disregarding the votes and seat allocated to the party or independent candidate contemplated in subitem (1);
- (b) disregarding the votes and seats allocated to independent candidates already in office; and
- (c) recalculating the result for the region or provincial legislature in terms of the provisions in item 7 or item 12.

### Definitions

25. In this Schedule—

**'national list'** means a list of candidates prepared by a party for an election of the National Assembly to reflect that party's order of preference of candidates in respect of the allocation of compensatory seats;

**'provincial list'** means a list of candidates prepared by a party for an election of a provincial legislature;

**'regional list'** means a list of candidates in respect of a region prepared by a party for an election of the National Assembly to reflect that party's order of preference of candidates in respect of the allocation of regional seats in respect of each region; and

**‘votes’** means—

- (a) where it occurs in items 5, 6 and 7, votes cast in the election for the National Assembly;
- (b) where it occurs in items 11 and 12, votes cast in the election for the provincial legislature of a province concerned; and
- (c) where it occurs in item 14, votes cast in the election for the National Assembly and the provincial legislatures.”

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#### **Amendment of Schedule 2 to Act 73 of 1998**

**22.** Schedule 2 to the principal Act is hereby amended by the substitution in item 7(g) for subparagraph (iii) of the following subparagraph:

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“(iii) that representatives of that party or candidate attend meetings of any [party] political liaison committee or other forum convened by the Commission.”

#### **Short title and commencement**

**23.** This Act is called the Electoral Amendment Act, 2022, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

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## **MEMORANDUM ON THE OBJECTS OF THE ELECTORAL AMENDMENT BILL, 2022**

### **1. INTRODUCTION**

- 1.1 The Constitutional Court in its judgment in *New Nation Movement NPC & others v President of the Republic of South Africa & others* [2020] ZACC 11, declared the Electoral Act, 1998 (Act No. 73 of 1998) (the “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.
- 1.2 The Constitutional Court directed Parliament to rectify the impugned sections of the Act within a period of 24 months from the date of the judgment, which 24 months is to be calculated from June 2020 to June 2022.

### **2. PURPOSE OF THE BILL**

The Electoral Amendment Bill, 2022 (the “Bill”) amends the Act by—

- (a) deleting a definition and by inserting certain definitions consequential to the expansion of this Act to include independent candidates as contesters to elections in the National Assembly and provincial legislatures;
- (b) including a provision that registered parties must submit a declaration confirming that all its candidates are registered to vote in the province where the election will take place;
- (c) providing for the nomination of independent candidates to contest elections in the National Assembly and provincial legislatures;
- (d) providing the requirements which must be met by persons who wish to be nominated as independent candidates;
- (e) providing the procedure that must be followed in the event that a non-compliant nomination of an independent candidate is determined;
- (f) providing for the inspection of copies of lists of independent candidates and accompanying documents;
- (g) providing for objections to independent candidates;
- (h) providing for the inclusion of a list of independent candidates entitled to contest elections;
- (i) providing for the appointment of agents by independent candidates;
- (j) providing that independent candidates are bound by the Electoral Code of Conduct;
- (k) providing for the return of a deposit to independent candidates in certain circumstances;
- (l) amending Schedule 1 and substituting Schedule 1A to make provision for independent candidates; and
- (m) providing for matters connected therewith.

### **3. SUMMARY OF BILL**

- 3.1 Clause 1 amends section 1 of the Act to include definitions for “candidate”, “Constitution”, “independent candidate”, “list of independent candidates”, “political liaison committee”, “province”, and “region” and by deleting the definition of “party liaison committee”.
- 3.2 Clause 2 amends section 20 of the Act which provides for election time tables, to refer to the new term “political liaison committee”.
- 3.3 Clause 3 amends section 27 of the Act which deals with the submission of lists of candidates, by providing that the list or lists must be accompanied by a declaration, signed by the duly authorised representative of the party, confirming that each candidate appearing on the party’s provincial list of candidates referred to in Schedule 1A, is registered to vote within the province in which the election will take place.
- 3.4 Clause 4 amends section 28 of the Act, which provides for non-compliance concerning submission of lists of candidates, to provide for technical

amendments by including reference to the newly inserted section 27(2)(cA) in section 28 of the Act.

- 3.5 Clause 5 amends section 30 of the Act which provides for objections of lists of candidates by deleting subsection (6) from section 30 of the Act.
- 3.6 Clause 6 inserts Part 3A in Chapter 3 of the Act, to provide for the nomination of independent candidates, the requirements for independent candidates to contest elections, the process to be followed in the event of non-compliance of a nomination of an independent candidate, the inspection of copies of lists of independent candidates and accompanying documents, objections to independent candidates, and the compilation of the list of independent candidates entitled to contest elections.
- 3.7 Clause 7 amends section 39 of the Act which provides assistance to certain voters, to provide for the inclusion of agents from either different parties or representing different independent candidates.
- 3.8 Clause 8 amends section 57A of the Act, which provides for the system of representation in the National Assembly and the provincial legislatures, by expanding the application of Schedule 1A of the Act to include candidate list and lists of independent candidates.
- 3.9 Clause 9 substitutes section 58 of the Act to provide for the appointment of agents by independent candidates.
- 3.10 Clause 10 amends section 59 of the Act to include a reference to independent candidates who are represented by agents.
- 3.11 Clause 11 amends section 62 of the Act which provides for consultation with political liaison committees.
- 3.12 Clause 12 amends section 64 of the Act to include a reference to the expression “political liaison committee”.
- 3.13 Clause 13 amends section 66 of the Act to substitute “party agents” with “agents”.
- 3.14 Clause 14 substitutes section 94 of the Act, which provides for the contravention of the Electoral Code of Conduct, to expand the application of the section to independent candidates.
- 3.15 Clause 15 amends section 96 of the Act to provide that an independent candidate may be ordered to forfeit any deposit paid by him or her.
- 3.16 Clause 16 amends section 99 of the Act which provides for the Electoral Code of Conduct and other codes, by providing that every independent candidate, before that independent candidate may be placed on a list of independent candidates in terms of section 31F, must subscribe to the Electoral Code of Conduct.
- 3.17 Clause 17 amends section 100 to substitute “party national liaison committee” with “national political liaison committee”.
- 3.18 Clause 18 amends section 106 of the Act, which provides for the return and forfeiture of a deposit, to provide for the Commission to refund to an independent candidate any deposit paid by such candidate in terms of section 31B(3)(b) if the candidate is allocated a seat in the legislature whose election the independent candidate contested.
- 3.19 Clause 19 amends section 110 of the Act, which provides for the effect of certain irregularities by including reference to independent candidates.

- 3.20 Clause 20 amends Schedule 1 of the Act, which provides for the election timetable, to include independent candidates in the election timetable and to make other technical amendments.
- 3.21 Clause 21 amends Schedule 1A to the Act, which provides for the system of representation in the national assembly and provincial legislatures, by substituting the Schedule with one that includes independent candidates.
- 3.22 Clause 22 amends Schedule 2 to the Act which provides for the Electoral Code of Conduct to refer to “political liaison committees”.
- 3.23 Clause 23 contains the short title and provides that the Electoral Amendment Act, 2022 shall come into operation on a date determined by the President by proclamation in the *Gazette*.

#### **4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS**

The coming into operation of the amendment Act will have no additional personnel implications.

#### **5. FINANCIAL IMPLICATIONS FOR STATE**

The costing of the Bill will be undertaken when the Bill is finalised and passed.

#### **6. COMMUNICATION IMPLICATIONS**

There are no communication implications envisaged as a result of the introduction of the Bill. The Department will however, work with Government Communication and Information Services to develop a communications strategy on the Bill.

#### **7. CONSTITUTIONAL OBLIGATIONS**

The Bill complies with the Constitutional Court judgment in *New Nation Movement NPC & others v President of the Republic of South Africa & others* [2020] ZACC 11.

#### **8. INSTITUTIONS CONSULTED**

- (a) The Ministerial Advisory Committee, established by the Minister of Home Affairs, consulted, amongst others, with:
- (i) Political Parties (amongst others, ANC, ACDP, DA, EFF, ATM, COPE, FF+);
  - (ii) Civil Society Organisations (Activate Change Drivers, Corruption Watch, My Vote Counts, One South Africa Movement, Youth Lab, The 70's Group and iTrends);
  - (iii) Organised Labour (Business Unity South Africa);
  - (iv) Organised Business (Congress of South African Trade Unions and South African Federation of Trade Unions);
  - (v) the South African Council of Churches;
  - (vi) University of KwaZulu-Natal;
  - (vii) University of Johannesburg;
  - (viii) Helen Suzman Foundation;
  - (ix) Auwal Socio-Economic Research Institute; and
  - (x) Inclusivity Society Institute.
- (b) The Department further consulted with:
- (i) Forum of South African Directors-General;
  - (ii) Governance, State Capacity and Institutional Development Cluster of Directors-General; and
  - (iii) Justice, Crime Prevention and Security Cluster of Directors-General.

## 9. PARLIAMENTARY PROCEDURE

9.1 The Constitution prescribes the classification of Bills. The national legislative process regarding Bills is governed by sections 73 to 77 of the Constitution which prescribes the different procedures to be followed when enacting legislation. Four categories of Bills are distinguished: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). A Bill must be correctly classified otherwise it is constitutionally invalid.

9.2 The following relevant Constitutional Court judgment is essential to assist in the tagging of the Bill and the legal principles from this judgment are highlighted as follows:

9.2.1 In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, CCT100/09 [2010] ZACC 10 (“the Tongoane case”), the key issue concerned the proper classification of the Communal Land Rights Act, 2004 (Act No. 11 of 2004) (“CLARA”), which had been processed in terms of section 75. The test for tagging must be informed by its purpose and how the Bill must be considered by the provinces and in the National Council of Provinces. The more the Bill affects the interests, concerns and capabilities of the provinces, the more say the provinces should have on its content.

9.2.2 The legislative competence and the substance of the Bill must be considered when tagging a Bill. At paragraphs 70 and 72 of the Tongoane case, the Constitutional Court stated that:

*“... the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence. Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence.”*

9.2.3 The test for tagging must be informed by its purpose and how the Bill must be considered by the provinces and in the National Council of Provinces. At paragraph 60 of the Tongoane case, the Constitutional Court held that the more the Bill affects the interests, concerns and capabilities of the provinces, the more say the provinces should have on its content. Furthermore, at paragraph 72 of the Tongoane case, it was stated as follows:

*“To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a)–(f), over which the provinces have no legislative competence, as well as Bills, the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)–(f); and second by whether the provisions of a Bill in substantial measure fall within*

*a concurrent provincial legislative competence*". (Underlining is our emphasis)

- 9.2.4 The Constitutional Court rejected the "pith and substance" test and endorsed the substantial measure test instead. Ngcobo CJ held as follows:

*"[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill must be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content."*. (Underlining is our emphasis).

- 9.2.5 At paragraph 74 of the Tongoane case, the Constitutional Court then examined the CLARA to determine the extent to which its provisions regulated "indigenous law" and "traditional leadership", which are two clauses listed in Schedule 4 to the Constitution. The Constitutional Court held that any Bill whose provisions substantially affect the interests of provinces must be tagged as a section 76 Bill. This would include Bills over which provinces have concurrent jurisdiction and the Constitutional Court further stated the following:

*"[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.*

*[70] To apply the "pith and substance" test to the tagging question, therefore, undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) requires to be enacted in accordance with the section 76 procedure. It does this because it focuses on the substance of a Bill and treats provisions which fall outside its main substance as merely incidental to it and consequently irrelevant to tagging. In so doing, it ignores the impact of those provisions on the provinces. To ignore this impact is to ignore the role of the provinces in the enactment of legislation substantially affecting them. Therefore the test for determining how a Bill*



*is to be tagged must be broader than that for determining legislative competence.*” (Underlining is our emphasis).

- 9.3 The primary objective of the Bill is to provide for the inclusion of independent candidates to contest elections in the National Assembly and provincial legislatures.
- 9.4 The Department and the State Law Advisers noted that clauses in the Bill as introduced provided for matters that affect the provinces. By means of example, clause 31A(1) of the Bill, provided for the nomination of independent candidates and that 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 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.
- 9.5 Clause 31B provided for the requirements and qualifications for independent candidates to contest elections. Clause 31B(1) provided that a person may contest an election as an independent candidate only if that person is nominated on a prescribed form and that form is submitted to the Commission by a specific date and is accompanied by, among other requirements, a completed prescribed form, with at least the prescribed minimum number of signatures of voters whose names appear on the segment of the voters’ roll for the region or province in which the candidate is standing for election.
- 9.6 The Department and the State Law Advisers have considered all the provisions in the Bill in light of the Tongoane case, and found that the purpose and effect of the Bill in a substantial manner affects the interests, concerns and capacities of the provinces. The primary objective of the Bill is to provide for the inclusion of independent candidates to contest elections in the National Assembly and provincial legislatures.
- 9.7 The Department and the State Law Advisers were of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution, since the purpose and effect of the Bill in a substantial measure affects the interests, concerns and capacities of the provinces.
- 9.8 The Joint Tagging Mechanism officially classified the Bill to be dealt with in accordance with section 75 of the Constitution as it did not find any content that in a substantial measure affected provinces as per section 76 of the Constitution.
- 9.9 It is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leadership in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to customary law or customs of traditional communities.





Printed by Creda Communications

ISBN 978-1-4850-0818-7