

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CC Case Number: **CCT 110 / 19**

In the new matter between:

**THE SPEAKER OF THE NATIONAL ASSEMBLY  
CHAIRPERSON: NATIONAL COUNCIL OF PROVINCES**

First Applicant  
Second Applicant

and

**NEW NATION MOVEMENT NPC  
CHANTAL DAWN REVELL  
GRO  
INDIGENOUS FIRST NATION ADVOCACY SA PBO  
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA  
MINISTER OF HOME AFFAIRS  
THE INDEPENDENT ELECTORAL COMMISSION**

First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent  
Seventh Respondent

and

**COUNCIL FOR THE ADVANCEMENT OF THE  
SOUTH AFRICAN CONSTITUTION**

First Amicus Curiae

**ORGANISATION UNDOING TAX ABUSE**

Second Amicus Curiae

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**FIRST RESPONDENT'S WRITTEN SUBMISSIONS**

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- 1 This Court afforded Parliament two years to fix the Electoral Act.<sup>1</sup> Parliament will not meet the deadline.<sup>2</sup> It asks for a last-minute “lifeline”.<sup>3</sup>
- 2 The Speaker estimates that the Electoral Amendment Bill, 2021 will be passed in September 2022.<sup>4</sup> The Speaker confirms that there will be “no immediate consequence” if this Court’s declaration of invalidity comes into effect on 11 June 2022 before the Bill becomes law.<sup>5</sup> The Electoral Act will then be unconstitutional,<sup>6</sup> but the Bill will be in the pipeline.
- 3 So, Parliament does not ask for an extension of the suspension period to prevent some irreparable harm to innocent third parties, or to pre-emptively patch up a gap in the law. Rather, Parliament wants a permission slip to excuse its failure to comply with this Court’s order.
- 4 This Court should decline the invitation. For the most part, the Speaker blames, not explains. The Speaker argues that “in practice” the Executive introduces bills on “policy matters”.<sup>7</sup> The Minister of Home Affairs introduced the Bill in the National Assembly at the beginning of January 2022, which, according to the Speaker, did not leave Parliament enough time.

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<sup>1</sup> *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) at para 125.

<sup>2</sup> Speaker’s founding affidavit; para 10.

<sup>3</sup> *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at para 82.

<sup>4</sup> Speaker’s supplementary affidavit; para 25.

<sup>5</sup> Speaker’s written submissions; para 28.

<sup>6</sup> See para 4 of this Court’s order in *New Nation Movement* (note 1) (“It is declared that the Electoral Act 73 of 1998 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.”).

<sup>7</sup> Speaker’s written submissions; para 10.

- 5 The blame game is not good enough. The government “has the obligation to avoid” the “unfortunate consequence” of last-minute applications to extend suspended periods of invalidity.<sup>8</sup> It should give this Court a full and frank explanation of what needs to be done when indicating, for the first time, how much time it needs to fix a constitutionally defective statute. Parliament and the Minister failed to do so here, which is the only reason for this eleventh-hour request for more time.
- 6 The blame game is also wrong as a matter of law. Section 73 of the Constitution allows any “member or committee of the National Assembly” to introduce a bill.<sup>9</sup> While it might be good government practice for Parliament and the Executive to work together, there is no constitutional reason why Parliament had to wait for the Executive to introduce an amendment to the Electoral Act.
- 7 This Court’s power to extend a suspension should be “sparingly exercised.”<sup>10</sup> This Court should consider “the sufficiency of the explanation for failing to correct the defect within the period of suspension; the prejudice likely to be suffered if the suspension is not extended; the prospects of correcting the defect within the extended period; as well as the need to promote a functional and orderly state administration for the benefit of the general public.”<sup>11</sup>
- 8 Nothing about the Speaker’s explanation for the two-year delay was unforeseeable. The Speaker should have explained the several steps in the

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<sup>8</sup> *Ex parte Minister of Social Development* 2006 (4) SA 309 (CC) at para 52 (Ngcobo J, concurring).

<sup>9</sup> Section 55 of the Constitution makes similar provision for the National Assembly, whilst section 68 does so for the National Council of Provinces.

<sup>10</sup> *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* 2015 JDR 1198 (CC) at para 12. See also *Zondi v MEC Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) and *Electoral Commission of South Africa v Speaker of the National Assembly* [2018] ZACC 46.

<sup>11</sup> *Teddy Bear Clinic* (note 10) at para 12.

legislative process, and the “practice” of waiting for the Minister to initiate that process, when this Court determined the period of suspension in the first place.

- 9 When the explanation is placed in context, it is of an unacceptable kind.
- 10 In March 2021, the Minister of Home Affairs sent a letter to the chairperson of Parliament’s portfolio committee on Home Affairs.
  - 10.1 The letter refers to the Department of Home Affairs establishing an “advisory committee to assist in developing policy on the Electoral Act amendments”. The letter also notes that the Department was waiting for nominees to the committee from various entities.
  - 10.2 At the time this letter was written, it had already been 9 months since this Court delivered its judgment. More than a third of the way into the 24-month suspension period, Parliament and the Department were still trying to get an “advisory committee” off the ground.
- 11 It is not clear what transpired between June 2020 and October 2021. In October 2021, Ms Conradie (from the New Nation Movement’s attorneys, Maphalla Mokate Conradie Inc.) wrote to the Speaker.
- 12 The Speaker replied at the beginning of November.
  - 12.1 The Speaker noted that “*Parliament is aware*” of this Court’s judgment.
  - 12.2 The Speaker confirmed, as this Court’s judgment made clear, that the Electoral Act “needs to be corrected” by 10 June 2022.
  - 12.3 The Speaker reported on what steps Parliament had taken until that point:

*“Since the New Nation judgment, the Portfolio Committee on Home Affairs has been in constant dialogue with the Minister of Home Affairs and the*

*Department of Home Affairs on how they intend to address the judgment and steps they have taken to date with a view to introducing a draft Bill into Parliament. Various briefing meetings by the Minister of Home Affairs and the Independent Electoral Commission have been held with the Portfolio Committee on Home Affairs.*

*The latest correspondence received from the Minister of Home Affairs indicates that he is scheduled to brief Cabinet on the Ministerial Advisory report on 24 November 2021, after which the Minister will present an update to the Portfolio Committee on Home Affairs. From Parliament's side all is being done to meet the deadlines set by the Court."*

The Speaker's reply was light on detail. In particular, the Speaker said nothing about what Parliament had done since this Court delivered its judgment.

- 13 This Court's judgment requires Parliament to fix the Electoral Act. Section 73 of the Constitution allows any "member or committee of the National Assembly" to introduce a bill. So, too, does section 55. There is simply no excuse to have abdicated, and afterward, for Parliament to simply wash its hands of the matter.
- 14 A few days later, on 8 November 2021, New Nation Movement wrote another letter to the Speaker.
  - 14.1 The letter noted that the Speaker's reply shows that "no practical steps have been taken since the judgment was delivered". It was no use for Parliament to point out what others plan to do because "[t]he order did not direct the Minister of Home Affairs or the Independent Electoral Commission to pass any law." Rather, this Court's order "*instructed Parliament to pass legislative changes to cure the constitutional defects.*"

- 14.2 The letter also pointed out that the Speaker's reply "*says nothing about any draft Bill which is necessary to be published as part of any legislative change.*"
- 14.3 The letter called on Parliament to "*indicate precisely what steps are being taken, when the Bill will be published and how will Parliament ensure that the deadline of June 2022 is met.*"
- 15 The Speaker sent a terse reply on 10 November 2021. Regrettably, the Speaker did not, as was requested, "*indicate precisely what steps are being taken, when the Bill will be published and how will Parliament ensure that the deadline of June 2022 is met.*" Instead, the Speaker repeated empty assurances:
- "We wish to reassure you of Parliament's commitment to discharge its constitutional and legal obligations of this matter to the best of its abilities. We are in communication with the responsible Minister who is aware of the timelines and is in the process of finalizing the policy. We expect that a draft bill will be ready in due course."*
- 16 The Speaker did not even bother to put a time estimate to the boilerplate phrase "*in due course*".
- 17 This eleventh-hour request for more time provides ample reasons to be sceptical about the achievement of the amendment process in time for the next election in 2024. Last year, the Electoral Commission and the Executive forced eleventh-hour litigation in this Court about the local government elections (*Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* (CCT 245/21) [2021] ZACC 29).
- 18 New Nation Movement reasonably apprehends that similar brinkmanship is in store for the next national election, and this Court would be faced with an unenviable but avoidable choice:
- 18.1 either run the next election on the "old system" excluding independents despite its order; or

- 18.2 allow the beneficiaries of the “old system” that was found to be unconstitutional.
- 19 It is for this reason that we ask this Court to supervise any process which must be followed henceforth.
- 20 Far from being a “sparingly exercised” power,<sup>12</sup> extensions to suspension periods are becoming common on this Court’s roll. This Court has already rightly lamented the unnecessary strain of this type of avoidable urgent litigation.<sup>13</sup> The Speaker does not do enough to show why this is an exceptional case that warrants an extension of the suspension period. The Speaker’s application should be dismissed.
- 21 This Court should not stop there. Parliament and the Minister will not comply with this Court’s order and the June 2022 deadline. They are organs of state under a constitutional obligation to give effect to the right of independent candidates to contest the national election. They have failed that obligation. This Court should make a declaration to that effect.
- 22 In addition, if this Court grants Parliament an extension to the suspension period, it should supervise the process of the amendment to ensure there is compliance with its order. The supervision could take two forms.
- 22.1 First, this Court could direct a reading in order.
- 22.2 In the alternative, it could allow Parliament to effect the changes by a fresh deadline in September 2022 but keep a monitoring eye over the process. Whichever approach is taken, it would be intolerable to simply let Parliament go about these amendments as though it is business as usual.

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<sup>12</sup> *Teddy Bear Clinic* (note 10) at para 12.

<sup>13</sup> *Teddy Bear Clinic* (note 10) at para 15. See also *Ex parte Minister of Social Development* (note 8) at para 17.

- 23 The next national election is in 2024. Last year, eleventh-hour litigation forced this Court onto the frontlines of the local government elections.<sup>14</sup> The New Nation Movement reasonably apprehends that similar brinkmanship is in store for the next national election.
- 24 We have proposed a reading in order. If the Electoral Act is not amended in time, the reading-in order would kick in and the national election could proceed according to the Electoral Act as read with the reading-in order. Independent candidates would then still be able to participate in the national election even if there is another failure to amend the Electoral Act on time. And for its part, this Court could avoid being drawn into another round of undesirable last-minute election litigation.
- 25 A reading-in order would cause no harm to the separation of powers. Parliament would remain free to amend the Electoral Act. But a reading-in order is necessary to ensure that the right of independent candidates to participate in national and provincial elections is filibustered no more.
- 26 New Nation Movement accepts that the content of a reading-in order is not straightforward. This Court already tailored a way to decide difficult remedy questions: an *Allpay*-style hearing on remedy.<sup>15</sup>
- 27 If this Court grants an extension, it should direct the parties to file affidavits on an appropriate reading-in order that would take effect should the Bill not be enacted by the expiry of the extended deadline. This Court should also direct the parties to file written submissions and set this application down for another hearing on an appropriate reading-in order.<sup>16</sup>

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<sup>14</sup> *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* (CCT 245/21) [2021] ZACC 29.

<sup>15</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* 2014 (1) SA 604 (CC) at para 96.

<sup>16</sup> See *Allpay* (note 15) at para 98.



28 If an extension is granted without this Court's intervention in the form of a reading-in order, the unfortunate next chapter in this litigation is likely to be zero-sum urgent litigation on the eve of the 2024 election.

29 In the alternative, should Parliament be given the extension it seeks, it should be subject to the supervisory jurisdiction of this Court.

29.1 The failure to amend the Electoral Act on time, and Parliament's empty promise that it will do better next time, brings this case in line with *Black Sash Trust*.<sup>17</sup> This Court's words in *Black Sash Trust* could be written about this case: since this Court's order declaring the Electoral Act unconstitutional, "not much has changed, except that this time around the Minister [of Home Affairs] may have contributed to the continued recalcitrance."<sup>18</sup> And here too, "[a]ll this requires explanation and accountability."<sup>19</sup> Parliament's inability to amend the Act "compromise[s] the continued protection" of independent candidates' right to participate in the next national election.<sup>20</sup> This "justifies further court supervision."<sup>21</sup>

29.2 This Court should direct Parliament and the Minister to file reports on affidavit every month setting out how they plan to ensure that the Bill is passed by 30 September 2022, what steps have been taken that month, what further steps are planned for the following month, and when those steps will be taken.

This Court should also direct that if there is any material change to Parliament's estimate that the Bill will be passed by 30 September 2022, Parliament and the

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<sup>17</sup> *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC).

<sup>18</sup> *Black Sash Trust* (note 17) at para 57.

<sup>19</sup> *Black Sash Trust* (note 17) at para 58.

<sup>20</sup> *Black Sash Trust* (note 17) at para 62.

<sup>21</sup> *Black Sash Trust* (note 17) at para 62.

Minister are required to immediately report on affidavit to this Court and to explain the reason for and consequence of the change.<sup>22</sup>

**TEMBEKA NGCUKAITOBI SC**

**JASON MITCHELL**

**KAMEEL PREMHID**

Counsel for the New Nation Movement

\* May 2022

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<sup>22</sup> See, in this regard, the order granted in *Black Sash Trust*.