IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: **CCT144/23**

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC (Registration Number: 2021/616521/08)	Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

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APPLICANT'S PRACTICE NOTE

NATURE OF THE PROCEEDINGS

1. The Applicant seeks direct access to this Court as well as an order declaring Item 1 of Schedule 1A to the (amended) Electoral Act 73 of 1998 ("**the Act**"), unconstitutional and invalid to the extent that it provides for the elections by way of 200 regional seats for National Assembly (instead of 350) and 200

compensatory seats (instead of 50). As remedy, the Applicant seeks a reading-in so that there will be 350 regional seats and 50 compensatory seats.

ISSUES THAT WILL BE ARGUED

2. The Applicant shall address five issues:

2.1. Direct access;

2.2. Why the electoral system imposed by the Act (as amended) is unfair to independent candidates;

2.3. The fundamental rights violated by the Act (as amended);

2.4. The unsustainability of the Respondents' justifications for the 200/200 split imposed by the Act (as amended); and

2.5. The Applicant's proposed remedy.

RECORD

3. The following portions of the record must be read:

3.1. The Applicant's Notice of Motion and Founding Affidavit and annexures (1 – 117);

3.2. The Fifth Respondent's Explanatory Affidavit (132 – 211);

3.3. The Second and Third Respondents' Answering Affidavit and annexures (216 – 457 & 466 – 471);

3.4. The Fourth Respondent's Answering Affidavit and annexures (476 – 755) save that PAM1 (549 – 577) and PAM2 (578 – 728) are also annexed to the Second and Third Respondents' Answering Affidavit.

ORAL ARGUMENT

4. The Applicant estimates that oral argument will require ½ a day.

SUMMARY OF ARGUMENT

5. It is in the interests of justice that the Applicant be granted direct access to this Court: the application concerns legal issues of fundamental importance relating to the fairness of the 2024 elections and there is not enough time to first approach the High Court and thereafter to approach this Court to confirm any order of invalidity of the Act (as amended) before the 2024 elections.

6. Whilst the Act (as amended) makes provision for independent candidates to compete in national and provincial elections, Item 1 only allows independents to compete for the regional seats in section 1(a), *not* for the compensatory seats in section 1(b). The result of this is that the quota of votes that a political party must obtain to be allocated a compensatory seat is much lower than the quota of votes an independent must obtain to be allocated a regional seat, which violates *inter alia* the equality of the vote and equal opportunity to be elected. This is unconstitutional and irrational.

7. The Respondents' justifications for the 200/200 split are unsustainable. Expert evidence shows that here is only a low to moderate risk of overhang in one particular scenario and no risk of the outcome not being "*in general, proportionally representative*".

8. As a remedy the Applicant proposes that Item 1 of the Act (as amended) be amended to reduce the number of seats available in the regional elections to 350 and reduce the number seats available in the compensatory elections to 50, rendering the quota required by both independents and political parties to gain a seat more equal, whilst keeping the risk of overhang low.

9. The Applicant submits that this issue is not a policy choice which is solely within Parliament's prerogative. This issue concerns the right to vote and free and fair elections, over which this Court undoubtedly has oversight.

AUTHORITIES

The Applicant intends to refer to the following authorities in oral argument:

- ***Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others*** 2022 (5) BCLR 571 (CC)

- ***New Nation Movement NPC and Others v President of the Republic of South Africa and Others*** 2020 (6) SA 257 (CC)

- ***My Vote Counts NPC v Minister of Justice and Correctional Services*** 2018 (5) SA 380 (CC)

- ***Ramakatsa and Others v Magashule and Others*** 2013 (2) BCLR 202 (CC)

- ***August v Electoral Commission*** 1999 (3) SA 1 (CC)

- ***Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*** 2018 (5) SA 349 (CC)

- ***Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another*** 2023 (1) SA 1 (CC)

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18 August 2023

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APPLICANT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

A. INTRODUCTION

1. The Applicant, the Independent Candidate Association South Africa NPC ("**ICA**"), seeks an order which declares Item 1 of Schedule 1A to the Electoral Act 73 of 1998 ("**the Act**"), as amended by the Electoral Amendment Act 1 of 2023 ("**the Amendment Act**"), unconstitutional.

2. Item 1 allocates seats in the National Assembly ("**NA**") 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."* (own emphasis)

3. Whilst the Amendment Act makes provision for independent candidates ("**independents**") to compete in national and provincial elections, Item 1 only allows independents to compete for the regional seats in section 1(a), *not* for the compensatory seats in section 1(b). For the reasons explained below, this means that the quota for obtaining a compensatory seat is much lower than for a regional seat. This violates the equality of the vote. An independent needs to obtain 87%[1] more votes than a party to obtain a seat.

4. It is easy to rectify though. One simply needs to boost the number of seats available in the regional elections to 350 and reduce the number of seats available in the compensatory elections to 50. On the uncontested expert

[1] **Atkins Report** at p. 64, para 53. This is on average across the 9 regions and calculated with reference to the vote in the 2019 elections.

evidence, this will go a long way to equalise the vote[2] between the independents and the parties whilst not having any significant impact on proportional representation. The 200/200 split between regional elections and compensatory elections is the problem.

5. The First Respondent, the President of the Republic of South Africa ("**the President**"), has opposed this application,[3] but has failed to deliver an answering affidavit. The Second, Third and Fourth Respondents, the Speaker of the National Assembly ("**the Speaker**"), the Chairperson of the National Council of Provinces ("**the Chairperson**") and the Minister of Home Affairs ("**the Minister**") respectively, have also opposed this application.[4] The Fifth Respondent, the Independent Electoral Commission ("**IEC**"), has delivered a Notice of Intention to Abide by the decision of this Court.[5]

6. No political party registered for elections for the National Assembly, as cited as the Sixth Respondent, has entered an appearance in this application.

7. These heads of argument are structured as follows:

   7.1. **First**, we deal with the ICA's standing to bring this application;

   7.2. **Second**, we explain why this Court should grant the ICA direct access to this Court;

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[2] **Atkins Report** at Record pp. 67 – 68. If independents obtain 2% of the vote, it will reduce the extra votes that independents must get to 10% and if independents obtain 8% of the vote it will reduce the additional votes that independents must get to 7%, on average across the 9 regions.
[3] **President and Minister's Notice of Intention to Oppose** p. 123.
[4] **Speaker and Chairperson's Notice of Intention to Oppose** p. 118.
[5] **President's Notice of Intention to Abide** p. 126.

7.3. **Third**, we set out a brief background to the promulgation of the Amendment Act;

7.4. **Fourth**, we explain how the elections for the NA will work and why it is unfair to independents;

7.5. **Fifth**, we explain why the 200/200 split violates fundamental rights and other constitutional provisions;

7.6. **Sixth**, we explain why there is no justification for 200/200 split and the limitation of fundamental rights and other constitutional provisions; and

7.7. **Finally**, we deal with the ICA's suggested remedy and costs.

B. STANDING

8. The ICA represents and promotes the interests of independent candidates, including scrutinising legislation which affects independents. ICA's members and associates include 29 citizens who intend or are contemplating standing as independent candidates in the 2024 national and provincial elections ("**the 2024 elections**").[6]

[6] **Founding Affidavit** para 12.4, p. 19.

9. ICA made numerous submissions to Parliament regarding the defects in the Amendment Act and has actively participated in the consultation process regarding its adoption.[7]

10. In the circumstances, we submit that the ICA has the requisite standing to bring this application in terms of all of the categories under section 38 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"):

10.1. It is acting in its own interest because of its mission described above.

10.2. It is acting on behalf of another person who cannot act in their own name, namely citizens who wish to vote for an independent and cannot be expected to bring the challenge in their own names.

10.3. It is acting as a member of, or in the interest of, a group or class of persons, namely independents and citizens wishing to vote for independents.

10.4. It is acting in the public interest as it is of fundamental importance that the elections are constitutional.

10.5. It is an association acting in the interest of its members in that, if granted, this application will affect independents competing in the 2024 elections.[8]

[7] **Founding Affidavit** paras 12.1 – 12.2.9, pp. 18 – 19.
[8] **Founding Affidavit** paras 13 – 13.5 pp 23 – 24.

11. No opposing party has raised any objections to the ICA's standing to bring this application.[9]

C. DIRECT ACCESS

12. If one has regard to recent cases such as ***Moko v Acting Principal, Malusi Secondary School*** 2021 (3) SA 323 (CC) paras 16 – 19, the following factors are relevant in the present matter on the question of whether direct access should be granted:

12.1. The principle that an application for direct access to this Court is an extraordinary procedure that ought to be followed only in exceptional circumstances and that persuasive and compelling reasons are required before this Court will exercise its discretion to grant direct access.

12.2. For the existence of exceptional circumstances there must be sufficient urgency or public importance, and proof of prejudice to the ends of justice to justify such a procedure.

12.3. Other factors include the prospects of success and also whether this Court is called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other

[9] **Speaker and Chairperson's Answering Affidavit** para 83, p. 265; and **Minister's Answering Affidavit** para 203, p. 545.

courts having constitutional jurisdiction (i.e. sitting as a court of first and last instance).

12.4. A further relevant consideration to a grant of direct access is whether an applicant can show that they have exhausted all other remedies and procedures that are available to them.

13. We submit that it is in the interests of justice[10] that this Court grant the ICA direct access in this matter.

14. The main reasons for seeking direct access are that:

14.1. legal issues of fundamental importance relating to the fairness of the 2024 elections are raised;

14.2. the validity of Item 1 of Schedule 1A of the Amendment Act is challenged;

14.3. the challenge has reasonable prospects of success; and

14.4. there is simply not enough time to first approach the High Court for the relief sought and thereafter to seek confirmation of the order of invalidity, as required by section 172(2) of the Constitution.

[10] Constitutional Court Rule 18, read with section 167(6)(a) of the Constitution.

15. As far as the timeline is concerned:

15.1. The electoral system herein challenged is to be applied in the upcoming elections to be held – on the IEC's version – as early as 22 May 2024.[11]

15.2. The relief sought will have an effect on the number of independent candidates participating. According to the Minister, if the relief is granted it will increase the number of independents participating.[12] The outcome of the matter will certainly affect the choice of whether or not to run as an independent. A decision to compete as independent needs to be taken well in advance of the 2024 elections. Those deciding to stand as independents will have to undertake the process of obtaining the requisite amount of signatures in order to appear on the ballot.[13] It may impact on political parties, who will soon begin their election campaigns and the compilation of their regional candidate and compensatory party lists.[14] It will impact the IEC, which will need to adapt their Results System to accommodate any amended seat allocation model.[15] Accordingly, both the ICA and the IEC are in agreement that this application must be determined as soon as possible.[16]

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[11] **IEC's Answering Affidavit** para 46, p. 163.
[12] **Minister's Answering Affidavit** para 190.4, p. 541.
[13] **Founding Affidavit** para 61, p. 36.
[14] **IEC's Answering Affidavit** paras 49.1 – 49.2, p. 165.
[15] **IEC's Answering Affidavit** para 47.1, p. 164.
[16] **IEC's Answering Affidavit** para 50, p. 165.

16. As a result of the above, ICA could not have brought this application in the High Court before approaching this Court in order to confirm any order of invalidity obtained.

17. Also, this application may suitably be determined by this Court as:

17.1. This application *solely* concerns constitutional legal issues and whilst it would have been useful, it is not essential for this Court to obtain the views of the High Court (and thereafter the Supreme Court of Appeal) before this Court decides this matter.

17.2. There are no substantial factual disputes in this application. More particularly the mathematical calculations conducted by the ICA's expert, Michael Atkins, which are supported by two actuaries, are not seriously challenged.

17.3. The ICA has exhausted all other possibilities (making submissions to Parliament and its committees, petitioning the President, for instance) that were available to it before approaching this Court.[17]

18. No party has opposed the ICA's application for direct access to this Court. The Minister, in fact, supports the ICA's application for direct access.[18]

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[17] **Founding Affidavit** paras 12.2 – 12.4, pp. 18 – 19. Regarding the petition, see **Founding Affidavit** para 30 p. 29.
[18] **Minister's Answering Affidavit** paras 34 – 38, pp. 491 – 492.

19. Therefore, we respectfully submit that the ICA must be granted direct access to this Court.

D. BACKGROUND TO THE PROMULGATION OF THE AMENDMENT ACT

20. The background is set out in detail in ICA's founding affidavit;[19] Parliament's affidavit;[20] and the Minister's affidavit.[21] There are no material factual disputes regarding the background. We merely describe the main events.

21. On 11 June 2020 this Court in ***New Nation II***[22] declared the Act unconstitutional and invalid to the extent that it requires that adult citizens may be elected to the National Assembly only through their membership of political parties. This declaration of invalidity was suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.

22. In response to this judgment, the Minister established a Ministerial Advisory Committee on Electoral Reform ("**MAC**") which was tasked *inter alia* with developing policy options for an electoral system that addresses the defects in the Act.

23. On 9 June 2021 the MAC released its report. It could not reach a consensus: the majority of MAC voted in favour of a mixed-member model incorporating single-member constituencies and the minority of MAC favoured a "*slightly*

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[19] Record at p. 26ff.
[20] Record at p. 230ff.
[21] Record at p. 492ff.
[22] ***New Nation Movement NPC and Others v President of the Republic of South Africa and Others*** 2020 (6) SA 257 (CC).

modified" multi-member constituency. The Minister then directed a team of advocates to draft an electoral amendment bill giving effect to the "*minimalist option*" preferred by the minority of MAC.

24. Ultimately, several versions of the Bill were published for public comment. After having been granted various extensions by this Court, on 23 February 2023 the Electoral Amendment Bill was passed by both houses and sent to the President for assent. This version of the Bill became the Amendment Act which is challenged in these proceedings.

25. The President signed the Electoral Amendment Bill of 2022 into law on 17 April 2023.[23]

E. HOW THE ELECTORAL SYSTEM WILL WORK AND WHY IT IS UNFAIR TO INDEPENDENTS

26. The manner in which the allocation of seats under the Amendment Act will work is not controversial. It can be explained with reference to the relevant parts of the IEC's answering affidavit.

27. For the 200 regional seats:[24]

    27.1. IEC determines the number of seats per region with reference to the number of registered voters in the region.

[23] **Founding Affidavit** paras 21 – 31, pp. 26 – 20. These facts are not disputed by the Second, Third and Fifth Respondents (**Speaker and Chairperson's Answering Affidavit** paras 24 – 63, pp. 230 – 250; and **Minister's Answering Affidavit** paras 39 – 100 pp 492 – 509).
[24] **IEC's Explanatory Affidavit** para 15, p. 145ff.

27.2. Quota for a seat is determined by dividing the total number of valid votes in the region by the number of seats allocated to the region, plus one.

27.3. Divide the votes for each party or independent by the quota. This is the initial allocation.

27.4. Award unallocated seats on the largest remainder basis.

27.5. Independents can only qualify for one seat, if they qualify for more than one seat in a region, the other seat(s) are forfeited. If they qualify in more than one region they are awarded the seat where they received the highest proportion of the vote and the other seat(s) are forfeited.

27.6. Political parties get the aggregate of seats they obtained under quota and the largest remainder methods.

27.7. Provision is also made for forfeiture by independents (as above) or if a party list contains fewer names than the number of its provisional allocation.

28. For the 200 compensatory seats:[25]

28.1. A quota is determined by dividing the sum of the total number of valid votes cast in favour of parties in the regional election and the total

[25] **IEC's Explanatory Affidavit** para 16, p. 147ff.

number of valid votes cast in the compensatory elections by the total number of seats in the NA (400) minus the seats won by the independents in the regional election, plus one.

28.2. Divide the votes for each party (independents cannot compete) or independent by the quota.

28.3. Award unallocated seats on the largest remainder basis to a maximum of five seats, and thereafter on the highest average basis.

28.4. Deduct any regional seats which the party may have won in the regional elections.

28.5. Deal with forfeiture, if necessary.

29. The unfairness of the above to independents have been carefully analysed by Mr Michael Atkins in his report ("**the Atkins Report**"), as confirmed by two actuaries Messrs Johan Human and Lusani Mulaudzi. Before dealing with the findings it is important to point out at the outset that:

29.1. None of the calculations in the Atkins Report has been challenged, led alone challenged by experts in the field.

29.2. The IEC has annexed to its explanatory affidavit an undated report from Lynge and Rosen, titled "*Analysis of the Effects of the Electoral Amendment Bill*".[26] The Lynge Rosen Report deals with the

[26] Record at p. 171.

allegation that the Amendment Bill introduces additional disproportionality and thus violate section 46 of the Constitution. The Lynge Rosen Report concludes that the deviation from perfect proportionality never exceeds one seat[27] i.e. no party ever loses or gains more than one seat.[28] This does not deal with unfairness to independents.

29.3. The IEC itself did an exercise to determine whether the 350/50 split would result in fewer wasted votes and excess votes than the 200/200 split.[29] The methodology is difficult to understand and there appears to be calculation errors. Be that as it may, the conclusion is that in the 200/200 split 98.04% of the vote determines the outcome and under the 350/50 split, 97.94% of the vote determines the outcome. It is not clear what the relevance of this is. If anything it seems to support the ICA's case.

29.4. Then there are undated IEC submissions to the Select Committee which refers to models (which are not annexed),[30] that the Minister seeks to make something of.[31] As we explain below, these submissions and models have nothing to do with the ICA's case.

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[27] Record at p. 178.
[28] Record at p. 179.
[29] **IEC's Explanatory Affidavit** at para 43, p. 161ff.
[30] Record at p. 444.
[31] **Minister's Answering Affidavit** at para 70.12, p. 260.

30. We now turn to deal with the four main findings of the Atkins Report.

31. The first proposition in the Atkins Report is unremarkable. It shows, with reference to the votes cast in the 2019 election, that the regional quotas will be much higher than higher than an equivalent one-ballot quota from the compensatory elections.[32] This is common sense. The difference ranges from 107% higher (Gauteng) to 53% higher (Northern Cape). One average, the regional quotas are 87% higher than the compensatory ones.

32. The second proposition in the Atkins Report is equally uncontroversial. It is obvious that for every seat moved from the compensatory elections to the regional elections, the regional quota will be reduced. This is what the Atkins Report shows in the second part.[33] It shows that:

32.1. With reference to the 2019 election figures and assuming independents achieve 2% of the vote, then

32.1.1 on the 200/200 split the quota for regional seats is on average 91% higher than for compensatory seats, whereas

32.1.2 on the 350/50 split the quota for regional seats is on average only 10% higher than for compensatory seats.

[32] The technical basis on which the comparison is made is set out in the Atkins Report at Record pp. 63 – 64, paras 48 – 53.
[33] **Atkins Report**, Record at p. 67.

32.2. The same exercise conducted with reference to the 2014 election figures show the same result.

32.3. If independents achieve 8% of the vote (rather than 2%), the gap in the quotas between regional and compensatory reduces to 87% (200/200 split) and 7% (350/50 split).

33. The third proposition addressed in the Atkins Report is an assessment of the risk of overhang.[34] In this regard, the Atkins Report deals with the risk of overhang on the 350/50 split with reference to three categories of participants in the elections: (1) "*main parties*", which are those that achieved more than a single quota in 2014/2019; (2) "*minor parties*", which are those that achieved less than a single quota in 2014/2019; and the largest party (ANC). What is considered is the risk of overhang in favour of a party in the three categories (the last category has just one member) of one seat or more than one seat. The Atkins Report shows:

33.1. On the 2019 election data and the **main parties**: the highest risk of all the permutations is the 2,03% risk of overhang of one seat if independents win 1%. The risk for overhang of more than one seat in this category is 0.08%. The risk of overhang on all other permutations for members of this category are lower.

33.2. On the 2019 election data and the **minor parties**: the highest risk of all the permutations is the 6,88 % risk of overhang of one seat if

[34] **Atkins Report**, Record at p. 72.

independents win 1%. The risk for overhang of more than one seat in this category is 0%. The risk of overhang on all other permutations for members of this category are lower.

33.3. On the 2019 election data and the **largest party**: risk of overhang in favour is 0%.

33.4. On the 2014 election data and the **main parties**: the highest risk of all the permutations is the 0.93%% risk of overhang of one seat if independents win 1%. The risk for overhang of more than one seat in this category is 0%. The risk of overhang on all other permutations for members of this category are lower.

33.5. On the 2019 election data and the **minor parties**: the highest risk of all the permutations is the 15,08 % risk of overhang of one seat if independents win 1%. The risk for overhang of more than one seat in this category is 0%. The risk of overhang on all other permutations for members of this category are lower.

33.6. On the 2019 election data and the **largest party**: risk of overhang in favour is 0%.

34. This shows that, on the 350/50 split there is a low to moderate risk (15,08% maximum) of overhang in favour of a minor party of one seat. This means that one minor party may get a seat on this particular permutation which on proportional representation it should not get. There is no real risk of overhang of more than one seat. On the 200/200 split there is no real risk of overhang,

whether it be one or more seats in any of the categories or permutations.[35] Of course, the (very minor) reduction of risk comes at a very price to the equality of the vote and the equality of opportunity for candidates.

35. The fourth issue addressed in the Atkins Report is the effect on number of seats for parties and the independents if one reduces the number of compensatory seats from 200 to 50.[36] This shows what one would expect, namely that the seats of parties reduce proportionally and the seats for independents increase as the compensatory seats are reduced. But it will be noted that even at the 350/50 split the independents will still win less seats than the parties even the same (percentage) support levels. This however is not the subject of the present challenge. What is important is that, on the 350/50 split independents get much closer to the parties, in terms of number of seats for the same percentage of votes, than on the 200/200 split. Again, for the reasons already stated, it is obvious that this must be so.

F. FUNDAMENTAL RIGHTS VIOLATED BY AMENDMENT ACT

36. The ICA contends that the 200/200 split system is unconstitutional for the following reasons:[37]

    36.1. Firstly, it is irrational and inconsistent with the rule of law (section 1(c) of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"));

[35] Only 0,03% risk of overhang in favour of a minor party on the 2014 data if independents achieve 6%.
[36] **Atkins Report**, Record at p. 79.
[37] Paragraph 9.1 – 9.4 of the **Applicant's Founding Affidavit**, p. 16.

36.2. Secondly, it violates section 3(2)(a) of the Constitution which provides that "*all citizens are equally entitled to the rights, privileges and benefits of citizenship*";

36.3. Thirdly, it violates sections 9(1), the relevant parts of which provide that "*everyone has the right to equal benefit of the law*" insofar as it arbitrarily differentiates between independents and parties;[38]

36.4. Fourthly, it violates section 19(2) of the Constitution which provides that every citizen has the "*right to free, fair and regular elections*";

36.5. Fifthly, it violates section 19(3) of the Constitution, which provides that every adult citizen has the right "*to vote in elections*" and "*to stand for public office*" and should thus have an equal chance to being elected for public office.[39]

37. Ultimately, as explained by Jafta J and the majority in ***New Nation II***,[40] these rights and constitutional provisions are interconnected and inter-related.

38. All of the above challenges boil down to this:

38.1. Once independents may stand for elections to the NA, as this Court ruled in ***New Nation II***, is it then constitutionally permissible to adopt

[38] Para 48 of the **Founding Affidavit**, p. 33.
[39] Para 49 of the **Founding Affidavit**, p. 33.
[40] ***New Nation II*** at paras 142, 147 – 162

a system which requires independents to obtain significantly more votes than parties in order to secure a seat in the NA?

38.2. Is there not a concept entrenched in the Constitution such as that votes must carry the same weight and/or that candidates competing for the same legislature must have an equal opportunity to secure a seat?

38.3. If this is so, does it not follow that limitations on the equality of the vote or equality of the opportunity to stand for office may only be introduced for a legitimate purpose, such as to ensure overall proportionality of outcome and/or to protect against overhang?

38.4. Is it substantively and procedurally rational to introduce an amendment which fails meaningfully to give effect to section 19(3) and which is not reasonably capable of attaining the desired outcome[41] and in respect of which the inadequacies in the 200/200 split were highlighted during public participation processes but which were not addressed by the Parliamentary Committee?[42]

(i) Importance of the right to vote

39. The right to vote and stand for public office has a special relationship with the right to equality given our Apartheid past. As held in ***Ramakatsa***,[43] in the past,

[41] ***Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*** 2018 (5) SA 349 (CC).
[42] ***Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another*** 2023 (1) SA 1 (CC) para 52.
[43] ***Ramakatsa and Others v Magashule and Others*** 2013 (2) BCLR 202 (CC).

the majority of black people "*were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them.*"[44]

40. In ***August***,[45] Sachs J recognised the constitutional value of a vote for each and every citizen. He held:

> *"The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a* ***badge of dignity and of personhood****. Quite literally, it says that everybody counts".* (our emphasis)

41. More recently, in ***Electoral Commission***,[46] in determining whether the IEC could hold the local government elections outside of the timeframes stipulated by the Constitution, this Court said of the right to vote:

> *"As already indicated, this matter concerned this country's citizens' right to vote in a free and fair election for municipal councils. It is a right which the majority of the people of this country holds dear because for a long time it was denied to them. It is a right that the citizens get to exercise twice every five years in this country – once in respect of the national and provincial elections and once in respect of the local government election. That is, of course, unless there are by-elections or one or other election is challenged in court and it has to be re-run. The right to vote is a right that gives every citizen the opportunity to choose a government of his or her choice, be it a national, provincial or local government."*[47]

42. The superficial and apparent neutrality of the 200/200 split is not the end but the beginning of the enquiry. This Court explained, in ***New Nation II***, why it

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[44] Para 64.
[45] ***August v Electoral Commission*** 1999 (3) SA 1 (CC) para 17.
[46] ***Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others*** 2022 (5) BCLR 571 (CC).
[47] Para 40 of the judgment.

should be on guard as apparent neutrality may result in unconstitutional outcomes.[48] It is well-established that the commitment to substantive requires the Court to look past the apparent neutrality of legislation and consider the operation and real-life effect, and its impact on the fundamental rights in question.[49]

(ii) A vote means an equal vote

43. In this part we deal with the basic notion that a vote means an equal vote and an equal opportunity to run for office and we do so with reference to:

43.1. International instruments;

43.2. The jurisprudence in the United States;

43.3. The jurisprudence in Australia; and

43.4. The jurisprudence in Canada.

(a) International Instruments

44. Multiple international law instruments protect adult suffrage and many highlight, in particular, the requirement for equal suffrage:

44.1. The American Convention on Human Rights, art. 23(1)(b), stating that every citizen shall enjoy the right "*to vote and to be elected in*

[48] See para 19 of the **Judgment**: *"It is exactly because of that appearance of neutrality that we must avoid the conflict that otherwise results."*
[49] This test was adopted by this Court in ***New National Party v Government of the Republic of South Africa and Others*** 1999 (3) SA 191, at para 28.

genuine periodic elections, which shall be by universal and ***equal suffrage*** *and by secret ballot that guarantees the free expression of the will of the voters*";

44.2. The International Convention on the Elimination of all Forms of Racial Discrimination, art. 5(c), stating that signatories undertake to eliminate racial discrimination in enjoyment of rights "*to participate in elections, to vote and to stand for election-on the basis of universal and* ***equal suffrage****, to take part in the Government as well as in the conduct of public affairs at any level and* ***to have equal access to public service***";

44.3. The Convention on the Political Rights of Women, art. 1, states that "*[w]omen shall be entitled to vote in all elections on* ***equal terms*** *with men, without any discrimination*");

44.4. The African Charter on Human and Peoples' Rights, art. 13(1), provides that "*[e]very citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law*";

44.5. Protocol (No. 1) to the Convention for the Protection of Human Rights and Fundamental Freedoms, states signatories' obligation "*to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*";

44.6. Universal Declaration of Human Rights, art. 21, states that "*[e]veryone has the right to take part in the government of his country directly or through freely chosen representatives*".

45. Helpful guidance on the meaning of an equal vote can be gleaned from the United Nations Human Rights Committee's commentary on Article 25 of the International Covenant on Civil and Political Rights.[50] There it is explained what equality of the right to vote means:

> *"21. Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors.* ***The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another****. The drawing of electoral boundaries and* ***the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely****."*

46. This is also confirmed by the European Commission For Democracy Through Law (Venice Commission) which adopted a Code Of Good Practice In Electoral Matters: Guidelines And Explanatory Report.[51] It states:

> *"2. Equal suffrage This entails:*
>
> *2.1. Equal voting rights:* ***each voter has in principle one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes****.*

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[50] The United Nations Human Rights Committee General Comment on Article 25 (available at https://www.ohchr.org/en/hrbodies/pages/tbgeneralcomments.aspx).

[51] https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Code_conduite_PREMS%2002611 5%20GBR.pdf

*2.2. Equal **voting power: seats must be evenly distributed** between the constituencies.*

i. This must at least apply to elections to lower houses of parliament and regional and local elections:

ii. It entails a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged. iii. The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration.

iv. The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity)

*v. **In order to guarantee equal voting power, the distribution of seats must be reviewed at least every ten years, preferably outside election periods**."*

(b) The United States of America

47. In the United States the issue of the weighting of votes has arisen principally in the context of the effective dilution of the power of that vote through the manner in which district lines are drawn.

48. The principle that votes must have equal weight was recognised in ***Gray v Sanders***, 372 U.S. 368 (1963).[52] There, the majority of the US Supreme Court stated:

> *"How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area, or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is*

[52] 9 L ed 2d 821.

> *designated, all who participate in the election are to have an equal vote -- whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.* ***This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters, but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State when he casts his ballot in favor of one of several competing candidates underlies many of our decisions."*** [53]

49. Also useful, is the following passage from the minority judgment:

> *"In the context of a nominating primary respecting candidates for statewide office, the Court construes the Equal Protection Clause of the Fourteenth Amendment as requiring* ***that each person's vote be given equal weight****. The majority says:*
>
> > ***"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote."*** [54]

50. Then followed ***Reynolds v Sims***, 377 U.S. 533 (1964),[55] which is a landmark case in which the Court ruled that the electoral districts of state legislative chambers must be roughly equal in population. The Court held that the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government and the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[56]

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[53] Pp. 829 – 830.
[54] P 832.
[55] 12 L ed 2d 506.
[56] Pp 554 – 555.

(c) Australian jurisprudence

51. The general principle is that some disparity in voting power will be permitted, within relatively narrow bands. The permissible extent of such deviation has been dealt with in caselaw. In ***McGinty***,[57] the High Court of Australia, expressed this principle in the following terms:

> *"It is no doubt true that something approaching* ***numerical equality of electors within electorates is an important factor****, together with much else, in the attainment of what many will regard as representative democracy in its purest form, just as adult suffrage, free of discrimination on the grounds of race, sex, property or educational qualification will likewise aid in its attainment.* ***But neither of these in absolute form is necessarily imported into the Constitution by the selection of representative democracy as the chosen mode of government for the nation****.*
>
> *The plaintiffs submit that both the Commonwealth Constitution and the Western Australian Constitution incorporate representative democracy as the central principle of government. They challenge the proposition, accepted in McKinlay,* ***that an equality of voting power*** *among the electors possessing the franchise is not mandated by the Commonwealth Constitution. Western Australia, on the other hand, submits that neither the Commonwealth Constitution nor the Constitution of Western Australia requires equality of voting power. Western Australia points out that an electoral system may give effect to the political will of the overall majority of voters although there be a disparity in voting power as between the voters in some districts or regions and the voters in other districts or regions, that representation of minority groups or adequate representation of geographical districts in the Parliament might be secured only, or more efficiently,* ***by allowing a disparity of voting power and that some disparity may assist in the formation of stable political institutions (both legislative and executive****). These points may be well taken, although the argument focuses on the political results that can follow an unequal distribution of voting power rather than on an equality of voting power possessed by each holder of the franchise. The question whether differences in voting power can be justified by*

[57] ***McGinty v Western Australia*** [1996] HCA 48; (1996) 186 CLR 140 (28 March 1996).

distinctions based on political opinion, minority interests or geographical residence does not admit of a definitive answer."[58]

(d) Canadian jurisprudence

52. The principle of equality of the vote was also explained by the Saskatchewan Court of Appeal [59] in these terms:

> *"D. Equality Of Voting Power*
>
> *[33] As the ideas of freedom and democracy are inextricably linked, so too are the ideas of equality and democracy. Notionally, no person's portion of sovereign power exceeds that of another. And so we speak of "**one person - one vote", and so it is that the idea of equality is inherent in the right to vote: Dixon** (supra) 247 [59 D.L.R.]*
>
> *"E. Deviation From Equal Voting Power*
>
> *[43] While some deviation is obviously permissible, there remain, however, certain basic principles inherent in the Charter right to vote, principles which must ultimately guide a Legislature in determining electoral constituency boundaries.*
>
> *[44] What must provincial electoral systems strive to achieve to give full effect to this Charter right? In our opinion they must strive to make each citizen's portion of sovereign power equal. As we said earlier, if constituencies of **widely unequal voting population elect an equal number of representatives, the voting power of each citizen voter in the larger constituencies is debased**, and the citizens in those constituencies have a lesser share of representation than do those in the smaller constituencies.*
>
> *[47] We are of the view therefore, that while some deviation from the concept of equal representation is inherent, any such deviation must interfere as little as possible with the controlling principle of "one person-one vote", subject that is, to such noninherent limitations as may be justified under s. 1 of the Charter, which will be discussed later."*

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[58] Paras 8-9.

[59] ***Reference re Prov. Electoral Boundaries (Sask.)*** [1991] 2 SCR 158.

53. These principles confirm the general principle that votes should have an equal voting power and it follows that candidates should have equal opportunity to be elected, but that a departure from strict equality is permissible within a narrow band.

(e) Conclusion

54. It is submitted that the group of interconnected fundamental rights relied upon by the ICA includes the right to an equal vote and an equal opportunity to be elected to office. Those rights are infringed (limited) by Item 1 of Schedule 1A to the Electoral Act (as amended). The next question is whether the limitation of the cluster of rights are justified.

G. LIMITATION OR JUSTIFICATION FOR THE 200/200 SPLIT

(i) Defence and policy choices

55. It is submitted that this Court should not defer to Parliament's choice of the 200/200 split as a "*policy decision*".

56. It is stated in the founding affidavit that:

> *"… it is central to the ICA's case that legislation which deals with the formation of the citizens' will, i.e. how the representatives are to be elected in order to represent the citizens' will, must be subjected to strict scrutiny. There is no room for deference here or any "counter-majoritarian" dilemma here. The Court is called upon to scrutinise whether the electoral system fairly selects candidates for purposes of*

> *representative democracy. If it does not, then the majority has no legitimacy to govern.*[60]

57. The role of the right to vote in determining who should exercise political power, makes the right to vote worthy of particular scrutiny by a court to ensure that fair participation in the political process is afforded.

58. In ***Kramer v Union Free School District No 15 395*** US 621 (1969), [61] the Court held with ***Williams v Rhodes****,* 393 U. S. 23, 393 U.S. 30 (1968)[62] that we must give the statute a close and exacting examination because *"[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."*[63]

59. Thus, the Court held that state apportionment statutes, which may dilute the effectiveness of some citizens' votes, must receive close scrutiny. No less rigid an examination is applicable to statutes denying the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some *bona fide* residents of requisite age and citizenship

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[60] **Founding Affidavit** at para 45, p. 33.
[61] 23 L ed 2d 583.
[62] 21 L Ed 24.
[63] P.626

and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.[64]

60. The Court went on to hold that, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "*rational basis*" for the distinctions made are not applicable

61. In the circumstances it is not appropriate, as contended by Parliament, that there are policy choices to be made[65] and that the split between regional and compensator seats was ultimately a policy decision.[66] Deciding on the weight of votes for independents and parties is not a policy choice.

(ii) Limitations clause

62. It is submitted that it is not necessary in the present matter to conduct a separate analysis of each subsection of section 36(1) of the Constitution.[67]

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[64] P.627.
[65] **Speaker and Chairperson's Answering Affidavit** at para 5, p. 221; para 12 at p. 223; para 21.1 at p. 228.
[66] **Speaker and Chairperson's Answering Affidavit** at para 50.11, p. 246.
[67] For a recent analysis of the subsections, see ***Nandutu and Others v Minister of Home Affairs and Others*** 2019 (5) SA 325 (CC).

Justification under section 36(1) has not been pleaded. The position is akin to that which prevailed in ***New Nation II*** where the Court held that the state respondents on whom the onus rested have failed to proffer justification for the limitation.[68]

63. We nevertheless deal with the justifications offered by the IEC, Parliament and the Minister separately below, in the event that it is contended that there are inherent limitations applicable to the cluster of fundamental rights relied upon or that there should be a balancing of those rights against section 46 (1) (d) of the Constitution, which requires an electoral system for the NA that results, in general, in proportional representation;

(iii) IEC justification

64. The IEC offers one justification, and one justification only, for the 200/200 split. This is clear from the following passages of the explanatory affidavit filed on behalf of the IEC.

64.1. The IEC claims that the split is necessary to deal with "*the problem of overhang seats and its implications for the requirement of proportional representation in the NA*".[69]

64.2. The IEC contends, further, that "*a critical benefit of the 200/200 allocation is the achievement of proportional representation as*

[68] ***New Nation II*** at para 119.
[69] **IEC's Explanatory Affidavit** at para 8.2, p. 139.

between the represented political parties at a national level, without any risk of overhang".[70]

64.3. Overhang, according to the IEC, is an avoidable deviation of proportionality.[71]

64.4. The IEC contends that the risk of overhang poses a particularly serious problem in the NA elections as the total number of seats are capped and the IEC will have no means of correcting a problem in the allocation of seats if overhang occurs.[72]

64.5. The IEC contends that the lowering of the seats to 350 may improve the prospects of independent candidates, but that will be at a foreseeable risk of overhang and the IEC not being able to declare the result of an election.[73]

65. As stated above, the IEC has provided no expert evidence to this Court to counter the analysis and conclusions in the Atkins Report.

66. The Atkins Report explains that the risk of overhang is low to moderate in one scenario only. There is a risk of between 6.88% –15.08% that one minor party may gain one additional seat if independents obtain 1% of the vote.

[70] **IEC's Explanatory Affidavit** at para 20, p. 150.
[71] **IEC's Explanatory Affidavit** at para 33.1, p. 154.
[72] **IEC's Explanatory Affidavit** at paras 33.2 and 33.3, p. 155.
[73] **IEC's Explanatory Affidavit** at para 35, p. 155.

67. Is this an unacceptable risk given the benefit it brings of equalising the vote between parties and independents?

68. It is submitted not.

69. Firstly, the IEC's own report, authored by Lynge and Rosen accepts such a 1-seat deviation as within the bounds of "*in general, proportional representation*".

70. Secondly, the deviation from perfect proportionality is certainly justifiable given the significant improvement of the equality of the vote which will result therefrom.

71. Thirdly, to the extent that this is an "*avoidable*" deviation from proportionality, it is fully justified in order to ameliorate the violation of equality of the vote.

(iv) Parliament's Justification

72. The position in respect of Parliament is somewhat different. The reason for this is that:

72.1. Parliament was advised that the nature of the split (200/200 or 350/50 or any other split) is "*ultimately a policy question*".[74]

72.2. Parliament was advised, further, that the exact proportion of how many seats should be used to achieve overall proportionality (the compensatory seats) and how many should be available to be

[74] **Legal Opinion** at paras 84 – 86, pp. 398 – 399.

contested by independent candidates and political parties (regional seats) "*is something that is pre-eminently that Parliament must decide*".[75]

73. This is a view which remains Parliament's primary defence of the 200/200 split. It is, for instance, stated in the answering affidavit that: "*According to Council, this [the split] was ultimately a policy decision and the Bill follows the proposal in the minimalist option presented by the MAC*".[76]

74. The belief that it had a policy choice regarding the split meant that Parliament never considered the impact of the split on the equality of the vote. It never obtained expert scientific advice on issues such as overhang risk and so on.

75. It is against this background that Parliament's 12 reasons for giving independents the right to compete only in respect of the 200 regional seats must be assessed.[77] The justifications that it comes up now are *ex post facto* ones. We nevertheless deal with each of these briefly:

75.1. Parliament says: independents may only obtain a single seat.[78] The ICA response is that this has nothing to do with the matter. To the extent that there may be additional wasted votes or excess votes, it has no bearing on the ICA's case.

[75] **Legal Opinion** at para 16, p. 405.
[76] **Parliament's Answering Affidavit** at para 50.11, p. 246.
[77] **Parliament's Answering Affidavit** at para 70, pp. 254 – 267.
[78] **Parliament's Answering Affidavit** at para 70.1, p. 254.

75.2. Parliament says: the quotas are the same for regional elections.[79] The ICA's response is that this is not disputed. It is the allocation of compensatory seats which lower the overall quota for the parties.

75.3. Parliament says: independents may not obtain compensatory seats.[80] The ICA's response is that it is not contended that independents must be given compensatory seats. The compensatory seats should however be kept to a minimum so as not to disturb the equality of the vote.

75.4. Parliament says: a key objective of the 200/200 split is to ensure that a distortion of proportionality can be corrected.[81] The ICA's response is that this can be achieved by the 350/50 split as well.

75.5. Parliament says: the 200/200 split achieves proportional representation without any risk of overhang.[82] We dealt with the issue of overhang above. The (very small) additional risk is justifiable given the restoration of equality of the vote through the 350/50 split.

75.6. Parliament says: an increase in the number of independents may result in a deviation of overall proportionality.[83] The ICA's response is that it was carefully explained in the Atkins Report that overall proportionality is <u>not</u> disturbed by the 350/50 split.

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[79] **Parliament's Answering Affidavit** at para 70.2, p. 254.
[80] **Parliament's Answering Affidavit** at para 70.3, p. 255.
[81] **Parliament's Answering Affidavit** at para 70.4, p. 255.
[82] **Parliament's Answering Affidavit** at para 70.5, p. 256.
[83] **Parliament's Answering Affidavit** at para 70.6, p. 256.

75.7. Parliament says: the Atkins model carries the risk of overhang.[84] This was dealt with above.

75.8. Parliament says: the IEC explained through expert input that the Amendment Act does not introduce additional disproportionality and that the deviation never exceeds one seat.[85] The ICA's response is that this supports the ICA argument.

75.9. Parliament says: the electoral formula contains a predisposition towards parties with larger vote shares which serves a legitimate government objective, which is to ensure a proportional representation electoral system, in general.[86] The ICA's response is that this has absolutely nothing to do with the ICA's case.

75.10. Parliament says: a similar approach is followed in respect of election of councillors to a metropolitan and local municipality.[87] The ICA's response is that the position at local government level is very different because the elections in the wards take place on the first-past-the-post method and this causes major deviations from proportionality which then needs to be corrected by a much higher percentage of compensatory seats. Having said that, the constitutional validity of the system adopted at local government level is not before this Court and is not dealt with in the Atkins Report. It may be that less than 50% of the seats is needed to be reserved in

[84] **Parliament's Answering Affidavit** at para 70.7, p. 257.
[85] **Parliament's Answering Affidavit** at para 70.8, p. 257.
[86] **Parliament's Answering Affidavit** at para 70.9, p. 258.
[87] **Parliament's Answering Affidavit** at para 70.10, p. 258.

some wards to restore proportionality, but it may also be that more than 50% is necessary at the local government level in some wards That local government electoral system can simply not be compared with the one at national (and provincial) level.

75.11. Parliament says: there is no perfect system that would perfectly align with the imperatives of this Court's judgment in ***New Nation II*** as well as section 46(1)(d) of the Constitution.[88] The ICA's response is that, to the extent that it is suggested that trade-offs and balancing of interest may be necessary, this is accepted and exactly what the IEC proposes.

75.12. Parliament places reliance is placed on an undated IEC submission annexed as **"PA10"** to Parliament's affidavit.[89] The ICA's response is that although the IEC's submission deals with comments from Mr Atkins to the NCOP,[90] these comments have little if anything to do with the analysis and conclusions contained in the Atkins Report relied upon in this matter by the ICA.

(v) Minister of Home Affairs justification

76. The Minister associates himself with the defences set out above raised by the IEC and Parliament. We shall not repeat those here and the ICA's response thereto. We only deal with new issues raised by the Minister hereunder.

[88] **Parliament's Answering Affidavit** at para 70.11, p. 258.
[89] **Parliament's Answering Affidavit** at para 70.12, pp. 258 – 260.
[90] Record at para 6, p. 451.

77. The first of these is that the Minister contends that the IEC disputes the analysis in section F of the Atkins Report and that the projected quota for compensatory seats will be much higher than the quota in the Atkins Report and that it would be "*actually in the mid eighty thousand and higher than most regional quotas*".[91] The ICA's response is that there is absolutely no factual or mathematical basis for this contention. As we explained above, the compensatory seats' quota is determined with reference to all 400 seats (minus those won by the independents in the regional elections) and obviously will be lower than the regional quotas.

78. The second is that the Minister contends that although the exact impact of changing the 200/200 split to 350/50 split is not clear, it is likely that it will result in an increase in the number of independent candidates. This, the Minister contends:

78.1. Will lead to further deviations from overall proportionality and make ballot papers longer.[92]

78.2. Impact on the IEC's ability to count and declare an election "*swiftly*".

78.3. Adversely impact on voter participation since voting will take longer and voters may also be confused about identifying their candidate or the party they seek to support.[93]

[91] **Minister's Answering Affidavit** at para 129, p. 515.
[92] **Minister's Answering Affidavit** at paras 190.4 – 190.7, pp. 541 – 542.
[93] **Minister's Answering Affidavit** at para 190.7, p. 542.

78.4. Materially increase the time it takes to count ballots as counting officers and counters would have to check longer ballot papers.[94]

78.5. Result in a situation where more counting officers and counters would need to be employed to do this work.[95]

79. It is not clear why the Minister is raising these issues. Practical difficulties are for the IEC to raise. The IEC is running the elections and not f the Minister.

80. The above are the kind of objection that was raised in ***August***. There it was contended that the logistical exercise of providing a vote for prisoner would be enormously costly and time consuming.[96] These were ultimately dismissed on the basis that they were not insuperable.[97] The same applies here. The fact of the matter is that the difficulties are not impossible to overcome. This Court rejected reliance on practical difficulties associated with the accommodation of voting rights which fell short of objective impossibility.[98]

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[94] **Minister's Answering Affidavit** at para 190.10, p. 542.
[95] **Minister's Answering Affidavit** at para 190.10, p. 542.
[96] ***August*** at para 13
[97] ***August*** at para 13
[98] In ***Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others*** (CCT 245/21) [2021] ZACC 29; 2022 (5) BCLR 571 (CC) (3 September 2021), the IEC approached the Constitutional Court based on practical difficulties presented by holding the local government election because by COVID-19. The Court rejected reliance on practical difficulties which fell short of objective impossibility. See for example, para 200 below:

> *"[200] This case, I must emphasise, does not present a situation of objective practical impossibility. It is difficult to postulate plausible circumstances in which it would be practically impossible for the Commission to hold elections on a nationwide basis. Examples at a local level can more readily be envisaged, for example localised flooding on election day or the destruction of voting materials at a voting station by a disgruntled mob. Conceivably in such a case, section 25 of the Municipal Structures Act might authorise the holding of a by-election because of a failure by the Commission to declare the election results for that council or ward within the period specified in the EC Act, but it is unnecessary to decide the precise legal basis on which a later election would be permissible. In the case of objective impossibility, the election would not take place on the scheduled date, and practically speaking it is difficult to imagine that anybody would object to its being held at a later time."*

H. REMEDY

81. To begin with, this Court must declare Item 1 of Schedule 1A to be inconsistent with the Constitution and invalid to the extent that it provides for 200 seats to be allocated from regional lists and 200 seats to be allocated from national lists. If the 200/200 split is unconstitutional then this Court is obliged, by virtue of section 172(1)(a), to declare the legislative provision invalid to the extent of inconsistency.

82. The remedy in the notice of motion is a combination of a striking down and reading-in, which will result in Item 1 being changed as follows:

> *"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~~ **350 of** 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*

In ***My Vote Counts NPC v Minister of Justice and Correctional Services*** 2018 (5) SA 380 (CC) the Constitutional Court found the Electoral Act constitutionally deficient for failure to provide for recordal, preservation and disclosure of information on private funding of political parties and independent candidates. The Court pointed out that the right - which must be facilitated by legislative enactment - had not fully been given effect to in the statute. But the existence of "whatever logistical constraint might exists", as the Court observed, did not mean the right was not available to be enjoyed.

> *"[29] [Section 19] addresses the fundamental right every adult citizen has 'to stand for public office and, if elected, to hold office'. Our Constitution does not itself limit the enjoyment of this right to local government elections. The right to stand for public office is tied up to the right to 'vote in elections for any legislative body' that is constitutionally established, meaning every adult citizen may in terms of the Constitution stand as an independent candidate to be elected to municipalities, provincial legislatures or the National Assembly. The enjoyment of this right is not and has not been proscribed by the Constitution. It is just not facilitated by legislation. But that does not mean that the right is not available to be enjoyed by whoever might have lost confidence in political parties. It does, in my view, remain open to be exercised whenever so desired, regardless of whatever logistical constraints might exist."*

(b) ~~*half*~~ ***50 of*** *the seats are filled by candidates from lists of candidates of parties and these shall be referred to as compensatory seats."*

83. This is the primary remedy sought.

84. ICA recognise however that this Court may find that it should ultimately be left up to Parliament to rectify the constitutional defect. In such an instance, the declaration of invalidity should be suspended for a period of 36 months in order for Parliament to address the defects. This is a long period but it must be borne in mind that the correction may be coupled with an overhaul of the electoral system as a whole to provide, for instance, for constituencies.

85. The suspended order of invalidity, on its own, would not be effective relief for ICA. For this reason the Court should order, in addition, that the above striking-out and reading-in should apply to the 2024 national elections for the NA.

86. As far as costs are concerned, ***Biowatch Trust v Registrar, Genetic Resources, and Others*** 2009 (6) SA 232 (CC) applies.

I. CONCLUSION

87. For all the above reasons it is submitted that direct access should be granted and that the application should succeed for either the main or the alternative relief and that the ICA should be awarded its costs, including the cost of three counsel.

T G MADONSELA SC

H J DE WAAL SC

T PALMER

YS NTLOKO

C LOUIS

Applicant’s counsel

18 August 2023

LIST OF AUTHORITIES

South African case law

1. ***Moko v Acting Principal, Malusi Secondary School*** 2021 (3) SA 323 (CC)

2. ***New Nation Movement NPC and Others v President of the Republic of South Africa and Others*** 2020 (6) SA 257 (CC)

3. ***Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*** 2018 (5) SA 349 (CC)

4. ***Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another*** 2023 (1) SA 1 (CC)

5. ***Ramakatsa and Others v Magashule and Others*** 2013 (2) BCLR 202 (CC)

6. ***August v Electoral Commission*** 1999 (3) SA 1 (CC)

7. ***Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others*** 2022 (5) BCLR 571 (CC)

8. ***New National Party v Government of the Republic of South Africa and Others*** 1999 (3) SA 191

9. ***Nandutu and Others v Minister of Home Affairs and Others*** 2019 (5) SA 325 (CC)

10. ***My Vote Counts NPC v Minister of Justice and Correctional Services*** 2018 (5) SA 380 (CC)

11. ***Biowatch Trust v Registrar, Genetic Resources, and Others*** 2009 (6) SA 232 (CC)

Foreign case law

12. ***Gray v Sanders***, 372 U.S. 368 (1963)

13. ***Reynolds v Sims***, 377 U.S. 533 (1964)

14. ***McGinty v Western Australia*** [1996] HCA 48; (1996) 186 CLR 140 (28 March 1996)

15. ***Reference re Prov. Electoral Boundaries (Sask.)*** [1991] 2 SCR 158.

16. ***Kramer v Union Free School District No 15 395*** US 621 (1969)

17. ***Williams v Rhodes,*** 393 U. S. 23, 393 U.S. 30 (1968)

18. ***Avery v Midland County***, 390 U.S. 474 (1968)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

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SECOND AND THIRD RESPONDENTS' ("PARLIAMENT")

PRACTICE NOTE

NATURE OF THE PROCEEDINGS

1. The applicant, Independent Candidate Association South Africa ("**ICA**"), has brought an urgent application for direct access.

2. This application seeks to engage the jurisdiction of this Court in order to declare Item 1 of Schedule 1A of the Electoral Act No 73 of 1998 ("**the Electoral Act**") to be "*inconsistent with sections 1(c); 3(2)(a); 9(1); 19(2); 19(3) and 46(1)(d) of the*

Constitution to the extent that it provides for 200 seats in the National Assembly to be allocated from regional lists and 200 seats to be allocated from national lists."

THE ISSUES THAT WILL BE ARGUED

2. Parliament will present argument on the following: (a) a brief overview of the electoral system with reference to the constitutional imperatives sought to be achieved; (b) an explanation of the complexity of the issues presented by the amendments to the Electoral Act as well as the caution and thoroughness exercised by Parliament in the process that it followed; (c) an explanation for the underlying rationale for the 200/200 split between regional and compensatory seats; (d) that there is no infringement of rights or irrationality occasioned by the impugned amendments; and (e) explain why the ICA's proposed remedy is unsustainable.

3. In essence, Parliament will argue that the ICA seeks to have this Court determine the appropriate number of regional and compensatory seats in the National Assembly. This is an exercise that this Court must engage in, in order to determine whether the current split yields an unconstitutionality in the terms contended for. This ambitious relief, clothed as a rights infringement and rationality challenge, is sought notwithstanding the constitutional role given to Parliament, the complexity of the issues presented, the Respondents' carefully reasoned views for the 200/200 split between regional and compensatory seats and the clear absence of any basis having been shown for irrationality and/or a rights infringement.

THE PORTION OF THE RECORD THAT SHOULD BE READ

3. The notice of motion, founding affidavit and annexures (1 – 117);

4. The fifth respondent's explanatory affidavit (132 - 211);

5. The second and third respondents' answering affidavit and annexures (216 – 457 & 466 - 471);

6. The fourth respondent's answering affidavit and annexures (476 - 755) save for the (549 – 577 and 578 - 728), which are already annexed to the second and third respondents answering affidavits.

7. The heads of argument filed in this matter.

AN ESTIMATE OF THE DURATION OF ORAL ARGUMENT

9. Parliament will require 1 hour.

A SUMMARY OF THE ARGUMENT

10. Parliament does not oppose direct access and urgency.

11. As regards the merits, Parliament will argue:

    11.1. While it accepts that this Court can and must engage with the challenge to the constitutionality of the impugned provisions, the key question is the threshold that it applies in doing so. In identifying and applying this threshold, this Court will be guided by its jurisprudence. In this regard, reference will be made to case-law in respect of: (a) the wide remit given by the Constitution to Parliament to enact an electoral system; and (b) deference and appropriate respect.

11.2. In making these arguments, Parliament accepts that legislative choices must be rationally related to a legitimate government purpose in that they must not be arbitrary or capricious and must not infringe rights.

11.3. As independent candidates can, by definition, only ever hold one seat, by having independent candidates compete in the election, there is a risk that proportional representation will be distorted. The rationale for the 200/200 split between regional and compensatory seats is that the 200 compensatory seats are designed to achieve proportionality. According to the IEC, a critical benefit of the 200/200 seat allocation is the achievement of proportional representation as between represented political parties at a national level without any risk of overhang.

11.4. Overhang is when more seats are required to be allocated to restore proportionality as between the represented parties after the allocation of the regional (or constituency) votes than are available in the legislature. Parliament has explained that overhang is a very important issue that has the potential to fundamentally skew proportional representation and if an overhang does occur, it seriously jeopardises a system of proportional representation (in general).

11.5. On the evidence in this matter: (a) it is common cause that there is no risk of overhang on a 200/200 split; (b) there is a risk of overhang on the alternative proposal made by the ICA – this is confirmed by Mr Atkins (its Expert); (c) there is a dispute of fact as to the <u>likelihood</u> of an overhang occurring on the 350/50 split – according to Mr Atkins, "*the probability of overhang*" in respect of Minor Parties is between 6.88% and 15.08% - what is however to be accepted

is that it is foreseeable; (d) if an overhang does occur, it has serious implications for an electoral system that results in proportional representation in general; (e) an overhang is an avoidable deviation in the design of an electoral system; and (f) if an overhang does occur, there is no method of remediation proposed by the ICA and it has the consequence of the IEC not being able to declare the result of an election.

11.6. What the ICA downplays is that: (a) the probability of overhang arises in respect of Minor Parties (defined as those parties obtaining fewer votes than a single quota in the respective election); (b) the result of the overhang is that it could impact on one seat, the result of which is that it impacts on a potentially significant number of minor parties; (c) a one seat deviation – according to Parliament - even if an overhang occurs in respect of a single seat, it has serious consequences for the affected party, and more importantly for the system of proportional representation in general.

11.7. It was both reasonable and rational for Parliament to have adopted a course that avoided any risk of overhang, given its dire consequences. While it may be arguable that Parliament could have determined this issue differently so as to benefit independent candidates, the fact that it chose not to on account of the risk of overhang (and the grave consequences if it manifested), is, we submit, eminently reasonable.

11.8. The ICA provides no solution at all for dealing with an overhang. The import of the ICA's argument is therefore: (a) there is a foreseeable risk of overhang; (b) there is no solution proposed to deal with it; and (c) despite that, its model

ought to be favoured over that of Parliament's which avoids any risk of overhang.

11.9. The IEC, Parliament and the Minister have explained that during the legislative amendment process, the IEC engaged researchers to investigate the claim that the proposed new electoral system for the National Assembly, with a 200/200 split, failed to meet the constitutional requirement that electoral systems results, in general, in proportional representation. The researchers, having run hundreds of thousands of Monte Carlo simulations, concluded that:

11.9.1. The amended electoral formula does not introduce additional disproportionality – the deviation from absolute proportionality is the same for both electoral formula.

11.9.2. The deviation from absolute proportionality never exceeds one seat (meaning that no party ever loses or gains more than one seat to which they are entitled as a result of the vote).

11.9.3. The deviation from perfect proportionality can be attributed to a rounding error, with the unavoidable use of whole numbers in the calculation of votes and rounding off of fractions in determining outcomes.

11.10. The 200/200 split is rationally related to a legitimate governmental purpose to (a) ensure an electoral system that results in proportional representation in general (b) to avoid any possible risk of overhang. This ensures free and fair elections.

11.11. There is no infringement of the right to free and fair elections and nor is there any infringement of the right to "*vote in elections*" and "*to stand for public office*": (a) all citizens are entitled to vote, to stand for political office and if elected, to hold office. The Electoral Act clearly allows for this; (b) all persons have the right to vote for either independent candidates or political parties; (c) at the regional tier, identical criteria and quotas apply to independent candidates and political parties; (d) independent candidates (unlike political parties) may not hold more than a single seat; (e) at the compensatory tier, given that the purpose is to restore proportionality, applies only to political parties. The ICA accepts that this is necessary; (f) the right to free and fair elections is compromised (not advanced) by the alternative proposal made by the ICA.

11.12. If this Court does find that there has been a limitation of a right, the limitation is reasonable and justifiable for reasons addressed in the answering affidavits and summarised above.

11.13. In the event that this Court is to find that there is merit to the challenge, Parliament submits that an appropriate order which constitutes just and equitable relief would be the following: (a) declaration of constitutional invalidity as contemplated by section 172(1)(a) of the Constitution; (b) an Order suspending the declaration of invalidity for 36 months to enable Parliament to address the defects. Parliament will argue that the interim relief sought by the ICA is not just and equitable.

AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED

12. Particular reliance will be placed on the following authorities:

12.1. Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC) (2010 (2) SACR 101; 2010 (5) BCLR 391; [2010] ZACC 4)

12.2. AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs 2009 (3) SA 649 (CC) (2009 (6) BCLR 611; [2009] ZACC 4)

12.3. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15)

12.4. Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25)

12.5. New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020)

12.6. New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5)

12.7. UDM v President of the RSA (ACDP Intervening; IDASA as Amici Curiae) (No 2) 2003 (1) SA 495 (CC) (2002 (11) BCLR 1179; [2002] ZACC 21)

KARRISHA PILLAY SC

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Friday, 25 August 2023

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

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HEADS OF ARGUMENT ON BEHALF OF SECOND AND THIRD RESPONDENTS

CONTENTS

A. INTRODUCTION

1. This application seeks to engage the jurisdiction of this Court, by way of direct access, in order to declare Item 1 of Schedule 1A of the Electoral Act No 73 of 1998 ("**the Electoral Act**") to be "*inconsistent with sections 1(c); 3(2)(a); 9(1); 19(2); 19(3) and 46(1)(d) of the Constitution to the extent that it provides for 200 seats in the National Assembly to be allocated from regional lists and 200 seats to be allocated from national lists.*"[1]

2. At its core, the Applicant ("**the ICA**") seeks to have this Court determine the appropriate number of regional and compensatory seats in the National Assembly. This is an exercise that this Court must engage in, in order to determine whether the current split yields an unconstitutionality in the terms contended for. This ambitious relief, clothed as a rights infringement and rationality challenge, is sought notwithstanding the constitutional role given to Parliament, the complexity of the issues presented, the Respondents' carefully reasoned views for the 200/200 split between regional and compensatory seats and the clear absence of any basis having been shown for irrationality and/or a rights infringement.

3. The preferences of the ICA underlie this application. Given that the ICA has "*about 29 members or associates who are citizens who intend or are contemplating standing as independent candidates in the 2024 national and provincial elections*"[2], it is unsurprising that it ultimately seeks to advance the position of independent candidates. But, the rights and interests of independent candidates are not the sole objective of the amendments to the Electoral Act. It is the rights and interests of all South Africans (including

[1] NM, p 2, par 1.
[2] FA, p 13, par 12.13.

independent candidates) and the constitutional mandate that must be met. In line with this broader imperative, Parliament has sought to adopt an electoral system that allows independent candidates to compete in the elections and that ensures a constitutionally compliant electoral system.

4. This application is plainly without merit: (a) the issues presented in this application are eminently polycentric and complex in nature; (b) on the ICA's own version, its proposal creates a risk of overhang, the consequence of which is serious and threatens the constitutional imperative of a constitutionally compliant system that results in proportional representation, in general; (c) according to the Fifth Respondent ("**the IEC**") (and based on expert input that it received), the amended electoral formula does not introduce additional disproportionality.[3]

5. There is no opposition to the application for direct access. The Fourth Respondent ("**the Minister**") has expressed the view that the luxury of an initial hearing in the High Court is not permitted.[4] The IEC explained that it requires certainty in this matter by mid-September 2023 so as to ensure that its preparations for the 2024 elections are not materially prejudiced.[5] Parliament abides the application for direct access and makes no submissions in respect thereof.[6] These Heads of Argument are approached on the basis that this Court will grant the ICA direct access.

6. Our arguments are structured as follows:

[3] AA (Parliament), p 257, par 70.8.
[4] AA (Minister), p 491, par 35.
[5] EA (IEC), p 164, par 47.2.
[6] AA (Parliament), p 222, par 9.

6.1. In **Part B**, we provide an overview of the electoral system with reference to the constitutional imperatives sought to be achieved.

6.2. In **Part C**, we explain the complexity of the issues presented by the amendments to the Electoral Act as well as the caution and thoroughness exercised by Parliament in the process that it followed.

6.3. In **Part D**, we address the underlying rationale for the 200/200 split between regional and compensatory seats.

6.4. In **Part E**, we advance submissions as to why there is no constitutional infringement occasioned by the amendments.

6.5. In **Part F**, we address the question of remedy.

B. AN OVERVIEW OF THE ELECTORAL SYSTEM WITH REFERENCE TO THE CONSTITUTIONAL IMPERATIVES

7. There are 400 seats in the National Assembly. The seats in the National Assembly are as determined in terms of section 46 of the Constitution and Item 1 of Schedule 1A of the Electoral Act.

8. Section 46 (1) of the Constitution provides that the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that: (a) is prescribed by national legislation; (b) is based on the national common voter's roll; (c) provides for a minimum voting age of 18 years; and (d) results, in general, in proportional representation.

9. According to section 46(2) of the Constitution, an Act of Parliament must provide a formula for determining the number of members of the National Assembly.

10. In terms of Schedule 1A to the Electoral Act, the seats in the National Assembly will be divided in equal halves: the first 200 seats are referred to as regional seats and the other half as compensatory seats. Schedule 1A reads as follows:

> *"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."*

11. The election of the 200 regional seat representatives in the National Assembly is divided into nine "*Regions*". Regional boundaries coincide with provincial boundaries[7]:

11.1. A voter will receive a ballot paper specific to his or her region and on that ballot paper will be a mixture of independent candidates and political parties.

11.2. A voter can either vote for an independent candidate or a political party on the regional seat ballot.

11.3. All votes cast in each region will first be used to determine the allocation of regional seats to both independent candidates and political parties. If an independent candidate meets the relevant quota for a seat, they will be elected to the National Assembly. However, once allocated a seat, all additional votes

[7] AA (Parliament), p 251, par 66.

received by the independent candidate will be forfeited / discarded and a new quota will be used to determine the proportional representation of political parties discarding the votes for that candidate and the seat they obtained. The discarding of the additional votes for the independent candidate is inevitable because an independent candidate is one member and cannot be allocated more than one seat therefore a recalculation would be required.

12. Item 1(b) of Schedule 1A makes provision for compensatory seats[8]:

12.1. The purpose behind the compensatory seat allocation system is to correct disproportionality in representation in the results of an election.

12.2. Section 46(1) of the Constitution does not prescribe how the electoral system of South Africa must be constructed to achieve, in general, proportional representation.

12.3. Proportional representation systems are, in general, subject to distortions with the introduction of independent candidates.

12.4. The only way to include independents in a two-tier compensatory system is to allow them to retain the seats they win and then obtain proportionality only regarding the remaining seats applying to the parties that gain representation.

12.5. This grants representation to independents and maintains inter-party proportionality.

[8] AA (Parliament), p 252, par 67.

12.6. Thus, in terms of the Electoral Act, the compensatory seats are reserved for political parties only. Once an independent candidate has secured their seat, their votes are discarded for determination of a new quota for representation by other parties on the proportional representation list.

12.7. The compensatory seats comprise the second tier of seat allocation – the top-up from the lists of candidates of political parties. It is required in order to meet the constitutional requirement of proportionality.

13. The Electoral Act contemplates that in voting for representation in the National Assembly, a voter will vote twice, once for regional seats and once for a political party for the compensatory seat. As the IEC has explained, the second ballot does not elect compensatory representatives directly. It serves the purpose of determining, together with the outcomes of the first ballot, the overall support of political parties fairly. This ensures that the allocation of compensatory representatives can be proportional to a greater extent than a one-ballot system would permit.[9]

C. THE COMPLEXITY OF THE ISSUES AND THOROUGHNESS OF THE PROCESS ADOPTED BY PARLIAMENT IN SEEKING TO ENSURE A CONSTITUTIONALLY COMPLIANT OUTCOME

The evidence

14. The ICA does not appear to appreciate the significance of the extensive process followed by the Minister and Parliament, the numerous legal opinions sought and given and the careful balancing exercise that was undertaken by Parliament.

[9] AA (Parliament), p 253, par 68.

15. The Minister has explained that: (a) between February and October 2022, the National Assembly's Portfolio Committee on Home Affairs ("**the Portfolio Committee**") met more than 20 times to discuss and deliberate on the proposed amendments to the electoral system in the Bill[10]; (b) the NCOP Select Committee on Security and Justice ("**the Select Committee**") met eight times in quick succession between 2 November and 25 November 22 and considered the further submissions made by members of the public[11]; (c) the Bill, together with the NCOP's proposed amendments, was referred back to the Portfolio Committee and was ultimately passed by the National Assembly in February 2023.[12] The Bill was assented to by the President on 17 April 2023.[13]

16. The detailed process that was followed is addressed by Parliament in no less than 20 pages of its answering affidavit.[14] The following key aspects of the process warrant reference:

    16.1. Soon after this Court's judgment in **New Nation Movement NPC and Others v President of the Republic of South Africa and Others** (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020) ("**New Nation Movement**"), on 25 June 2020, the Portfolio Committee held a meeting to discuss the judgment.[15]

[10] AA (Minister), p 499, par 66.
[11] AA (Minister), p 504, par 80.
[12] AA (Minister), p 508, par 94 and 96.
[13] AA (Minister), p 508, par 97.
[14] AA (Parliament), p 230, par 24 and ffl (Section E).
[15] AA (Parliament), p 230, par 25 and 26.

16.2. On 1 March 2021 the Minister informed the Portfolio Committee that Cabinet had established a Ministerial Advisory Committee ("**the MAC**") to investigate and report on electoral reform.[16]

16.3. The MAC provided its report to the Minister on 9 June 2021, which proposed two possible options for electoral reform.[17] The Minister determined that Option 1 was most appropriate ("**the minimalist option**").[18] Under this option, the current composition of seats in the National Assembly and provincial legislatures remain unchanged in that the National Assembly would comprise 200 regional seats and 200 compensatory seats.[19]

16.4. A team of four independent Counsel were briefed to prepare an initial draft of the Amendment Bill and to advise on its constitutional implications.[20] According to the memorandum from Counsel, the 400 seats in the National Assembly would continue to be divided into 200 regional seats (which would be contested by political parties and independent candidates) and 200 compensatory seats (which would be contested by political parties only and not independent candidates).[21]

16.5. On 24 November 2021, a Cabinet meeting was held during which Cabinet approved the MAC Report, a memorandum on the draft Electoral Bill and the

[16] AA (Parliament), p 231, par 28.
[17] AA (Parliament), p 231, par 30 read with PA1, p 274.
[18] AA (Parliament), p 232, par 32.
[19] AA (Parliament), p 232, par 32.3. and p 234, par 33.
[20] AA (Parliament), p 234, par 34.
[21] AA (Parliament), p 236, par 38.8 to 38.10.

draft Electoral Bill for submission to Parliament for further processing and public consultation.[22]

16.6. On 10 January 2022 the Electoral Amendment Bill was introduced in Parliament.[23]

16.7. Between the period February and 20 October 2022, the Portfolio Committee heard oral submissions from members of the public, obtained the views of the IEC, obtained various legal opinions from Counsel, analysed and carefully considered the various input that it had received. According to the IEC's Submission, it was recommended that the three round allocation system be reduced to a single round allocation using a Droop quota and highest remainder method. The IEC explained that this system would be of benefit to independent candidates.[24]

16.8. During the public hearings, conflicting submissions were made – some in support of the 200/200 split between regional and compensatory seats and others rejecting that proposed split and arguing that all 400 seats in the National Assembly should be equally contested by both independent candidates and political parties.[25] The Minister ultimately reasoned that the 200/200 split between the regional and compensatory seats are designed to achieve proportional representation in accordance with section 46(1)(d) of the Constitution.[26]

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[22] AA (Parliament), p 234, par 36.
[23] AA (Parliament), p 238, par 42.
[24] AA (Parliament), p 239, par 45 read with PA5, p 349.
[25] AA (Parliament), p 241, par 46.1 read with PA 6, p 362.
[26] AA (Parliament), p 242, par 46.3.

16.9. Based on the public comments received, on 8 July 2022 a further opinion was provided by Counsel, according to which:

16.9.1. The system as proposed by the IEC was embraced and developed by Counsel as an alternative to the three stage allocation system that was proposed in the initial version of the Bill.[27] Aside from being simpler and more straight forward, Counsel emphasised that an advantage of the alternative system was that political parties and independent candidates would compete on a level playing field in that they needed to satisfy the same quota in order to obtain seats and where independent candidates forfeited seats, all parties and independent candidates would be entitled to contest those forfeited seats with a reduced quota.[28]

16.9.2. The similarity in the approach adopted in the Bill with that which is followed in local government elections was identified.[29]

16.9.3. The split in the number of seats between regional and compensatory seats was determined to be a policy decision which followed from the minimalist option presented by the MAC.[30]

16.10. The Bill was passed by the National Assembly on 20 October 2022 and referred to the NCOP for consideration.[31]

[27] AA (Parliament), p 204, par 50.5.
[28] AA (Parliament), p 244, par 50.7.
[29] AA (Parliament), p 245, par 50.9.
[30] AA (Parliament), p 246, par 50.11.
[31] AA (Parliament), p 246, par 53.

16.11. The Select Committee called for submissions from the public, received a range of input and deliberated on the Bill in the course of eight meetings between 2 and 25 November 2022.[32] Pursuant thereto, in late November 2022 the Select Committee proposed various amendments to the Electoral Bill. This resulted in the Bill having been referred back to the National Assembly for consideration and resulted in further public consultation.[33]

16.12. On 13 November 2022 a further opinion was sought from Counsel.[34] According to this opinion, reserving half of the seats in the National Assembly for the purposes of achieving overall proportionality in general is not unfair and would be likely to be found to be constitutionally permissible. A carefully reasoned basis (founded on at least five separate grounds) was provided.[35]

16.13. Thereafter, the Minister engaged with and responded to the issues raised in the public participation process. The reasoning in support of the 200/200 split was underpinned by the following: (a) the constitutional imperative of an electoral system that results in proportional representation, in general; (b) the practical difficulty of providing for proportional representation with independent candidates holding one seat even though they may receive more votes than a party; (c) allowing independent candidates to contest compensatory seats would distort the proportional representation requirement and also run the risk of National Assembly seats being unfilled; (d) the purpose behind the compensatory seat allocation is to correct disproportionality in representation in

[32] AA (Parliament), p 247, par 54.
[33] AA (Parliament), p 247, par 55.
[34] AA (Parliament), p 247, par 56 read with PA8, p 400.
[35] AA (Parliament), p 247, par 56.2.

the results of the election; (e) counsel had provided a detailed opinion advising that reserving half the seats as compensatory seats is constitutionally permissible and rational.[36]

16.14. The NCOP passed the Bill (with the proposed amendments) on 29 November 2022 returning it to the National Assembly for concurrence.[37]

16.15. On 10 February 2023 the Portfolio Committee adopted the Bill and recommended its adoption to the National Assembly. On 23 February 2023 the National Assembly passed the Bill.[38]

17. The following emerges from this background:

17.1. First, a recommendation (as one of two options) was made by the MAC as to the minimalist option. The Minister made a policy laden decision to follow the minimalist option, the consequence of which was to adopt a 200/200 split.

17.2. Second, as part of the process, the IEC made proposals to benefit independent candidates.[39]

17.3. Third, when this issue arose in the course of the public participation process the Minister obtained two separate opinions from Counsel on this issue, on 8 July 2022 and on 13 November 2022. Both these opinions from highly esteemed,

[36] AA (Parliament), p 249, par 57.
[37] AA (Parliament), p 250, par 58.
[38] AA (Parliament), p 250, par 61 and 63.
[39] AA (Parliament), p 239, par 45 read with PA5, p 349.

independent Counsel advised the Minister that the 200/200 split would pass constitutional muster and provided detailed reasoning in respect thereof.

17.4. Fourth, when this issue arose both before the National Assembly and the NCOP, detailed reasoning was provided in support of the 200/200 split. This was after thorough engagement on the issue.

17.5. Fifth, in having adopted the amendments to the Electoral Act, Parliament and the Minister were guided by the skill and expertise of: (a) various experts in the field of electoral systems (who served on the MAC); (b) the IEC and the experts on whom it relied; (c) external legal Counsel who are highly skilled in the field. Through the complex web of iterations and engagements that are addressed in the answering affidavits filed, the issue of the 200/200 split which was a repeated feature of the engagement process, was considered and the counter proposals rejected for reasons addressed in the answering affidavits.

The legal principles: polycentricity and deference

18. We accept that this Court can and must engage with the challenge to the constitutionality of the impugned provisions. The key question however is the threshold that it applies in doing so. In identifying and applying this threshold, this Court will be guided by its jurisprudence.

19. This Court has, on multiple occasions, emphasised the wide remit given by the Constitution to Parliament to enact an electoral system. By way of example:

19.1. In **New National Party v Government of the Republic of South Africa** 1999 (3) SA 191, this Court explained that the right to vote is a right to vote in a free

and fair election *"in terms of an electoral system prescribed by national legislation…[t]he details of the system are left to Parliament."*[40]

19.2. In **AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another** 2009 (3) SA 649 (CC)[41]

> *"[6] Parliament has the constitutional authority and duty to design an electoral scheme to regulate the exercise of the right to vote. This is apparent from ss 46(1), 105(1) and 157(5) of the Constitution. In **New National Party** this court held: The right to vote contemplated by s 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. The details of the system are left to Parliament. The national legislation which prescribes the electoral system is the Electoral Act…."*

19.3. In **New Nation Movement**, this Court reiterated:

> *"The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system."*[42]

20. The choice of the electoral system at national and provincial levels is – by constitutional design – left in the hands of the people's representatives, Parliament. This is because, in terms of the Constitution, the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.[43] The National Council

[40] At par 11.
[41] See too: par 80.
[42] At par 15.
[43] Section 42(3) of the Constitution.

of Provinces ("**the NCOP**"), in turn, represents the provinces and ensures that their interests are taken into account in the national sphere of government.[44]

21. It is for Parliament (representing the people and the provinces) to wrestle and weigh the benefits of the different types of electoral schemes available and to design a system that meets the framework requirements of the Constitution, including allowing for independents to stand for public office and ensuring that the electoral system enacted results, in general, in proportional representation. This is what Parliament has done.

22. Yet, the ICA seek to challenge decisions as to how Parliament balanced competing considerations, rights and interests and the manner in which it gave effect to this Court's Order in **New Nation Movement**.

23. In holding Parliament accountable as against its constitutional mandate, this Court will also be guided by the following case law:

23.1. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) (**Bato Star**) at par 48 this Court held[45]:

> *"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be*

[44] Section 42(4) of the Constitution.
[45] See too: **Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch** 2020 (1) SA 368 (CC) (2019 (12) BCLR 1479; [2019] ZACC 38) at par 42.

> *taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."*

23.2. This Court further held in **Bato Star** (at para 46), citing **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd** 2003 (6) SA 407 (SCA) ([2003] 2 All SA 616; [2003] ZASCA 46) at par 47 that deference entails a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.[46]

24. In its Heads of Argument, the ICA argues with reference to **Kramer v Union Free School District No 15 395** US 621 (1969), 61 and **Williams v Rhodes** 393 U. S. 23, 393 U.S. 30 (1968)62 that "*if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling*

[46] See too: **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253; [1996] ZACC 26) at par 35 and **International Trade Administration Commission v SCAW SA (Pty) Ltd** 2012 (4) SA 618 (CC) (2010 (5) BCLR 457; [2010] ZACC 6) at par 91 and 95.

state interest."[47] The ICA argues that the Court held that for these reasons, deference usually given to the judgement of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials.[48]

25. The ICA is however mistaken as to the relevance of **Kramer** and **Williams**. Parliament's case on this issue is as follows:

25.1. Unlike the American cases that the ICA relies on, the present matter does not concern the denial of the franchise.

25.2. The principle of deference as developed by this Court does not call for immunity from judicial accountability or "*judicial timidity or an unreadiness to perform the judicial function*" but rather "*appropriate respect*" which flows "*not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself*".[49]

25.3. It is clear that legislative choices must be rationally related to a legitimate government purpose in that they must not be arbitrary or capricious and must not infringe rights.[50]

25.4. As the evidence makes clear, a highly complex technical and policy laden task was undertaken to "*design a system that struck a balance between allowing individuals to stand as independent candidates to be elected to the National*

[47] Applicant's HoA, p 32, par 59.
[48] Applicant's HoA, p 32, par 60.
[49] **Bato Star**, par 46.
[50] **New National Party of South Africa v Government of the Republic of South Africa and Others** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) (**New National Party**) at par 19 and 20.

Assembly, while ensuring that the representatives in the National Assembly are, in general, proportional to their support in the electorate".[51]

D. THE BASIS AND RATIONALE FOR THE 200/200 SPLIT BETWEEN REGIONAL AND COMPENSATORY SEATS

26. Parliament, the Minister and the IEC have provided detailed explanations for the 200/200 split between regional and compensatory seats, key aspects of which we emphasise hereunder.

27. First, the ICA's complaint is based on a differential quota that is required by: (a) independent candidates who are eligible to compete for 200 regional seats; and (b) political parties who compete for 200 regional seats and 200 compensatory seats. But, as the Minister explains, the Amendment Act uses two different methods: one for allocating regional seats to independent candidates and political parties and another for allocating compensatory seats to political parties.[52] According to the Minister "*these methods legitimately differentiate because they serve different purposes – namely: allowing citizens to stand for and hold office in the National Assembly as individuals; and ensure that the systems results, in general in proportionality*."[53] It follows, we submit that the comparison sought to be drawn by the ICA, its consequent complaint of differentiation and the alleged constitutional infringements are misplaced.

28. Second, there is no dispute that independent candidates, by definition and by virtue of their choice to compete as independent candidates can only ever hold one seat, no matter how many votes they get.[54] This means that by having independent candidates compete

[51] AA (Minister), p 484, par 15. See too: AA (Parliament), p 222, par 5, 6 and 7.
[52] AA (Minister), p 488, par 27.
[53] AA (Minister), p 488, par 27.
[54] AA (Minister), p 486, par 24.4.

in the elections, there is a risk that proportional representation is distorted. Unless properly managed, Parliament has explained, this has the potential to result in an electoral system that does not, in general, result in proportional representation, thereby yielding a result that is inconsistent with section 46(1)(d) of the Constitution.[55]

29. Third, the 200 compensatory seats are designed to achieve proportionality. Of significance, we reiterate, there is no challenge to the compensatory seats being reserved exclusively for political parties. By reserving the compensatory seats exclusively for political parties, proportionality is restored. According to the IEC, a critical benefit of the 200/200 seat allocation is the achievement of proportional representation as between represented political parties at a national level without any risk of overhang. [56] Importantly, the ICA's own expert, Mr Akins (who takes issues with the number being set at 200) accepts that: (a) the compensatory seats "*now perform a proportional balancing function in the same manner that proportional representation seats do in local government elections*"[57]; (b) the purpose of compensatory seats is to ensure that the overall total of seats awarded are proportional to the support of contestants, which is necessary as constituency elections clearly have the possibility of producing disproportionate outcomes[58]; (c) an appropriate number of compensatory seats should be determined for each election type in order to ensure that proportional representation is guaranteed. [59]

30. Fourth, in respect of the 200 regional seats in the National Assembly, the votes required for independent candidates or political parties to win such a seat is identical – they must

[55] AA (Parliament), p 254, par 70.1.
[56] EA (IEC), p 150, par 20.
[57] EA (IEC), MJ1, p 65, par 59.
[58] EA (IEC), MJ1, p 66, par 60.
[59] EA (IEC), MJ1, p 66, par 61. See too, par 74.

meet the same quota to be elected to the National Assembly. Equally so, votes tendered in support of an independent candidate carry equal weight to that of a party. There is no differentiation in this regard.[60] The IEC has explained that in the regional tier, all candidates, whether parties or independent candidates, "*must meet the same regional quota to be elected to the National Assembly. Independent candidates do not need any more votes to be elected than party candidates. And a vote for an independent carries equal weight to a vote for a political party.*"[61]

31. Fifth, guided by the views of the IEC, Parliament ultimately determined that the 200/200 seat allocation achieves proportional representation of represented political parties at national level without any risk of overhang. Overhang is when more seats are required to be allocated to restore proportionality as between the represented parties after the allocation of the regional (or constituency) votes, than are available in the legislature.[62] Parliament has explained that overhang is a very important issue that has the potential to fundamentally skew proportional representation and if an overhang does occur, it seriously jeopardises a system of proportional representation (in general).[63] Of relevance in this regard is:

31.1. The evidence of the IEC that: (a) with a 200/200 split, "*there is no risk at all of overhang eventuating*"[64]; (b) the risk of overhang is by no means a small or insignificant matter (as Mr Atkins argues), it is an avoidable deviation in the design of an electoral system[65]; (c) should overhang occur in the national

[60] AA (Parliament), p 254, par 70.2.
[61] EA (IEC), p 158, par 40.3.
[62] EA (IEC), p 152, par 29.
[63] AA (Parliament), p 256, par 70.5.
[64] EA (IEC), p 154, par 31.
[65] EA (IEC), p 154, par 33.

elections, the IEC would have no means of correcting the problem in the allocations of seats to ensure in general proportional representation, which presents the risk that the IEC will be unable to declare the election results[66]; and (d) the lowering of the quota by having 350 seats "*may improve the prospects of independent candidates but that will be at the foreseeable risk of overhang occurring and the Commission not being able to declare the result of an election.*"[67]

31.2. The evidence of Parliament that some of the key conclusions reached by Mr Atkins are disputed on the following grounds: (a) an overhang may occur; (b) if an overhang does occur, there is no system of remediation; (c) even if an overhang occurs in respect of a single seat, it has serious consequences for the affected party, and more importantly for the system of proportional representation in general.[68]

31.3. The evidence of Mr Atkins that: (a) parties with strong regionally biased support "*may have a risk of overhang but that the circumstances where this happens are limited, and overhang is limited to a single seat*"[69]; and (b) at 50 compensatory seats, there is a low to moderate risk of overhang of no more than one seat whereas there is a zero or negligible risk of overhang amounting to more than one seat[70]; (c) the seat allocation calculations set out in Item 6(a) to (c) for the National Assembly will ensure that the outcome is proportional and

[66] EA (IEC), p 155, par 33.3.
[67] EA (IEC), p 155, par 35.
[68] AA (Parliament), p 257, par 70.7.
[69] FA, MJ1, p 77, par 89.
[70] FA, MJ1, p 54, par 19.

meets the requirements of section 46(1)(d) of the Constitution, "*with one small caveat*"[71]; (d) there is no risk of overhang on a 200/200 split.[72]

31.4. The import of the aforegoing evidence is: (a) it is common cause that there is no risk of overhang on a 200/200 split; (b) there is a risk of overhang on the alternative proposal made by the ICA – this is confirmed by Mr Atkins; (c) there is a dispute of fact as to the likelihood of an overhang occurring on the 350/50 split – according to Mr Atkins, "*the probability of overhang*" in respect of Minor Parties is between 6.88% and 15.08% - what is however to be accepted is that it is foreseeable; (d) if an overhang does occur, it has serious implications for an electoral system that results in proportional representation in general; (e) an overhang is an avoidable deviation in the design of an electoral system; and (f) if an overhang does occur, there is no method of remediation proposed by the ICA and it has the consequence of the IEC not being able to declare the result of an election.

31.5. In its Heads of Argument, the ICA argues that according to the Atkins Report, "*the risk of overhang is low to moderate in one scenario only*" and that the risk is between 6.88% and 15.08% that one minor party may gain one additional seat if independents obtain 1% of the vote.[73] The suggestion that the impact is on one minor party, does not emerge from the Atkins Report.[74] What the ICA downplays is that: (a) the probability of overhang arises in respect of minor parties (defined as those parties obtaining fewer votes than a single quota in the

[71] FA, MJ1, p 70, par 70.
[72] FA, MJ1, p 72, par 83.
[73] Applicant's HoA, p 34, par 66.
[74] FA, MJ1, p 72, par 82.2, 85.6 and 89

respective election[75]); (b) the result of the overhang is that it could impact on one seat, the result of which is that it impacts on a potentially significant number of minor parties[76]; (c) a one seat deviation – according to Parliament - even if an overhang occurs in respect of a single seat, it has serious consequences for the affected party, and more importantly for the system of proportional representation in general.[77] As regards the latter issue, we emphasise that this determination is not a matter of the conclusions reached by an Expert (as the ICA argues[78]) but rather one reached by Parliament. We refer to what we have already stated as regards Parliament's conclusions on this issue. In any event, the ICA is mistaken: there are avoidable and unavoidable deviations. Overhang, even in respect of a single seat, is an avoidable deviation. According to the IEC's Expert, there are other deviations that are unavoidable – for instance, arising from rounding errors.

31.6. As regards the remaining arguments that the ICA advances in its Heads of Argument (i.e. that the deviation from perfect proportionality is "*certainly justifiable given the significant improvement of the equality of the vote which will result therefrom*"[79] and that to the extent that it is avoidable "*it is fully justified in order to ameliorate the violation of equality of the vote*"[80]), these arguments show little regard for the principles of deference, polycentricity, preferences and the proper role of the Courts in matters such as these. Simply

[75] FA, MJ1, p 72, par 82.
[76] According to the Atkins Report (FA, MJ1, p 72, par 83): "*In each table, the risk of overhang occurring within the specified group of parties, and advantaging at least one party in the group, is given, showing the risk of a single seat overhang , and that of two or more seats' overhang separately.*" See too: p 77, par 89.
[77] AA (Parliament), p 257, par 70.7.
[78] Applicant's HoA, p 35, par 69.
[79] Applicant's HoA, p 35, par 70.
[80] Applicant's HoA, p 35, par 71.

put, it was both reasonable and rational for Parliament to have adopted a course that avoided any risk of overhang, given its dire consequences. While it may be arguable that Parliament could have determined this issue differently so as to benefit independent candidates, the fact that it chose not to on account of the risk of overhang (and the grave consequences if it manifested), is, we submit, eminently reasonable.

31.7. We reiterate, the ICA provides no solution at all for dealing with an overhang. The import of the ICA's argument is therefore: (a) there is a foreseeable risk of overhang; (b) there is no solution proposed to deal with it; and (c) despite that, its model ought to be favoured over that of Parliament's which avoids any risk of overhang.

32. Sixth, the IEC, Parliament and the Minister have explained that during the legislative amendment process, the IEC engaged independent researchers to investigate the claim that the proposed new electoral system for the National Assembly, with a 200/200 split failed to meet the constitutional requirement that the electoral systems results, in general, in proportional representation.[81] According to the Report by Lynge and Rosen, they ran hundreds of thousands of Monte Carlo simulations, representing hundreds of thousands of hypothetical elections and compared the seat allocation under the original electoral formula for the National Assembly (before the accommodation of independent candidates) to that under the amended electoral formula and concluded[82]:

[81] EA (IEC), p 151, par 26.
[82] EA (IEC), p 152, par 27. See too: AA (Parliament), p 257, par 70.8.

32.1. The amended electoral formula does not introduce additional disproportionality – the deviation from absolute proportionality is the same for both electoral formula.

32.2. The deviation from absolute proportionality never exceeds one seat (meaning that no party ever loses or gains more than one seat to which they are entitled as a result of the vote).

32.3. The deviation from perfect proportionality can be attributed to a rounding error, with the unavoidable use of whole numbers in the calculation of votes and rounding off of fractions in determining outcomes.

33. The following falls to be emphasised:

33.1. There is no challenge to the need for a split between regional and compensatory seats. Mr Atkins recognises the important purpose of compensatory seats.

33.2. There is no challenge to the fact that compensatory seats are reserved for political parties only.

33.3. As regards the number of compensatory seats, there does not appear to be a dispute that its purpose is to ensure an electoral system that, in general, results in proportional representation.

33.4. What the ICA contends for is an alternative system that would further the interests of its members (independent candidates). While its proposal no doubt achieves this, it threatens the constitutional imperative of a system that results in proportional representation in general.

E. THERE IS NO CONSTITUTIONAL INFRINGEMENT

34. The ICA argues that the 200/200 split is unconstitutional for the following reasons:

34.1. First, it is irrational and inconsistent with the rule of law (section 1(c)) of the Constitution.[83]

34.2. Second, it violates section 3(2)(a) of the Constitution which provides that "*all citizens are equally entitled to the rights, privileges and benefits of citizenship*".[84]

34.3. Third, it violates section 9(1) of the Constitution which provides (in relevant part) that "*everyone has the right to equal benefit of the law*" insofar as it arbitrarily differentiates between independent candidates and political parties.[85]

34.4. Fourth, it violates section 19(2) of the Constitution which provides that every citizen has the right to free, fair and regular elections.[86]

34.5. Fifth, it violates section 19(3) of the Constitution which provides that every adult citizen has the right to "*vote in elections*" and "*to stand for public office*" and should thus have an equal chance to being elected for public office.[87]

[83] Applicant's HoA, p 19 par 36.1.
[84] Applicants' HoA, p 20 par 36.2.
[85] Applicants' HoA, p 20 par 36.3.
[86] Applicant's HoA, p 20 par 36.4.
[87] Applicant's HoA, p 20 par 36.5.

35. Notwithstanding the ICA's framing of the case, we submit that the challenge reduces to this (proceeding from the premise that there is a split between regional and compensatory seats and that independent candidates may compete for only regional seats):

35.1. First, whether there is a rational basis for the 200/200 split. If there is, there can be no infringement of sections 1(c) or 3(2)(a) or 9(1) of the Constitution.

35.2. Second, even if there is a rational basis for the 200/200 split, whether there is a violation of sections 19(2) and 19(3) of the Constitution and if so, whether there is a reasonable justification for it.

There is a rational basis for the 200/200 split

The law

36. It is trite that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with the threshold of rationality.[88]

37. The guiding principles in respect of a constitutional challenge founded on irrationality are well-established. The key principles relevant to the present matter as distilled from the jurisprudence of this Court are as follows:

37.1. It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be

[88] **Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1) para 85 (**Pharmaceutical Manufacturers Association**).

rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.[89]

37.2. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry.[90] Differently put, this Court has determined that the Constitution requires that public power vested in the Executive and other functionaries must be exercised in an objectively rational manner.[91]

37.3. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately.[92]

37.4. As this Court held in **Albutt v Centre for the Study of Violence and Reconciliation and Others** 2010 (3) SA 293 (CC) (2010 (2) SACR 101; 2010 (5) BCLR 391; [2010] ZACC 4) para 51:

> *"The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether*

[89] **Pharmaceutical Manufacturers Association,** par 85.
[90] **Pharmaceutical Manufacturers Association**, par 86.
[91] **Pharmaceutical Manufacturers Association**, par 89.
[92] **Pharmaceutical Manufacturers Association**, par 90.

> *they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."*

Own Emphasis

37.5. A person seeking to impugn the constitutionality of a legislative provision cannot simply rely on the fact that the State objective could have been achieved in a better way. As long as there is a rational relationship between the method and object, it is irrelevant that the object could have been achieved in a different way.[93]

37.6. The fact that rationality is an important requirement for the exercise of power in a constitutional State does not mean that a court may take over the function of government to formulate and implement policy. "*If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature. Provided a legitimate public purpose is served, the political merits or demerits of disputed legislation are of no concern to a court.*"[94]

37.7. The requirement that a legislative scheme must be rational is not directed at testing whether legislation is fair or reasonable or appropriate, but is restricted to the threshold question whether the measure the lawgiver has chosen is

[93] **Bel Porto School Governing Body and Others v Premier, Western Cape, and Another** 2002 (3) SA 265 (CC) (2002 (9) BCLR 891; [2002] ZACC 2). See too: **Prinsloo v Van der Linde and Another** 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759; [1997] ZACC 5) para 36 and **Law Society of South Africa and Others v Minister for Transport and Another** 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25) at par 35.
[94] **Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others** 2008 (5) SA 171 (CC) (2008 (10) BCLR 969; [2008] ZACC 10) at par 63.

properly related to the public good it seeks to realise. Rationality is a lower threshold than a limitations analysis under section 36 of the Constitution. However, to constitute a justifiable limitation, a provision must necessarily be rational.[95]

37.8. It is to be emphasised (as this Court has previously held): "*Again we say, that rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is permissible only where it is necessary and unavoidable to do so*."[96]

37.9. The claim based on an infringement of section 9(1) of the Constitution also reduces to a rationality enquiry. The jurisprudence of this Court has made clear there can be no breach of these rights, even where there is a differentiation between different categories of people, provided "*there is a rational connection between the measure and the legitimate governmental purpose of facilitating the effective exercise of the important right to vote.*"[97]

37.10. In the context of the threshold in respect of defection, this Court has held that the fact that a particular system operates to the disadvantage of particular parties does not mean that it is unconstitutional. By way of example, it referred to the introduction of a constituency-based system of elections which may operate to the prejudice of smaller parties, and observed that *"it could hardly be suggested*

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[95] **Law Society of South Africa and Others v Minister for Transport and Another** 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25) para 35. Referred to in **Amcu v Chamber of Mines of SA** 2017 (3) SA 242 (CC) (2017 (6) BCLR 700; [2017] ZACC 3) at par 66. See too: **Democratic Alliance v President of the Republic of South Africa and Others** 2013 (1) SA 248 (CC) (2012 (12) BCLR 1297; [2012] ZACC 24) at par 29 to 32.

[96] **Electronic Media Network Limited v e.tv (Pty) Limited** 2017 (9) BCLR 1108 (CC) at paras 85.

[97] **New National Party of SA v Govt of the RSA** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) at par 48.

that such a system is inconsistent with democracy. If defection is permissible, the details of the legislation must be left to Parliament, subject always to the provisions not being inconsistent with the Constitution. The mere fact that Parliament decides that a threshold of 10% is necessary for defections from a party, is not, in our view, inconsistent with the Constitution."[98]

37.11. This Court has held in **Democratic Party**: *there are very few laws of general application that will not, directly or indirectly, have the potential to affect different categories of people in different ways, whether for example, by reason of where they live, their standard of literacy or political beliefs."*[99] This Court emphasised the need for evidence as to the impact of a statutory provision on the applicants and that in the absence of evidence "*whatever the different impact, if any, might be, it is not possible to determine whether such impact constitutes unfair discrimination within the principles endorsed by this Court, unless it is established that such different impact is caused by the impugned legislation, and is not the result of some other cause."*[100]

The evidence

38. On the evidence, we submit that the 200/200 split is rationally related to the purpose for which the power was given and serves a legitimate government purpose for reasons set out fully in Section D of our Heads of Argument.

39. In essence, the rationality of the 200/200 split is:

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[98] **UDM v President of the RSA (ACDP Intervening; IDASA as Amici Curiae) (No 2)** 2003 (1) SA 495 (CC) (2002 (11) BCLR 1179; [2002] ZACC 21) at par 47.
[99] **Democratic Party v Minister of Home Affairs & Others** 1999 (3) SA 254 (CC) para 12.
[100] **Democratic Party**, par 12.

39.1. First, to avoid any possible risk of overhang, which, if it occurs threatens the constitutional imperative.

39.2. Second, to ensure an electoral system that results in proportional representation in general.

40. The Respondents' evidence in this regard accordingly reject and place in dispute the following aspects of the ICA's evidence:

40.1. There is no rationale for selecting 200 as the number of seats available in the collective regional elections and for selecting 200 as the number of compensatory seats.[101] As explained, the rationale is to avoid an overhang and ensure proportional representation, in general.

40.2. The 200/200 split is arbitrary and contrary to the rule of law in that while there may be a need for compensatory seats, "*there can be no justification for selecting 200 other than an improper purpose of undermining the prospects of independents getting elected.*"[102] On the contrary, the justification that Parliament has given is to ensure a constitutionally sound outcome.

The ineluctable conclusion

41. Based on the evidence, the only conclusion that may be reached on this score is that the 200/200 split serves an eminently legitimate government purpose, to ensure an electoral

[101] FA, p 24, par 35.
[102] FA, p 27, par 46.

system that results, in general, in proportional representation and to thereby ensures free and fair elections.

42. It is understandable that the choices made by Parliament in this regard and the balancing of competing rights and interests that it engaged in, do not serve the interests of the ICA and its constituents as it would have wanted. That preference however, does not found an unconstitutionality.

There is no violation of sections 19(2) and 19(3) of the Constitution

The law

43. Section 19 of the Constitution provides:

> *"(1) Every citizen is free to make political choices, which includes the right—*
>
> *(a) to form a political party;*
>
> *(b) to participate in the activities of, or recruit members for, a political party; and*
>
> *(c) to campaign for a political party or cause.*
>
> *(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.*
>
> *(3) Every adult citizen has the right —*
>
> *(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and*
>
> *(b) to stand for public office and, if elected, to hold office."*

44. We submit that there is no infringement of the right to free and fair elections and nor is there any infringement of the right to "*vote in elections*" and "*to stand for public office*".

45. The significance and import of these rights has been made clear in the jurisprudence:

45.1. It is necessary to regulate the exercise of the right to vote so as to give substantive content to the right.[103] In practical terms, this means that the right to vote necessitates an electoral system and the calling of elections.[104] In **New National Party**, this Court explained that: *"[T]he mere existence of the right to vote without proper arrangements for its effective exercise does nothing for democracy; it is both empty and useless."*[105]

45.2. "*The importance of the right to vote is self-evident and can never be overstated. There is, however, no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy, for without it there can be no democracy. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.*"[106]

45.3. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised.[107]

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[103] **New National Party** at par 13.
[104] **Richter v The Minister of Home Affairs and Others** 2009 (3) SA 615 (CC) para 53. See too: **Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others** 2005 (3) SA 280 (CC) para 28.
[105] **New National Party** at par 11.
[106] **New National Party of South Africa v Government of the Republic of South Africa and Others** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489) at par 11.
[107] **New National Party of South Africa v Government of the Republic of South Africa and Others** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) para 12.

45.4. There is no internationally accepted definition of the term "*free and fair elections*". Whether any election can be so characterised must always be assessed in context. Ultimately it involves a value judgment. This Court has distilled the following elements as being of fundamental importance to the conduct of free and fair elections: (a) every person who is entitled to vote should, if possible, be registered to do so; (b) no one who is not entitled to vote should be permitted to do so; (c) insofar as elections have a territorial component, as is the case with municipal elections where candidates are in the first instance elected to represent particular wards, the registration of voters must be undertaken in such a way as to ensure that only voters in that particular area (ward) are registered and permitted to vote; (d) the Constitution protects not only the act of voting and the outcome of elections, but also the right to participate in elections as a candidate and to seek public office.[108]

45.5. In the context of a challenge founded on an infringement of the right to vote a "*facial analysis*" must be undertaken. This Court determined "*the issue we have to determine is not whether the Department or other organs of State have performed their functions in a manner which has resulted in a denial of the vote to a substantial number of South Africans, but <u>whether the measure itself constitutes such denial and is on that account an infringement of the right to vote</u>*." To establish this, this Court held that the appellant must show that the machinery, mechanism or process provided for by the Electoral Act is not

[108] **Kham v Electoral Commission** 2016 (2) SA 338 (CC) (2016 (2) BCLR 157; [2015] ZACC 37) at par 34.

reasonably capable of ensuring that those who want to vote and who take reasonable steps in pursuit of the right are able to exercise it.[109]

The evidence

46. In its founding affidavit, the ICA alleges:

46.1. Although the amendments to the Electoral Act make it possible for independent candidates to compete in the national and provincial election, it does so in a manner where "*the playing fields are not level in that an independent candidate must get more votes than a political party to gain a seat in the National Assembly.*"[110]

46.2. An immediate and obvious consequence of only 200 seats being available for elections for which independents are eligible is that far more votes are required by independent candidates in order to secure a seat than is the case for parties.[111]

47. In its Heads of Argument, the ICA frames the questions for determination as being: (a) whether it is constitutionally permissible to adopt a system which requires independents to obtain significantly more votes than parties in order to secure a seat in the National Assembly; (b) whether votes must carry the same weight and/or that candidates competing for the same legislature must have an equal opportunity to secure a seat.[112]

48. We submit that the ICA's challenge has no merit for the following reasons:

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[109] **New National Party of SA v Govt of the RSA** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) at par 37.
[110] FA, p 8, par 6.
[111] FA, p 24, par 36 and par 41.1.
[112] Applicant's HoA, p 20, par 38.1 and 38.2.

48.1. First, compelling reasons have been given for the 200/200 split. We refer in this regard to Section D of these Heads of Argument.

48.2. Second, at the level of fact, the ICA's argument is misconceived. This is so because, as explained, at the regional tier, independent candidates compete with political parties on an identical basis. It follows that there are no variances in the weight of the vote at the level.

48.3. Third, at the level of the compensatory tier, the variances are the result of independent candidates not being able to compete at that level. It is as a result of this fundamental fact, that the ICA is driven to challenging the number of seats. Differently put, had the ICA been entitled to compete at the compensatory tier, there would have been no basis whatsoever for its complaint. Given that the ICA has accepted that the purpose of the compensatory level is to restore proportionality, properly construed, its argument is that proportionality can be achieved through an alternative means, which grants greater favour to independent candidates. This, however, does not meet the test for a finding of unconstitutionality. We refer to the case-law identified above.

48.4. Fourth, the difference in outcome emanates from the difference between independent candidates on the one hand and political parties on the other. As stated, the purpose that is served by the compensatory tier is to restore proportionality. That objective can only be served by political parties and not independent candidates. As the IEC has explained, the regional tier and the compensatory tier serve different purposes and are inherently different. According to the IEC, they are not on the same terms in terms of size of the

constituency (district magnitude), size of the voter base (voter's roll) and the number of seats in contention.[113]

48.5. Fifth, the allocation of seats to independent candidates in the regional tier is not affected by the quota for the allocation of compensatory seats.[114]

48.6. Sixth, independent candidates can only hold a single seat in the legislature. As the Minister has explained, this has important consequences because independent candidates have the potential to distort proportionality. It is only political parties who can send representatives in proportion to the support they achieve in an election, who can guarantee proportionality.[115]

49. In its Heads of Argument, the ICA argues that "*a vote means an equal vote and an equal opportunity to run for office*".[116]

50. The ICA refers to several international instruments which provide for the right to vote and equal suffrage.[117] None of these references however, advance the ICA's case.

51. The ICA refers to the jurisprudence of the United States which the ICA argues is of relevance given that "*the issue of weighting of votes has arisen principally in the context of the effective dilution of power of that vote through the name in which district lines are drawn.*"[118]

[113] EA (IEC), p 158, par 40.3.
[114] EA (IEC), p 159, par 40.4.
[115] AA (Parliament), p 483, par 14 and par 24.
[116] Applicant's HoA, p 23, par 43.
[117] Applicant's HoA, p 23, par 44.
[118] Applicant's HoA, p 26, par 47.

52. The jurisprudence of the USA and Canada is however of no assistance to the present matter. As this Court recognised in **UDM v President of the RSA (ACDP Intervening; IDASA as Amici Curiae)** (No 2) 2003 (1) SA 495 (CC) (2002 (11) BCLR 1179; [2002] ZACC 21) at par 29, there are many systems of multi-party democracy that do not have an electoral system based on proportional representation, including the United States of America, India, and Canada. The point is this: the case-law from the USA and Canada may have proven to be relevant had there not been a constitutional injunction for an electoral system that results in proportional representation, in general. Given that this is manifestly not the case, the foreign case-law referred to in this regard is of little relevance. In any event, the Canadian case referred to[119] does not deal with this issue in absolute terms in that it recognises some deviation from the concept of equal representation, subject to certain constraints and to the extent that it is justifiable under section 1 of the Canadian Charter.

53. Insofar as the ICA's reliance on Australian jurisprudence goes, it is significant that in **McGinty v Western Australia** [1996] HCA 48; (1996) 186 CLR 140 (28 March 1996),[120] it was held that "*the question whether differences in voting power can be justified by distinctions based on political opinion, minority interests or geographical residence does not admit of a definitive answer*".

54. The ICA accepts that the foreign case-law allows for a departure from strict equality "*within a narrow band*".[121]

[119] Applicant's HoA, p 29, par 52 read with FN 59 which refers to Re Prov Electoral Boundaries (Sask.) [1991] 2 SCR 158
[120] Applicant's HoA, p 28, par 51 read with FN 57.
[121] Applicant's HoA, p 30, par 53.

The ineluctable conclusion

55. We submit that the challenge founded on an infringement of section 19(2) and 19(3) of the Constitution must fail. In summary:

55.1. First, all citizens are entitled to vote, to stand for political office and if elected, to hold office. The Electoral Act clearly allows for this.

55.2. Second, all persons have the right to vote for either independent candidates or political parties.

55.3. Third, at the regional tier, identical criteria and quotas apply to independent candidates and political parties.

55.4. Fourth, independent candidates (unlike political parties) may not hold more than a single seat.

55.5. Fifth, the compensatory tier, given that the purpose is to restore proportionality, applies only to political parties. The ICA accepts that this is necessary.

55.6. Sixth, the right to free and fair elections is compromised (not advanced) by the alternative proposal made by the ICA.

Alternatively, to the extent that rights have been limited it is a reasonable and justifiable limitation in terms of section 36 of the Constitution

The law

56. If, notwithstanding the submissions made, this Court is to determine that the rights in section 19 of the Constitution have been infringed, then we submit that it is a reasonable

and justifiable limitation and meets with the threshold under section 36 of the Constitution.

57. Section 36(1) of the Constitution provides as follows:

> *"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
>
> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose."*

58. The applicable legal principles pertaining to a limitation enquiry are now well-established. We emphasise four that are particularly relevant for this matter:

59. First, section 36(1) requires a balancing of different interests. "*On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand, there is the importance of the purpose of the limitation.*"[122] Overall, what must be assessed is whether the limitation is proportional (whether it invades the fundamental right as little as possible, balancing the harm caused against the purpose served) and whether it is reasonable (having regard to its purpose and effect).[123] The task of the Court is to evaluate

[122] **National Coalition for Gay & Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC) at par 35.
[123] **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1999 (1) SA 6 (CC) at par 35.

whether the limitation is proportional in light of its purpose, particularly in light of the "*existence of less restrictive means to achieve this purpose.*"[124]

60. Second, while the State bears the onus of showing a justification, in **Minister of Home Affairs v Nicro & others**[125] Chaskalson CJ explained:

> *"This [meaning the limitation analysis] calls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them."*

61. Third, a limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends.[126] Consequently, a provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused.[127] That said, the State ought to be given a margin of appreciation in relation to whether there are less restrictive means available to achieve the stated purpose.[128]

62. Fourth, a key consideration is whether there is a legitimate government purpose to be served by the impugned provision.[129] In this regard, rights may be limited in order to

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[124] Ibid.
[125] **Minister of Home Affairs v Nicro & others** 2005 (3) SA 280 (CC) at par 35
[126] **S v Manamela and Another (Director-General of Justice Intervening)** 2000 (3) SA 1 (CC) at par 34.
[127] **Islamic Unity Convention v Independent Broadcasting Authority and Others** 2002 (4) SA 294 (CC) at par 49.
[128] **S v Makwanyane and Another** 1995 (3) SA 391 (CC) at par 104.
[129] **Richter v Minister of Home Affairs** 2009 (3) SA 615 (CC) at par 78.

meet a constitutional imperative[130] and further that rights may be limited in order to protect the rights of others.[131]

Applying the threshold for a justification enquiry

63. We submit that Parliament and the Minister have demonstrated a reasonable and justifiable justification in the event that the enquiry is to proceed to this leg. We emphasise only the following:

63.1. As regards the nature of the right: Parliament accepts the importance and significance of the rights that the ICA has invoked.

63.2. As to the importance of the purpose of the limitation: Parliament has explained that the importance and purpose of the limitation is geared to achieving an electoral system that results, in general in proportional representation.

63.3. As to the nature and extent of the limitation: as explained, independent candidates compete on an equal footing with political parties for regional seats. Given the purpose of compensatory seats, independent candidates may not hold such seats for reasons explained.

63.4. As to the final two criteria: the only alternative proffered by the ICA is a 350/50 split which, as we have explained, presents the risk of overhang with dire consequences which we have addressed. The ICA has presented no solution for this grave difficulty. We refer to what we have stated as regards the legitimate government purpose that is served by the 200/200 split – it is to meet the

[130] **SANDU v Minister of Defence** 1999 (4) SA 469 (CC) para 35.
[131] **Beinash and Another v Ernst and Young and Others** 1999 (2) SA 116 (CC) para 17.

constitutional imperative of an electoral system that results in proportional representation, in general.

64. The ICA raises several arguments against a reasonable and justifiable limitation of the rights that it claims have been infringed.[132] None of the ICA's arguments withstand scrutiny:

64.1. As regards the issue of the overhang[133], we refer to what we have stated at paragraph 31.

64.2. As regards Parliament having been advised that the 200/200 split is a policy decision[134]: (a) this is by no means "*Parliament's primary defence*"[135]; (b) the conclusion sought to be drawn (that this "*meant that Parliament never considered the impact of the split on the equality of the vote*") is manifestly inconsistent with Parliament's evidence in this matter, including the legal advice it sought and obtained and the expert guidance that it received from the IEC, to which we have referred.

64.3. As regards the criticism that Parliament's justification is *ex post facto*[136], this is not correct. Many of the reasons given by Parliament emerged during the course of the amendment process as is apparent from Parliament's answering affidavit. In any event, *ex post facto* justifications regularly occur in the context of

[132] Applicant's HoA, p 32, par 62 and ffl.
[133] Applicant's HoA, p 35, par 68 to 71.
[134] Applicant's HoA, p 35/36, par 72 and 73.
[135] Applicant's HoA, p 36, par 73.
[136] Applicant's HoA, p 36, par 75.

constitutional challenges; a constitutional challenge is distinguishable from that of a review.

64.4. It is not correct that the fact that independent candidates may only obtain a single seat, is of no consequence.[137] On the contrary, it underscores the importance of a mechanism through which proportionality is restored. Parliament has addressed the seriousness of such a consequence.

64.5. It is notable that the ICA argues that the restoration of proportionality can be achieved by the 350/50 split[138], without engaging in any meaningful way on the issues of overhang. We refer to the submissions that we have already made in this regard at paragraph 31.

64.6. We reiterate, Parliament has contended that the increase in the number of independent candidates may result in a deviation of overall proportionality. While the Atkins Report contends otherwise, this is done in the absence of any knowledge of the number of independent candidates.[139]

64.7. As regards a similar approach being followed in respect of the election of councillors to a metropolitan and local municipality, we submit that fundamental point of similarity is that both systems must result in proportional representation, in general. It is accepted that the local government system is not before Court.[140]

[137] Applicant's HoA, p 36, par 75.1.
[138] Applicant's HoA, p 37, par 75.4. and 75.5 and 75.7.
[139] Applicant's HoA, p 37, par 75.6.
[140] Applicant's HoA, p 38, par 75.10.

The ineluctable conclusion

65. For all of the reasons that we have addressed, we submit that, once more, at best for the ICA, it has proposed an alternative split, which Parliament considered and rejected. We reiterate: it was rejected on the following basis: (a) the 200/200 split carries no risk of overhang; and (b) the ICA's proposal carries a foreseeable risk of overhang – while there is a dispute as to the extent to which this is likely to occur and the extent to which it threatens proportional representation, these are issues that Parliament pertinently considered prior to opting for the 200/200 split. In so doing, Parliament reached conclusions that are different from the ICA's preference, but, which we submit are constitutionally compliant.

F. REMEDY

66. We submit that no case has been made out for the relief sought and that the application falls to be dismissed.

67. In the event that this Court is to find that there is merit to the challenge, we submit that an appropriate order which constitutes just and equitable relief would be the following:

    67.1. A declaration of constitutional invalidity as contemplated by section 172(1)(a) of the Constitution.

    67.2. An Order suspending the declaration of invalidity for 36 months to enable Parliament to address the defects.

68. We do not support the grant of any interim relief. As this Court has recognized, it and other Courts are "*acutely aware of the perils of trying to do too much. They intervene only when the evidence and arguments compel them to conclude that the executive or the*

legislature has done wrong, or has not done enough. And when the courts intervene, they do so with necessary trepidation."[141] We submit that neither the evidence nor the arguments presented justify the far reaching relief sought in this application.

G. CONCLUSION

69. For reasons addressed in these Heads of Argument, we submit that this application falls to be dismissed.

KARRISHA PILLAY SC

LERATO J ZIKALALA

Counsel for the Second and Third Respondents

Chambers, Cape Town and Johannesburg

Wednesday, 23 August 2023

[141] **Mwelase v D-G, Dept of Rural Dev & Land Reform** 2019 (6) SA 597 (CC) (2019 (11) BCLR 1358; [2019] ZACC 30) at par 53.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

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LIST OF AUTHORITIES ON BEHALF OF SECOND AND THIRD RESPONDENTS

Item	Reference	Referenced in Parliament's Heads of Argument
LEGISLATION		
1.	The Electoral Act No 73 of 1998	p 1, par 1
SOUTH AFRICAN CASE LAW		
2.	Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC) (2010 (2) SACR 101; 2010 (5) BCLR 391; [2010] ZACC 4)	p 28, par 37.4
3.	Amcu v Chamber of Mines of SA 2017 (3) SA 242 (CC) (2017 (6) BCLR 700; [2017] ZACC 3)	p 30, FN 95

4.	AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs 2009 (3) SA 649 (CC) (2009 (6) BCLR 611; [2009] ZACC 4)	p 14, par 19.2, FN 41
5.	Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15)	p 15, par 23.1
6.	Beinash and Another v Ernst and Young and Others 1999 (2) SA 116 (CC)	p 43, FN 131
7.	Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) (2002 (9) BCLR 891; [2002] ZACC 2)	p 29, FN 93
8.	Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC) (2012 (12) BCLR 1297; [2012] ZACC 24)	p 30, FN 95
9.	Democratic Party v Minister of Home Affairs & Others 1999 (3) SA 254 (CC)	p 31, FN 99
10.	Electronic Media Network Limited v e.tv (Pty) Limited 2017 (9) BCLR 1108 (CC)	p 30, FN 96
11.	Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253; [1996] ZACC 26)	p 16, FN 46
12.	Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch 2020 (1) SA 368 (CC) (2019 (12) BCLR 1479; [2019] ZACC 38)	p 15, FN 45
13.	International Trade Administration Commission v SCAW SA (Pty) Ltd 2012 (4) SA 618 (CC) (2010 (5) BCLR 457; [2010] ZACC 6)	p 16, FN 46
14.	Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC)	p 42, FN 127

15.	Kham v Electoral Commission 2016 (2) SA 338 (CC) (2016 (2) BCLR 157; [2015] ZACC 37)	p 35, FN 108
16.	Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25)	p 29, FN 93
17.	Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (5) SA 171 (CC) (2008 (10) BCLR 969; [2008] ZACC 10)	p 29, FN 94
18.	Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) ([2003] 2 All SA 616; [2003] ZASCA 46)	p 16, par 23.2
19.	Minister of Home Affairs v Nicro & Others 2005 (3) SA 280 (CC)	p 42, par 60, FN 125
20.	Mwelase v D-G, Dept of Rural Dev & Land Reform 2019 (6) SA 597 (CC) (2019 (11) BCLR 1358; [2019] ZACC 30)	p 47, FN 141
21.	National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)	p 41, FN 122
22.	New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020)	p 7, par 16.1
23.	New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) (New National Party)	p 17, FN 50
24.	Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1)	p 27, FN 88

25.	Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759; [1997] ZACC 5)	p 29, FN 93
26.	Richter v Minister of Home Affairs 2009 (3) SA 615 (CC)	p 34, FN 104
27.	S v Makwanyane and Another 1995 (3) SA 391 (CC)	p 42, FN 128
28.	S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC)	p 42, FN 126
29.	SANDU v Minister of Defence 1999 (4) SA 469 (CC)	p 43, FN 130
30.	UDM v President of the RSA (ACDP Intervening; IDASA as Amici Curiae) (No 2) 2003 (1) SA 495 (CC) (2002 (11) BCLR 1179; [2002] ZACC 21)	p 31, FN 98
FOREIGN CASE LAW		
31.	Kramer v Union Free School District No 15 395 US 621 (1969), 61	p 16, par 24
32.	McGinty v Western Australia [1996] HCA 48; (1996) 186 CLR 140 (28 March 1996)	p 39, par 53
33.	Williams v Rhodes 393 U. S. 23, 393 U.S. 30 (1968)62	p 16, par 24

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CCT CASE NO: CCT 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC Applicant
(Registration Number: 2021/616521/08)

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Third Respondent

MINISTER OF HOME AFFAIRS Fourth Respondent

INDEPENDENT ELECTORAL COMMISSION Fifth Respondent

ALL POLITICAL PARTIES REGISTERED FOR THE 2024 ELECTIONS FOR THE NATIONAL ASSEMBLY Sixth Respondent

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FILING NOTICE

DOCUMENTS FILE HEREWITH:

Fourth Respondent's Heads of Argument and Practice Note

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DATED AT CAPE TOWN THIS 23rd DAY OF AUGUST 2023.

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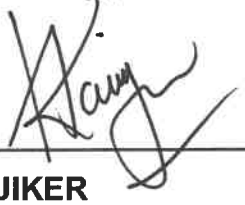

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 114/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC (Registration Number 2021/616521/08)	Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
ELECTORAL COMMISSION OF SOUTH AFRICA	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

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PRACTICE NOTE FOR MINISTER OF HOME AFFAIRS

THE NATURE OF THE MATTER

1 This is an urgent application for direct access. The fourth respondent (the Minister) does not oppose direct access. The Minister does oppose the merits of the application.

2 Before *New Nation Movement*,[1] there was an absolute bar to independent candidates contesting the elections. This Court in *New National Movement* declared the Electoral Act[2] was inconsistent with the Constitution because of that impediment.

3 Pursuant to *New Nation Movement*, Parliament has now adopted a modified electoral system that removes the impediment and now allows for independent candidates to contest the election. In so doing, Parliament has: (a) retained the two-tier system which has been in place since 1994; and (b) sought achieve the object of proportionality as required by sections 46(1)(d) and 105 of the Constitution.

4 The method chosen by Parliament is a 200/200 split between regional and compensatory seats. Only independent candidates may compete for regional seats; whereas only political parties may compete for compensatory seats. The reason for the distinction is that: by definition independent candidates may only occupy one seat and thus they distort proportionality. In order to overcome this, and restore proportionality to the system, only political parties compete for the compensatory seats.

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1 *New Nation Movement NPC and others v President RSA* 2020 (6) SA 257 (CC).

2 73 of 1998.

5 The applicant challenges the 200/200 split and contends that the ratio should rather be 350/50.

THE ISSUES TO BE ARGUED

6 The primary question before this Court is narrow: *Did Parliament act unconstitutionally by splitting the allocation of seats equally in a ratio of 200/200, rather than on a 350/50 basis?*

7 If so, what is the appropriate remedy?

ESTIMATED DURATION OF THE ARGUMENT

8 One day

THE RECORD

9 The entire record is in English.

SUMMARY OF ARGUMENT

10 The ICA's challenge is narrow. It challenges the 200/200 split. It contends that its preferred option of a 350/50 split is to be preferred.

11 The ICA's case is simply unsustainable for three key reasons.

12 First, it is based on a false premise regarding the relative value of the votes cast for regional seats under the Amendment Act.

13 Second, it plainly fails to establish that the approach of the Amendment Act to compensatory seats is in any way irrational or that it limits any right in the Bill of Rights. Once that is so, it fails to establish a breach of the Constitution on the test laid down by this Court in *New National Party*[3] and the cases that have followed it.

14 Third, it fails to offer any to solution to the risk of an "overhang" problem. The Amendment Act avoids that overhang risk. The ICA's preferred option – on its own version – does not. On that basis alone, it is difficult to see how it can seriously be contended that the Amendment Act is unconstitutional.

15 We respectfully submit that the ICA's case is a remarkably ambitious one.

15.1 It asks this Court to become engaged in the fine mechanics of the way the electoral system is designed.

15.2 It does so despite the admitted risk of creating an overhang and despite the fact that the country has yet to see how the new system works in practice.

15.3 We respectfully submit that this Court should resist that invitation.

STEVEN BUDLENDER SC
ADIEL NACERODIEN
MITCHELL DE BEER
Counsel for the Minister

Chambers, Sandton and Cape Town
23 August 2023

[3] *New National Party v Government of the RSA* 1999 (3) SA 191 (CC).

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WRITTEN SUBMISSIONS FOR MINISTER OF HOME AFFAIRS

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INTRODUCTION

1 In *New Nation Movement*,[1] this Court held that the Electoral Act[2] was inconsistent with the Constitution because it made no provision at all for independent candidates to contest elections for the National Assembly and provincial legislatures.

2 This Court suspended its declaration of invalidity, recognising that Parliament had reasonably explained that revising the electoral system to accommodate independent candidates would be a complex exercise.[3]

3 Parliament has now enacted the Electoral Amendment Act.[4] The amendments brought about by that the Amendment Act resolve the constitutional difficulty identified by this Court in *New Nation Movement.* The Amendment Act means that in the forthcoming 2024 elections, independent candidates will indeed be able to run for election to the National Assembly and Provincial Legislatures.

4 The applicant – the ICA – does not like the manner in which Parliament has cured this constitutional defect. It has its own preferred solution. So it approaches this Court insisting that Parliament's choice is unconstitutional.

5 As we demonstrate in what follows, the ICA's case is simply unsustainable for three key reasons.

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1 *New Nation Movement NPC and others v President RSA* 2020 (6) SA 257 (CC).

2 73 of 1998.

3 *New Nation Movement* at para 125.

4 1 of 2023.

5.1 First, it is based on a false premise regarding the relative value of the votes cast for regional seats under the Amendment Act.

5.2 Second, it plainly fails to establish that the approach of the Amendment Act to compensatory seats is in any way irrational or that it limits any right in the Bill of Rights. Once that is so, it fails to establish a breach of the Constitution on the test laid down by this Court in *New National Party*[5] and the cases that have followed it.

5.3 Third, it fails to offer any to solution to the risk of an "overhang" problem. The Amendment Act avoids that overhang risk. The ICA's preferred option – on its own version – does not. On that basis alone, it is difficult to see how it can seriously be contended that the Amendment Act is unconstitutional.

6 In what follows, we deal with the following issues in turn:

6.1 First, we summarise the key reforms brought about by the Amendment Act in their proper context.

6.2 Second, we sketch the real dispute between the parties.

6.3 Third, we set out the principles that emerge from this Court's jurisprudence on challenges to electoral schemes.

6.4 Fourth, we deal with the flaws in the ICA's constitutional challenge.

6.5 Fifth, we deal briefly with the question of remedy.

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[5] *New National Party v Government of the RSA* 1999 (3) SA 191 (CC).

7 The Minister accepts the ICA should be granted direct access to this Court in order to ensure finality ahead of the 2024 elections. Nothing further is said on this issue.

THE AMENDMENT ACT IN CONTEXT

The electoral system from 1994 to 2019

8 From 1994 to 2019, the 400 seats in the National Assembly were filled in the following way:

8.1 200 were regional seats filled based on regional (provincial) lists of political parties; and

8.2 200 were compensatory seats filled based on the national lists of political parties.

9 During that period a single ballot was cast by voters at national level. The votes cast in each region determined the allocation of regional seats for each region in the National Assembly.[6]

10 All ballots, in all regions, would be added together to ascertain overall party support nationally. The national list seats would then be used to put forward candidates in order restore overall proportionality between the represented parties.

[6] Minister's AA para 106 p 501.

The New Nation Movement judgment

11 In *New Nation Movement*, this Court held that sections 19(3)(b), 19(1) and section 18, read together, required that independent candidates must be given an opportunity to contest the national and provincial elections.[7] For this reason, the Court declared the Electoral Act unconstitutional.

12 The Court's holding was narrow and specific. It was that individual citizens are permitted to contest elections for the National Assembly and provincial legislatures by disassociating from others.[8] In other words, the electoral system must provide for persons who do "*not want to be shackled by party politics and constraints.*"[9]

13 This Court rightly also recognised that the electoral system had to comply with other requirements. Amongst these was the requirement in sections 46(1)(d) and 105(1)(d) of the Constitution that the electoral system prescribed by national legislation must be one that "*results, in general, in proportional representation*".

14 This leads to some significant complexity for those designing an election system which accommodates independent candidates:

14.1 Political parties can hold more than one seat in the National Assembly. That means that political parties can relatively easily be represented in the National Assembly, proportionally in relation to their support. For

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7 *New Nation Movement* at paras 17-19, 48-49 and 59.

8 *New Nation Movement* at paras 20-61.

9 *New Nation Movement* at para 52.

example, if a party wins 0,25% of the vote, it can be awarded 1 of the 400 National Assembly seats. But if the party wins 3% of the vote, it can be awarded 12 of the 400 National Assembly seats. And so on.

14.2 But the position for independent candidates is different.

14.2.1 By definition, an independent candidate contests the election alone. Indeed, at the core of this Court's judgment in *New Nation Movement* was a vivid explanation that a person who wants to be elected to the National Assembly should not have to join a political party if she objects to doing so.[10]

14.2.2 But this means that a given independent candidate can only ever occupy one seat in the National Assembly. Whether she wins 0,25% of the vote, 1% of the vote or 3% of the vote, she can only ever occupy 1 seat. And that means that her seats will not be proportional to the vote she receives.

15 This is, however, not an insuperable obstacle. As this Court rightly explained in *New Nation Movement,* it is possible to design a system that accommodates both independent candidates and political parties and which still "*results, in general,*

[10] See *New Nation Movement* at paras 48 to 58, including:

"*[53] …. We cannot dismissively say if you stand for political office through a political party, it makes no difference; you still do stand for political office. It may make all the difference to some. And it does to Ms Revell. She explains that, as a representative and leader of the Korana nation, a section of the Khoi and San people, she is averse to forming or joining a political party. Hers is not a for-the-sake-of-it objection. I understand her point perfectly. I read it to mean that, as a leader of a nation, she does not want to be constrained by that kind of partisanship that comes with being a member of a political party. That partisanship makes you ultimately answerable to the party. Being free of those shackles will make Ms Revell directly answerable to her nation, not to a political party. That is the choice she is making. In my book, it is a valid choice. Surely, her example is not isolated. There must be many and varied other examples. Subject to the Lavigne threshold, we cannot make light of them.*"

in proportional representation".[11] But it is a significant added complexity and one which must be accounted for in designing an electoral system that accommodates independent candidates.

16 The task for Parliament following the *New Nation Movement* judgment was to do exactly that: amend the electoral system so that it allows independent candidates to run for office, but also still "*results, in general, in proportional representation*". Thus, this Court's judgment required Parliament to design an electoral system which balanced various constitutional obligations.

17 Lastly, this Court made clear that it was not its job to decide whether one electoral system was "better" than another. That was a matter for Parliament:

> *"[L]et me mention that a lot was said about which electoral system is better, which system better affords the electorate accountability, etc. That is territory this judgment will not venture into. The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system. This Court's concern is whether the chosen system is compliant with the Constitution."*[12]

The approach of the Amendment Act

18 Parliament ultimately took the view that the existing electoral system could indeed be modified and adjusted to accommodate independent candidates, while adhering to the proportional representation requirement.

19 At the same time, Parliament was cognisant of the fact that there were calls for broader electoral reform from some sectors of the public and civil society. Such

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[11] *New Nation Movement* at paras 78-80.

[12] *New Nation Movement* at para 15 (emphasis added).

changes could not be implemented in time for the 2024 elections.[13] Parliament therefore decided that – alongside its modifications to the electoral system to allow independent candidates to contest the 2024 elections – it would enact legislative provisions creating an Electoral Reform Consultation Panel, which would facilitate the public debate on the basis of the experience of the 2024 elections.[14]

20 In respect of the modifications to allow independent candidates to run in the 2024 elections:

20.1 The Act retains the two-tier system that has been in place since 1994 to allocate seats in the National Assembly.

20.2 200 of the seats are allocated from the regions (provinces) which are multi-member constituencies – "**the regional seats**".

20.3 The other 200 seats are allocated based on the national lists of political parties – "**the compensatory seats**".

20.4 Both independent candidates and political parties are permitted to contest the 200 regional seats. They compete for the identical quota of votes to obtain a seat in the region which is calculated with the regional ballots cast by voters.

20.5 Only political parties may contest the 200 compensatory seats.

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[13] Minister AA para 55 pp 497-498.

[14] See section 23 of the Amendment Act. The Panel's functions are "*to independently investigate, consult on, report on and make recommendations in respect of potential reforms of the electoral system for the election of the National Assembly and the election of the provincial legislatures, in respect of the elections to be held after the 2024 elections*" (section 23(2)(a)).

21 The two sets of seats each serve different, but important functions.

22 In respect of the 200 regional seats:

22.1 The original purpose of having regional seats was to ensure that the membership of the National Assembly is not dominated by persons from regions (provinces) with larger populations.[15]

22.2 That is an important and legitimate purpose, which is still served by the 200 regional seats.

22.3 But the 200 regional seats also now serve an additional purpose – to allow independent candidates to contest the elections. They allow independent candidates to run anywhere in the country, subject only to meeting the eligibility criteria.

22.4 And they allow them to do so on an equal footing to political parties – because the relevant quota to obtain one of the 200 regional seats is identical for an independent candidate and a political party.

23 In respect of the 200 compensatory seats:

23.1 They serve a different but equally critical function.

23.2 Their function is to restore any deviations from overall proportionality that may arise in the allocation of regional seats.[16] The compensatory seats thus ensure that the electoral system results, in general, in

[15] Commission EA para 10 p 140.

[16] This is accepted by the applicant's expert, Atkins report para 60 p 66.

proportional representation. The seats serve the function of ensuring that the constitutional obligation in this regard is met.

23.3 This is achieved through a second compensatory ballot that voters will cast.

23.4 The need for these 200 compensatory seats to restore proportional representation has been present since 1994 when this system was first used.

23.5 But it took on an added impetus following the inclusion of independent candidates in the electoral system.

23.6 As we have explained in detail in paragraphs 14 to 14.2.2 above, independent candidates can only ever hold one seat and this could distort the overall proportionality of the elections results, meaning that the constitutional obligation would not be met. The 200 compensatory seats avoid this problem.

23.7 The quota for compensatory seats is calculated differently than the quota for regional seats. This is to be expected. Inter-party proportionality is determined by combining all regional ballots cast together with the compensatory ballots.

23.8 By using both the regional and compensatory ballots together in this manner, the system is able to better ascertain the overall proportional support for each party than a one-ballot system would.[17]

[17] Commission EA para 13.6 p 144.

24 A last factor to understand in relation to the purpose of the 200 compensatory seats is the need to avoid the risk of an "overhang".

24.1 An "overhang" occurs where a party gets more regional seats than it is entitled to on a proportionality basis.

24.2 Suppose, for example, that Party X does very well in one region (province) and is entitled to 10 regional seats – but does very poorly in the other eight regions (provinces) so that its overall seats in the National Assembly should only be 9 (ie, one less). This is an overhang problem.

24.3 We return to this issue below. For now we make only two points.

24.3.1 First, a risk of an overhang is a very serious issue. It is a risk that at the end of the election, the Electoral Commission will not be able to properly or lawfully allocate all 400 seats in the election.

24.3.2 Second, it is common cause between the parties that the 200/200 split between regional and compensatory seats avoids this overhang risk. This is because the 200 compensatory seats are always enough to properly restore proportionality.

THE REAL DISPUTE BETWEEN THE PARTIES

25 In understanding the ICA's constitutional challenge, it is important to begin with the extent of its objection to the Amendment Act.

26 As we understand the ICA's case, it is very limited.

26.1 First, the ICA does not object to the principle of two types of seats: regional seats and compensatory seats.

26.2 Second, the ICA does not object to the principle that independent candidates can only compete for regional seats, whereas political parties can compete for regional seats and compensatory seats.

26.3 Third, the ICA does not object to the use of two ballots or to the fact that both ballots will be used to determine the compensatory seats.

27 So, what then is the debate between the parties? It is about a single issue: *Did Parliament act unconstitutionally by splitting the seats 200/200 rather than 350/50?*

28 In other words, the nub of the ICA's case is that it would prefer that Parliament had split the seats 350/50 rather than 200/200.

29 And why would the ICA (as an association of independent candidates) prefer a 350/50 split? The ICA's founding affidavit tells the Court. It is because, it thinks that the 200/200 split makes it "*more difficult for an [independent] candidate to be elected*".[18]

[18] FA para 9.3 p 16 and para 49 pp 33-34.

30 In other words, the ICA would prefer a system which, in its view, would make it easier for independent candidates to be elected. And so it contends that the current system is unconstitutional.

31 We respectfully submit that the ICA's case is a remarkably ambitious one.

31.1 It asks this Court to become engaged in the fine mechanics of the way the electoral system is designed.

31.2 It does so despite the admitted risk of creating an overhang and despite the fact that the country has yet to see how the new system works in practice.

31.3 We respectfully submit that this Court should resist that invitation.

THE APPLICABLE LEGAL PRINCIPLES

32 The 1993 Constitution, for understandable reasons given the fraught nature of the transition, set out the details of the electoral system in considerable detail.

32.1 Section 40(1) of the Interim Constitution, 1993 provided that "*The National Assembly shall consist of 400 members elected in accordance with the system of proportional representation of voters as provided for in Schedule 2 and the Electoral Act, 1993*".

32.2 Schedule 2 of the 1993 Constitution then dealt with virtually all details of the electoral mechanics – how many ballots would be cast, the 200/200 split and so on.

33 But the present Constitution adopts a strikingly different approach.

34 Apart from the first elections under the present Constitution,[19] the constitutional drafters took a deliberate decision to vest the power to design the electoral system in Parliament, subject to certain constitutional guardrails.

35 Section 46(1) of the Constitution therefore provided only that:

> *"The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that-*
>
> *(a) is prescribed by national legislation;*
>
> *(b) is based on the national common voters roll;*
>
> *(c) provides for a minimum voting age of 18 years; and*
>
> *(d) results, in general, in proportional representation."*

36 Section 105(1) provides the same in respect of members of a provincial legislature.

37 This Court has repeatedly had occasion to consider the manner in which the Constitution deals with the electoral system. It has, on each occasion, stressed the wide latitude given by the Constitution to Parliament in this regard.

37.1 In *New National Party*, for example, this Court held that: [20]

> *"The right to vote contemplated by s 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. <u>The details of the system are left to Parliament</u> ... "*

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[19] Which were dealt with by Item 6 of Schedule 6 to the 1996 Constitution.

[20] *New National Party* at para 14.

37.2 In *AParty v Minister of Home Affairs*, this Court held: [21]

> *"Parliament has the constitutional authority and duty to design an electoral scheme to regulate the exercise of the right to vote. This is apparent from ss 46(1), 105(1) and 157(5) of the Constitution ...."*

37.3 This Court added that the design of the electoral system was "*a matter that lies peculiarly with Parliament's constitutional remit."*[22]

37.4 Most recently, in *New Nation Movement* this Court reiterated this point again:

> *"… The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system. This Court's concern is whether the chosen system is compliant with the Constitution."*[23]

38 We respectfully submit that this Court is unquestionably correct in its approach. Sections 46(1) and 105(1) of the Constitution expressly leave the choice of electoral system at national and provincial levels in the hands of Parliament.

39 In both instances, the Constitution expressly provides that South Africa's electoral system shall be as "*prescribed by national legislation*". This is quintessentially a matter that the Constitution vests in Parliament.[24]

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[21] *AParty and Another v Minister of Home Affairs and Another, Mofoko and Others v Minister of Home Affairs and Another* 2009 (3) SA 649 (CC) at para 6

[22] *A Party v Minister of Home Affairs* at para 80

[23] *New Nation Movement* at para 15

[24] *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC) at paras 120-126; *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC) at paras 53-69.

40 The Constitution does not itself determine the national and provincial electoral system, save to say that the electoral system must comply with various requirements. These are:

40.1 the system must be based on the national common voters roll;

40.2 the system must provide for a minimum voting age of 18 years;

40.3 the system must result, in general, in proportional representation; and

40.4 the system must permit independent candidates to contest elections.

41 There are a number of possible electoral systems that comply with these requirements, just as there are many electoral systems that are consistent with democracy.[25]

42 The Constitution leaves the decision on the preferred electoral system to Parliament and gives it a wide scope in making such decision.

43 We accept, of course, that Parliament's choices are constrained by the Constitution. This Court's jurisprudence has made it quite clear that provisions which disenfranchise citizens or preclude them from standing for office are not be permitted.

43.1 In *August*, the Court declared that prisoners were entitled to vote and directed the Commission and Minister of Home Affairs and Minister of

[25] *United Democratic Movement v President of the RSA (No 2)* 2003 (1) SA 495 (CC) at para 17

Correctional Services to make arrangements necessary to enable the prisoners to register as voters on the national common voters' roll.[26]

43.2 In *NICRO*, the Court struck down legislative provisions which deprived convicted prisoners serving sentences of imprisonment without the option of a fine of the right from participating in elections during the period of their imprisonment.[27]

43.3 In *Richter* and *AParty* the Court declared invalid legislative provisions which precluded South African citizens abroad from voting.[28]

43.4 Most recently, in *New Nation Movement* this Court declared the Electoral Act unconstitutional because it completely precluded independent candidates from contesting elections.

44 Therefore, the Court has rightly declared invalid bright-line exclusionary provisions in electoral legislation as they apply to voters or candidates.

45 But that must be contrasted with cases challenging the granular design of electoral systems, where legitimate competing options presented themselves and Parliament had selected one of those.

45.1 This is seen most clearly in *New National Party.*[29]

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[26] *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC).

[27] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC).

[28] *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* 2009 (3) SA 615 (CC), *AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another* 2009 (3) SA 649 (CC).

[29] *New National Party*,. See also *Democratic Party v Minister of Home Affairs and Another* 1999 (3) SA 254 (CC).

45.2 There, Parliament had enacted a requirement that a citizen needed a bar-coded ID book to vote. It was common cause that only 80% of South Africans had the bar-coded ID book and five million people eligible to vote did not.[30]

45.3 Nine members of this Court rejected a challenge to the law. They did so by explaining the limited constitutional grounds for such a challenge:

> *"It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.*
>
> *A second constraint is that the electoral scheme must not infringe any of the fundamental rights enshrined in chapter 2 of the Constitution. The onus is once again on the party who alleges an infringement of the right to establish it…."*[31]

45.4 This passage was expressly adopted by this Court in *New Nation Movement.*[32] It is an important passage given some of the arguments advanced by the ICA.

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[30] At para 30

[31] At para 19 (emphasis added)

[32] *New Nation Movement* at para 75

45.4.1 The passage makes clear that there is no free-floating reasonableness or proportionality requirement merely because one is dealing with the electoral legislation.

45.4.2 On the contrary, in the absence of a showing that a provision of the Bill of Rights has been limited, the electoral legislation is tested only against the rationality threshold.[33]

45.5 Similarly, in *UDM* 2002, this Court rejected a challenge to amendments to the Constitution and legislation which permitted floor-crossing by members of political parties.

45.6 The Court explained: [34]

> *"This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional."*

45.7 This too was endorsed by this Court in *New Nation Movement*.[35]

45.8 In *UDM* 2002, this Court also made clear that the fact that an electoral system might be more disadvantageous for some participants in an election than alternative systems did not render it unconstitutional:

> *"The fact that a particular system operates to the disadvantage of particular parties does not mean that it is unconstitutional. For instance, the introduction of a constituency-based system of elections may operate to the prejudice of smaller parties, yet it*

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[33] On the distinction between rational review and reasonableness review of legislation, see: *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) at paras 6-8.

[34] At para 11

[35] *New Nation Movement* at para 15

could hardly be suggested that such a system is inconsistent with democracy."[36]

46 The amended system in the Electoral Act for the National Assembly does not disenfranchise any citizen from voting or preclude them from running for public office. It permits independent candidates to run. It permits voters to cast votes both for independent candidates on the regional ballot and for political parties on the compensatory ballot to influence the overall proportional allocation of seats in the National Assembly.

47 The decisions made by Parliament challenged in this application are plainly ones made within its remit to design and specify mechanisms for the electoral system.

48 Lastly, we emphasise that even if reasonableness were the test for assessing electoral legislation (which it is not), this still does not entitle the ICA to ask this Court to second-guess Parliament's judgment. As this Court explained in *Grootboom*:

> *"… A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, … The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."* [37]

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[36] *UDM* at para 47

[37] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 41. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 48.

THE ICA'S CONSTITUTIONAL CHALLENGE

49 As the quote from *New National Party* makes clear, the ICA bears the burden of demonstrating that:

49.1 The Amendment Act is irrational; or

49.2 The Amendment Act limits a provision of the Bill of Rights.

50 We submit that the ICA has done neither.

The flaw in the ICA's premise

51 The ICA raises several arguments that the *ratio* of regional and compensatory seats in the Electoral Act violates the Constitution.

51.1 Each of these arguments is premised on the same contention, namely that independent candidates must get "*many more votes than a political party to gain a seat in the National Assembly*".[38]

51.2 It is contended that this fact "*creates an unfair election, distorts proportionality, and reduces the value of the votes cast in favour of independent candidates for no reason, let alone a convincing reason.*"[39]

52 This premise, however, is flawed.

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[38] FA para 6 p 8.

[39] FA para 36 p 24.

53 In respect of the 200 regional seats in the National Assembly, the votes required (quota) for an independent candidate or a political party to win such a seat in a given region (province) is identical. There is literally no difference between the votes required by an independent candidate or political party to win one of the 200 regional seats, which are allocated across the country.

54 An independent candidate competes for the 200 regional seats (a) before the same voters; (b) on the basis of the same ballot paper and (c) on the basis of the same quota, as is the case with a political party.

55 The ICA's starting premise is therefore simply incorrect.

The approach to compensatory seats is rational (and reasonable)

56 It is only when one considers the 200 other seats – the compensatory seats – that any difference emerges between independent candidates and political parties.

57 Those 200 compensatory seats can only be competed for by the political parties, not the independent candidates. This is because they are designed to achieve proportionality and only political parties can achieve proportionality.

58 This difference or differentiation between the methods of allocating seats (one method for allocating regional seats to independent candidates and political parties and one method for allocating compensatory seats to political parties) is not a result of "*unfairness*" or a reduction in the "*value*" of votes for independent candidates.

59 Rather, as we have explained in detail in paragraph 14 to 14.2.2 above, independent candidates can only ever hold one seat and this can distort the overall proportionality of the elections results, meaning that the constitutional obligation would not be met. To recap:

59.1 Political parties can hold more than one seat in the National Assembly. That means that political parties can relatively easily be represented in the National Assembly, proportionally in relation to their support. For example, if a party wins 0,25% of the vote, it can be awarded 1 of the 400 National Assembly seats. But if the party wins 3% of the vote, it can be awarded 12 of the 400 National Assembly seats. And so on.

59.2 But the position for independent candidates is different. By definition, an independent candidate contests the election alone. This means that a given independent candidate can only ever occupy one seat in the National Assembly. Whether she wins 0,25% of the vote, 1% of the vote or 3% of the vote, she can only ever occupy 1 seat. And that means that her seats will not be proportional to the vote she receives.

60 The 200 compensatory seats avoid this problem. They ensure that the potential distortions in proportionality produced by including independent candidates are redressed and that overall proportionality is restored – meaning that the section 46(1)(d) obligation is met.

61 Differentiating between independent candidates and political parties in this manner – by providing that only political parties contest the 200 compensatory seats – is manifestly rational.

61.1 It recognises the fundamental difference between them. Independent candidates can only hold a single seat, no matter the percentage of the vote they obtain, and therefore risk distorting proportionality. By contrast, political parties can fill seats in direct accordance with the percentage of the vote they obtain, and can therefore be used to restore proportionality.

61.2 Just as like cases should be treated alike, unlike cases should be treated differently. Lord Hoffman held as much held for the Privy Council in *Matadeen*:[40]

> *"As a formulation of the principle of equality, the Court cited Rault J. in Police v. Rose [1976] M.R. 79, 81:-*
>
> > *'Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently.'*
>
> *Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour."*

61.3 This Court adopted the same approach in *New National Party*:[41]

> *"Before this Court, the appellant advanced an argument based on what was alleged to be a breach of sections 9(1) and 9(2) of the Constitution. However, it is clear from what has been said in this judgment that although the documentary requirements in issue may be said to differentiate between different categories of people, there is a rational connection between the measure and the legitimate governmental purpose of facilitating the effective exercise of the important right to vote. No discrimination or unfairness has been established."*

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[40] *Matadeen and Others v. M.G.C. Pointu and Others (Mauritius)* [1998] UKPC 9 (18 February 1998) at 8-9.

[41] *New National Party* at para 48

62 It is accordingly apparent that voters' votes are not treated unequally or given different weight. Nor is there the slightest irrationality or arbitrariness. Even if the test were reasonableness (which it is not), this would manifestly be satisfied.

The overhang problem

63 We have already touched on the fact that a key purpose of the 200 compensatory seats is the need to avoid the risk of an "overhang". To recap:

63.1 An "overhang" occurs where a party gets more regional seats than it is entitled to on a proportionality basis.

63.2 Suppose, for example, that Party X does very well in one region (province) and is entitled to 10 regional seats – but does very poorly in the other eight regions (provinces) so that its overall seats in the National Assembly should only be 9 (ie, one less). This is an overhang problem.

64 The overhang risk is a significant problem. It would mean literally that the Electoral Commission would end up in a position whereby it had more seats to allocate in the National Assembly than the 400 permitted by the Constitution.

65 The overhang problem is seen playing out in Germany.[42]

[42] See the discussion of Volker Witting and Rina Goldenberg 'Germany passes law to shrink its XXL parliament' *Deutsche Welle* (Published 01/21/2023 last updated 03/17/2023) at https://amp.dw.com/en/germany-passes-law-to-shrink-its-xxl-parliament/a-64471203 .

65.1 Like in South Africa, the German electoral system for the *Bundestag* – the Federal Parliament – aims to achieve as best it can proportional representation.[43]

65.2 Voters also cast two ballots. One ballot is a direct vote for a candidate to represent their single member constituency and the other ballot one for the political party they support.

65.3 The German system was notorious for overhang seats or "*Überhangmandate*". It could allocate a party more constituency seats than it was entitled to in terms of their overall proportional support nationally. In the most recent *Bundestag* election in 2021, this resulted in a total of 138 extra seats being awarded.

65.4 For the 2025 elections, the new electoral system will require that overhang seats awarded to a party's representatives will not be allocated to them. This system is currently challenged in Germany's Constitutional Court.

66 It is common cause between the parties that:

66.1 The equal ratio of regional to compensatory seats (200/200) for the National Assembly has been used since the 1994 elections.[44]

[43] Article 38(1) of the Basic Law provides: "*Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience.*"

[44] Commission EA para 9 p 140.

66.2 The 200/200 split between regional and compensatory seats adopted in the Amendment Act does avoid this overhang risk.[45] This is because the 200 compensatory seats are sufficient to avoid the overhang risk.

66.3 But the 350/50 split preferred by the ICA does not avoid the overhang risk. On the contrary it introduces a significant overhang risk of up to 15% per election.[46]

67 The ICA does not suggest that the overhang issue is not a serious problem. But it fails to offer any to solution to the risk of an "overhang" problem. It suggests no mechanism by which it could be resolved. It does not explain what the Electoral Commission should do if this 15% risk eventuates in 2024 and it has more seats to allocate than are available in the National Assembly.

68 Yet, somewhat startlingly, the ICA persists in contending that Parliament's decision to avoid the overhang risk by adopting a 200/200 approach is unconstitutional and demands that this Court read-in a 350/50 split in its remedy.

69 We submit that the overhang issue is – by itself – destructive of the ICA's case. How can it ever be contended that the 200/200 split adopted by Parliament is unconstitutional when it avoids the risk of a serious problem that could otherwise result?

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[45] Again, we refer to the Atkins report table B pp 73-76.

[46] Atkins report paras 19 and 86 Table B pp 54, 72-78, Minister AA para 32 p 154.

The foreign jurisprudence does not assist the ICA

70 We note that the ICA refers to a number of foreign jurisdictions and international norms concerning the principle of one person one vote.[47] This includes the United States, Canada, and Australia.

71 But not one of those jurisdictions considers the question of the extent to which Parliament may permissibly take legislative steps to achieve proportionality in the electoral system.

71.1 This is because none have an electoral system or Constitution that requires proportional representation in results. On the contrary, their electoral systems are different to ours[48] – all use constituency systems rather than proportional representation.

71.2 Indeed, Canadian Courts have held that the fact that a single member constituency system leads to disproportionate results is not unconstitutional.[49] This is the very opposite of our constitutional scheme.

71.3 In those systems, what counts is not the overall proportion of support for a party, but rather the number of constituencies it wins. A party can win a majority of constituencies, while receiving less than a majority of the proportional support. This happened in South Africa in 1948 when

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[47] Written submissions paras 43-54.

[48] *United Democratic Movement* at para 29.

[49] *Daoust c. Québec (Directeur general des élections)*, 2011 QCCA 1634 (CanLII), leave to appeal to Supreme Court of Appeal refused [2012] S.C.C.A. No. 490.

the National Party came to power with only 37% of the total vote, whereas the United Party had 49%.[50] Our Constitution consciously set its face against this.

71.4 The decisions referred to by the ICA concerned issues surrounding whether voters in constituencies were evenly distributed from a geographical standpoint. That has nothing at all to do with the issues in the present matter.

The ICA's legal arguments are unsustainable

72 In support of its case, the ICA argues that the 200/200 split violates various constitutional provisions. We address each in turn.

73 The ICA's first argument is that the 200/200 split is arbitrary and has no justification.[51] It therefore contends that this violates section 1(c) of the Constitution. This is simply wrong. There are strong justifications:

73.1 The even distribution of regional and compensatory seats achieves proportionality. This is what the Commission's experts – Lynge and Rosen – concluded.[52] Their report must be accepted to the extent that it raises a dispute with the ICA's expert, as these are motion proceedings.[53]

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[50] Minister AA para 172 p 533.

[51] FA para 46 p 33.

[52] Report conclusions p 181.

[53] *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Others* 2022 (1) BCLR 1 (CC) at para 40. *Plascon-Evans* applies to expert affidavits too, see *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at para 36.

73.2 The 200/200 split also has no risk of allocating overhang seats.

73.3 It is plainly rational for Parliament to adopt the 200/200 split which will achieve these purposes.

73.4 The ICA also speculatively alleges that the 200/200 split was adopted for some "*improper purpose of undermining the prospects of independents getting elected*."[54] There is not one iota of evidence to support this supposed motive. This accusation should not have been made.

74 The ICA's second argument is that the even distribution of regional and compensatory seats breaches section 3(2)(a) of the Constitution[55] as, in its argument, a vote for an independent candidate carries less weight for no reason.[56] Its fourth argument is similar: it contends that votes for independent candidates count less for no reason and this violates section 19 of the Constitution.[57]

74.1 We have addressed the fundamental flaw in the argument already. Independent candidates and political parties compete for the same quota in regional elections: votes carry exactly the same weight. A vote for an independent candidate does not count less.

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[54] FA para 46 p 33.

[55] Relied on by the ICA at para 36.2 of its heads of argument

[56] FA para 47 p 33.

[57] FA para 49 pp 33-34. The ICA relies on sections 19(2) and 19(3) at paras 36.4 and 36.5 of its heads of argument.

74.2 When it comes to compensatory seats, the difference in approach between independent candidates and political parties is amply justified.

75 Third, the ICA argues that the 200/200 split of regional and compensatory seats arbitrarily differentiates between independent candidates and political parties and violates section 9(1) of the Constitution.[58]

75.1 There is no differentiation in respect of the regional seats. Political parties and independent candidates contest the 200 regional seats for the support of the same number of voters and for the same quota.

75.2 The method used for allocating compensatory seats differs from that used for allocating regional seats.

75.3 In respect of compensatory seats, there is a differentiation for good reason – the compensatory seats are used to restore proportionality. We reiterate that it is only political parties that can do so.

76 The ICA's fifth argument is that even distribution of compensatory and regional seats will "*undermine the fairness of the elections*" or the "*fairness of the outcome of the elections*" or violate section 19(2) of the Constitution.[59] This is incorrect. The ICA has not demonstrated how the freeness and fairness of elections would be compromised.

[58] FA para 48 p 33.

[59] FA para 50 p 34.

77 The sixth argument is that 200/200 split will violate the constitutional requirement of proportional representation.[60] But they are simply wrong on this score. The even distribution is precisely aimed at achieving proportionality. Regional constituencies have the potential to distort proportionality – especially if a distribution of seats gives rise to the risk of overhang. Having an even number of regional and compensatory seats addresses the issue of overhang as we have explained.

78 The six arguments raised by the ICA are therefore not sustainable. But there is a more fundamental problem.

78.1 As we have explained, the real nub of the ICA's case is simply that the division of seats between the regional seats and compensatory seats in the Amendment Act is not in accordance with its preferred division. But such an approach does not meet the correct test for rationality.[61]

78.2 Even assuming in the ICA's favour that the compensatory seats "*can*" be reduced to 50 and that it is "*not necessary*" for the split to be 200/200, these arguments do not explain why Parliament's legislative choice of the 200/200 split violates the Constitution.

78.3 Apart from anything else it is in accordance with precedent. The system in the Electoral Act before its amendment also divided the regional and national (now compensatory) seats evenly. And at local

[60] FA para 51 p 34.

[61] In addition to the cases we have already cited, see *Democratic Alliance v President of RSA and others* 2013 (1) SA 248 (CC) at para 32, *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 51.

government level, ward and proportional representation seats are also divided evenly in municipal councils in terms of national legislation contemplated by section 157(2) and (3) of the Constitution.

78.4 But more importantly there are in fact deeply compelling reasons for the 200/200 split. As the ICA and Mr Atkins are driven to accept, the 200/200 split serves the important – constitutionally required – purpose of achieving proportional representation in the National Assembly. There is no suggestion that the 200/200 split does not achieve that purpose (nor can there be).[62]

79 The debate about whether there may be some more appropriate or better manner in which to divide the regional and compensatory is not a matter of constitutional law – it is ultimately a matter left for Parliament to decide.

80 It is only where the ICA has shown an irrational provision or a limitation of fundamental rights that this court will step in. The ICA has shown neither.

JUST AND EQUITABLE REMEDY (IF ANY)

81 We have submitted that the ICA's case is without merit. Accordingly no need for a just and equitable remedy arises. If, however, the Court were to find that the ICA had established a breach of the Constitution, we make the following submissions.

82 First, the ICA's proposed reading-in is manifestly unsustainable.

[62] Minister's AA para 156 p 523.

82.1 Not only does it involve this Court amending important and delicate provisions of the electoral scheme, it gives rise to the overhang risk set out above.

82.2 On the ICA's own version a 350/50 distribution of regional and compensatory seats, produces a 15% risk of overhang. It however offers so solution at all to this overhang problem. It suggests no mechanism by which it could be resolved. It does not explain what the Commission should do if this 15% risk eventuates in the 2024 election and there are more seats to be allocated than are available.

83 Second, once the reading-in is rejected, the only remaining remedy is the suspension of any declaration of invalidity, until at least after the 2024 elections.

83.1 The 2024 elections must go ahead and cannot be postponed later than what it permitted by the Constitution.[63] The latest date on which they must be held is 14 August 2024.[64]

83.2 Quite plainly, there is not enough time for further amendments to be made to the Electoral Act ahead of the 2024 elections. The Commission has explained why there needs to be certainty about the electoral system that will be in place for 2024.[65]

83.3 A declaration of invalidity with immediate effect would therefore render the electoral system for the National Assembly in 2024 unworkable.

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[63] *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* 2022 (5) BCLR 571 (CC).

[64] Commission EA para 46 p 163.

[65] Commission EA paras 47-50 pp 163-165.

This Court has held that it is inappropriate to leave a *lacuna* in the law in the absence of a suspension order.[66]

CONCLUSION

84 We ultimately submit that direct access should be granted, but that the application should be dismissed.

85 Alternatively, should the Court declare any provision of the Act invalid, it should suspend its declaration of invalidity until after the 2024 elections.

86 The Minister does not seek costs.

STEVEN BUDLENDER SC
ADIEL NACERODIEN
MITCHELL DE BEER
Counsel for the Minister

Chambers, Sandton and Cape Town
23 August 2023

[66] *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC) at para 21.

AUTHORITIES

South African cases

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AParty and Another v Minister of Home Affairs and Another, Mofoko and Others v Minister of Home Affairs and Another 2009 (3) SA 649 (CC)

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN, GAUTENG

Case Number: 158/23

in the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

NOTICE OF APPLICATION (for Condonation)

TAKE NOTICE THAT One Movement South Africa NPC will apply at the hearing of this matter on 29 August 2023 for an Order as follows:

1 THAT the applicant's non-compliance with the 11 August 2023 directive of this Court, to deliver its written submissions by 18 August 2023, be and is hereby condoned.

2 Further, other or alternative relief.

TAKE NOTICE that the affidavit of **KIMRIE CRYER** will be used in support of this application.

KINDLY PLACE THE MATTER BEFORE THE REGISTRAR ACCORDINGLY FOR HEARING ON 29 AUGUST 2023.

Dated at SANDTON on this 21st day of August 2023.

APPLICANTS' ATTORNEYS

THOMSON WILKS INC.
Pebble Beach 8
Inanda Greens Business Park
54 Wierda Road West
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TO: **THE REGISTRAR OF THE CONSTITUTIONAL COURT**

AND TO: **STATE ATTORNEY**

FIRST RESPONDENT'S ATTORNEYS

4th Floor, 22 Long Street

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C/O: STATE ATTORNEY, JOHANNESBURG

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Ref.L Mr V Dhulum

AND TO: **STATE ATTORNEY**

SECOND RESPONDENT'S ATTORNEYS

AND TO: **MOETI KANYANE INCORPORATED**

THIRD RESPONDENT'S ATTORNEYS

Second Floor, Building B

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250 Hall Street, Centurion

C/O RAMS INCORPORATED

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Sandton

AND TO: **STATE ATTORNEY**

FOURTH AND FIFTH RESPONDENT'S ATTORNEYS

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN, GAUTENG

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SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

FOUNDING AFFIDAVIT: APPLICATION FOR CONDONATION

In re: Late Delivery of the Applicant's Written Submission

I, the undersigned,

KIMRIE CRYER

do hereby make oath and state:

1. I am an adult female attorney, practicing under the name and style of Thomson Wilks, which has its offices at Pebble Beach Building 8, Inanda Greens Business Park, 54 Wierda Road West, Weirda Valley, Sandton, Gauteng.

2. I am the applicant's attorney of record in the urgent application instituted under the above case number ("the application").

3. The facts contained herein fall within my personal knowledge, save where otherwise indicated.

THE PURPOSE OF THIS APPLICATION

4. This is an application for condonation for the late filing of the applicant's written submissions. The applicant's written submissions will be delivered during the morning of Monday 21 August 2023, when they ought to have been filed before the close of business on Friday 28 August 2023. The delay will therefore be by one court day.

5. The delay arose as follows.

6. On 11 August 2023 this Court issued directions to the parties which, *inter alia*, directed the applicant to deliver its written submissions on or before Friday, 18

August 2023.

7. Regrettably, the applicant was unable to file its written submission by the close of business on Friday 18 August 2023. However, the applicant emailed its written submissions to the parties during the course of Saturday afternoon on 19 August 2023. The applicant will also ensure that these submissions are filed on in the morning of Monday 21 August 2023.

8. The applicant's written submissions were not filed on time because of the following circumstances.

9. Immediately upon receiving this Court's directions, the applicant's legal team commenced preparations which included analysing the answering affidavits that had been filed by the respondents.

10. Thereafter, a consultation was held with the legal team on Monday afternoon on 14 August 2023, which was the earliest that all counsel were available. At that consultation a timetable was arranged for work to commence on the written submissions and for a combined draft to be sent to lead counsel during the evening of Wednesday 16 August 2023.

11. However, given the volume of the issues, a combined set of submissions was sent to lead counsel during the early morning on Thursday 17 August 2023. Unfortunately, lead counsel required substantial revisions to the submissions which were not possible to finalise during the course of the day on Thursday

17 August 2023.

12. Further, lead counsel had pre-existing professional commitments for Friday 18 August 2023, which had been scheduled prior to the receipt of this Court's directions. Lead counsel was unable to change those commitments.

13. As a result, lead counsel was only able to continue to settle and finalise the applicant's written submissions by working through the afternoon and throughout the night on Friday 18 August 2023.

14. Final edits and referencing were then completed by junior counsel during the morning on Saturday 19 August 2023.

15. The applicant's written submissions were thereafter finalised and sent by email to all the parties during the course of Saturday afternoon.

16. I respectfully submit that the interests of justice favour the granting of condonation, for the late filing of the applicant's written submissions, for the following reasons.

17. The applicant was not remiss in the delay. The delay arose through circumstances beyond its control. Unfortunately, lead counsel had to meet those pre-existing professional commitments on Friday 18 August 2023.

18. Further, the applicant's written submissions were sent as soon as possible

after the deadline, and they were served by email the very next day.

19. A copy of the email sent to the respondents in this regard is attached hereto marked "**CA1**".

20. On the same day (Saturday, 19 August 2023), the applicant filed its written submissions and list of authorities electronically with the Registrar of this Court. A copy of the email to the Registrar of this Court demonstrating this this is attached hereto marked "**CA2**".

21. I submit that the delay in serving the written submissions on the respondents is not inordinate in these circumstances and that the respondents will not be unduly prejudiced by the late delivery of the written submissions.

22. As noted, these submissions will be served the very next court day after Friday 18 August 2023, which is on Monday 21 August 2023.

23. As is evident from the issues raised in the applicant's urgent application, the matters are important and relate to national and provincial elections scheduled for 2024, as well as to the constitutional validity of the Electoral Act.

24. I respectfully submit that it is in the interests of justice of justice, in the interests of the parties and in the public interest to have the application heard and finalised by this Court as soon as is reasonably possible.

25. I respectfully submit that the applicant will be prejudiced if this Court does not condone the late filing of its written submissions. The written submissions contain the applicant's arguments in the application and the legal submissions upon which it relies for the relief it seeks.

26. In all the circumstances, I submit that the applicant has shown good cause for the delay of one day and for the grant of condonation.

27. The applicant extends its sincerest apologies to this Court and to the respondents for the delay in filing its written submissions late. By emailing the written submissions to the respondents on Saturday 19 August 2023, the applicant took all possible steps to minimise the prejudice to the respondents.

28. The applicant therefore respectfully seeks condonation for the late filing of its written submissions as prayed in the notice of application delivered with this affidavit.

DEPONENT

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and affirmed/sworn to before me at Sandton on 21st of August 2023, under compliance with the regulations contained in Government Notice R1258 dated 21 July 1972, and R1648 of 19 August 1977, having been complied with.

COMMISSIONER OF OATHS

URSULEY MATJEKE
Commissioner of Oaths Ex Officio
Registered Attorney R.S.A.
DM Kisch Inc
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"CA1"

Kimrie Cryer

From: Kimrie Cryer
Sent: Saturday, 19 August 2023 15:41
To: 'Chad Phillips'; 'Naidoo Ramona'; 'Nitara Chandika'; Stephen Thomson; Megan Brook; Jason Hunter; 'malebo@presidency.gov.za'; 'President RSA'; 'vincentm@presidency.gov.za'; 'State Attorney Pretoria'; 'Karjiker Shireen'; 'Visagie Carmenita'; 'Dhulam Vijay'; 'moeti@kanyane.co.za'; 'bridget@kanyane.co.za'
Cc: 'Dinesha Deeplal'; 'Avin Hiralall'; 'Esam Moyana'
Subject: RE: IND119.1 RE: Independent Candidate Association // The President of the Republic of South Africa and Others (CCT 144/23) and One Movement South Africa NPC // The President of the Republic of South Africa and Others (CCT 158/23) [WW-WS_JHB.FID2634782]
Attachments: OSA written Submissions 19.08.2023.pdf; 19.08.23 OSA List of Authorities.pdf

Dear Sir/Madam

Please see attached hereto the Applicants Heads of Argument and List of Authorities in the above matter.

Kindly acknowledge receipt of same.

Kind Regards,

THOMSON • WILKS
ATTORNEYS, NOTARIES, CONVEYANCERS

Kimrie Cryer
Senior Associate

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IN ASSOCIATION WITH dwf

"CA2"

Kimrie Cryer

From: Kimrie Cryer
Sent: Saturday, 19 August 2023 15:43
To: 'Dunisani Mathiba'; 'ddeeplal@straussdaly.co.za'; 'Chad Phillips'; 'ddeeplal@straussdaly.co.za'; 'Chad Phillips'; 'SKarjiker@justice.gov.za'; 'CVisagie'; 'Dhulam Vijay'; 'DLouw@justice.gov.za'; 'cnewman@justice.gov.za'; 'ecapes@justice.gov.za'; 'fmbeki@justice.gov.za'; 'speaker@parliament.gov.za'; 'pmasiza@parliament.gov.za'; 'moeti@kanyane.co.za'; 'bridget@kanyane.co.za'; Stephen Thomson; Megan Brook; Jason Hunter; 'SKarjiker@justice.gov.za'; 'CVisagie'; 'moeti@kanyane.co.za'; 'bridget@kanyane.co.za'; 'Rnaidoo@justice.gov.za'; 'ICedras@justice.gov.za'
Cc: 'Generaloffice'; 'Zoleka Sondlo'; 'Nonkululeko Sishwili'; 'Sabelo Ntuli'; 'Lerato Khanye'
Subject: RE: [Directions] CCT 144/23 Independent Candidate Association South Africa NPC v President of the Republic of South Africa and Others and CCT 158/23 One Movement South Africa NPC v President of South Africa and Others.
Attachments: RE: IND119.1 RE: Independent Candidate Association // The President of the Republic of South Africa and Others (CCT 144/23) and One Movement South Africa NPC // The President of the Republic of South Africa and Others (CCT 158/23) [WW-WS_JHB.FID2634782]; OSA written Submissions 19.08.2023.pdf; 19.08.23 OSA List of Authorities.pdf

Dear Mr Mathiba

The above matter refers.

Kindly find attached hereto the Applicants Heads of Argument and Practice Note, together with proof of electronic service thereof.

We kindly request that you confirm receipt hereof.

Kind Regards,

Kimrie Cryer
Senior Associate

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Subject: [Directions] CCT 144/23 Independent Candidate Association South Africa NPC v President of the Republic of South Africa and Others and CCT 158/23 One Movement South Africa NPC v President of South Africa and Others.

Dear Colleagues

Kindly find the attached set down directions in the above matter.

PLEASE ACKNOWLEGDE RECIEPT.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN, GAUTENG

Case Number: 158/23

in the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

APPLICANT'S WRITTEN SUBMISSIONS

Contents

A. INTRODUCTION

1. The applicant seeks direct access and urgent relief from this Court, to declare certain provisions of the Electoral Amendment Act 1 of 2003, unconstitutional.

2. The One South Africa Movement NPC is a registered not for profit company, which is a social movement founded on the values of advocacy, activism and accountability ("OSA"). The members of OSA include independent candidates operating as a collective with individual interests.[1]

[1] Founding affidavit, paragraphs 4-12, p12-13.

3. OSA has approached this Court asserting the rights of its members who intend to stand as independent candidates in the forthcoming election. OSA approaches this Court asserting the rights in section 19 and section 9 of the Bill of Rights[2] and it does so in terms of sections 38(d) and (e) of the Bill of Rights.[3] It asserts, also, the web of rights which are linked to the political rights in section 19 of the Bill of Rights.

4. The Electoral Amendment Act was passed in response to the decision of this Court in June 2020 in *New Nation Movement NPC and Others* v *President of the Republic of South Africa and Others*.[4]

5. Following upon two extensions granted by this Court, the National Assembly ultimately passed the amendment Bill on 23 February 2023 and referred it to the President for his approval.

6. The President signed the amendment Bill into law as Act 1 of 2003 and did so on 13 April 2023, which was gazetted on 17 April 2023 to commence on 19 April 2023.

7. In its founding affidavit, the applicant ("OSA") drew attention to what it contends are critical flaws in the Electoral Act, as they related to independent candidates. The specific sections in the Electoral Act that OSA challenges are those which affect independent candidates in:

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2 Founding affidavit, paragraphs 9 and 10, p13.
3 Founding affidavit, paragraph 9, p13.
4 2020 (6) SA 257 (CC).

(a) section 31(B)(3) - the signature requirement; and

(b) in Items 5, 7, 11, 12, 23 and 24 of Schedule 1A, as they relate to the recalculation of votes arising from a vacancy and forfeiture of seats applicable to independent candidates.

8. Much of the respondents' answering affidavits focus on the fact that the particular points of constitutional invalidity identified in *New Nation* have now been remedied. Indeed, it is common cause on the papers that independent candidates may now stand for election to the National Assembly and Provincial Legislatures. However, the issues presented in this application, extend far beyond just the constitutional invalidity identified in *New Nation.*

9. In short, the inquiry now is whether the electoral system introduced in the Electoral Act is constitutionally compliant. OSA contends that it is not, in the respects it has identified. On these challenged aspects, the Independent Electoral Commission has delivered an explanatory affidavit and abides the by decision of this Court, while the fourth and fifth respondents (collectively referred to as "Parliament") oppose such challenges, as does the second respondent the Minister of Home Affairs ("Minister").

10. We deal first with framework jurisprudential principles which are applicable to the constitutional issues in this application. These are described in **SECTION B**, as they have been identified by this Court in several judgments.

11. We deal with direct access and urgency in **SECTION C.**

12. In **SECTION D** we deal with the first constitutional challenge as it relates to the signature requirement for independent candidates.

13. In **SECTION E** we deal with the constitutional challenge as it relates to the recalculation, arising from vacancies and surplus votes as they relate to independent candidates.

14. In **SECTION F** we deal with the remedy sought by OSA.

15. In **SECTION G** we make concluding submissions.

16. An important issue must be addressed at the outset. OSA dealt in its founding affidavit with its arguments that Parliament had not corrected the legislative defect within the suspensive period. However, as correctly pointed out by the Minister and Parliament, OSA did not seek any relief over this issue in its Notice of Motion.

17. This is because OSA recognised the urgency of this matter and the need to have finality sooner rather than later, given the 2024 elections. Nevertheless, having regard to the counter-arguments presented by the respondents, OSA no longer persists in this argument before this Court.

18. Indeed, OSA accepts, as it must, that the sooner that clarity is provided by this Court on the merits of its constitutional challenges, the better for all parties

concerned, indeed the national interest would be best served by such outcome.

B. FRAMEWORK CONSTITUTIONAL PRINCIPLES

19. We submit that the following framework principles govern this application.

20. Section 1(d) of the Constitution commits the country to "universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness, and openness."

21. These founding values occupy "a special place" in our Constitution.[5] These values set "positive standards with which all law must comply in order to be valid.[6]

22. "A multi-party system of democratic government excludes a one-party State, or a system of government in which a limited number of parties are entitled to compete for office…".[7]

23. A multi-party system of democratic government contemplates "a political order in which "it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections…".[8]

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5 *New Nation,* at para 73, read in the context of paras 70-72.
6 *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae* (No 2) 2003 (1) SA 495 (CC), para 19.
7 *UDM*, para 24.
8 *UDM*, para 26.

24. The right to vote for any legislative body established in the Constitution is linked to the right to stand for political office. The political rights in section 19 are "intertwined": the fundamental right to vote includes electing people into public office, at a decision-making level of government, to advance citizens' interests.[9] In this context, "the right to vote and the right to stand for public office have always been viewed as interconnected and crucial to a democratic system of government."[10]

25. Our historical context and the battle for the franchise have yielded an interpretational principle that "legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement."[11]

26. Furthermore, the right to vote means that when citizens exercise such rights they do so upon the basis that their votes and the choices conveyed therein, will be afforded the same weight and treatment as other votes. This flows from:

(a) the guarantee in section 3(2)(a) of the Constitution; and[12]

(b) the right to equality in section 9 of the Bill of Rights, in which section 9(1) guarantees that "everyone is equal before the law and has the right to equal protection and benefit of the law."

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9 *New Nation*, para 108.

10 *New Nation*, para 142, per Jafta J.

11 *New Nation*, para 106, citing Sachs J in *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC), at para 17 and in para 107, the decision in *Ramakatsa and Others v Magashule and others* 2013 (2) BCLR 202 (CC), at para 70, about the need for a generous and purposive interpretation to give rights holders "the full protection afforded by the guaranteed right."

12 Section 3(2)(a) of the Constitution guarantees that all citizens are "equally entitled to the rights, privileges and benefits of citizenship," which includes the right to vote.

27. We submit that the fundamental importance of the franchise is the blueprint against which OSA's complaints must be assessed. This is so not only because the political rights in section 19 are interlinked and give effect to our founding values in section 1(d), or because they are linked to other rights, such as the rights of association and dignity, but also because "the right to vote and the exercise of it, is a crucial working part of our democracy."[13]

28. In this regard:

> "[54] Unlike many other civil and political guarantees, as this court has remarked on previous occasions, the right to vote imposes an obligation upon the State not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised. The right to vote necessitates an electoral system and the calling of elections. Running an election is a difficult task which calls for expertise and dedication. Section 190 of the Constitution recognises the need for an organisation to take responsibility for elections. It provides for an electoral commission which will manage elections, ensure that they are free and fair, and declare the result in a time to be provided for in national legislation that is 'as short as reasonably possible'. … ".[14]

29. In addition, this Court has recognised the importance of the representative and participatory elements of our democracy. In *Doctors for Life*, the context for our model of representative and participatory democracy was explained as

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[13] *Richter v Minister of Home Affairs and Others* 2009 (3) SA 615 (CC), at paragraph 53, per O'Regan J.

[14] *Richter*, at para 54.

follows:

> "[111] Our Constitution was inspired by a particular vision of a non-racial and democratic society in which government is based on the will of the people. Indeed, one of the goals that we have fashioned for ourselves in the Preamble to the Constitution is the establishment of 'a society based on democratic values, social justice and fundamental human rights'. The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values 'a multi-party system of democratic government, to ensure accountability, responsiveness and openness'. Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the Preamble to the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process."

30. Within this jurisprudential framework, Parliament is empowered to determine the electoral system in the country. This includes an electoral system that deals with the criteria specified in sections 46 and 105 of the Constitution, including Parliament's obligation to enact an electoral system which results, in general in proportional representation. There can be no quarrel with this mandate,[15] nor of the fact that Parliament may "regulate the exercise of the

[15] *New Nation,* para 75.

right to vote so as to give substantive content to the right."[16]

31. However, Parliament's power to enact legislation determining and regulating the electoral system, must be compliant with the Constitution.[17] Whatever electoral choices Parliament makes, these are always subject to constitutional scrutiny.[18]

32. Parliament does not have "carte blanche" in regard to the electoral system it prescribes.[19]

33. The two constitutional constraints imposed on Parliament are that legislative choices must be rationally related to a legitimate government purpose, that is, it must not be arbitrary and capricious and it must not infringe fundamental rights.[20]

34. OSA has approached this Court asserting that the rights in section 19, to stand for and to be voted into public office as well as the right to equal protection and benefit of the law, have been infringed by the Electoral Act.

35. Ordinarily, it is for Parliament to justify its legislative choices by demonstrating a rational basis for its decision:

> "[84] In *S v Makwanyane* Ackermann J characterised the new

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16 *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC), at para 13.
17 *New Nation*, para 11.
18 *UDM*, para 11.
19 *New Nation,* para 75.
20 *New Nation*, para 75.

constitutional order in the following terms:

> 'We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.'

Similarly, in *Prinsloo v Van der Linde and Another* this Court held that when Parliament enacts legislation that differentiates between groups or individuals it is required to act in a rational manner:

> 'In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State.'"[21]

36. The need for Parliament to demonstrate a rational basis for legislative choices in our constitutional order, applies, whether Parliament draws a differentiation in the law or not. This emerges from "the constitutional requirement of a rational connection between a law and its avowed purpose" which "has its source in s 2 of the Constitution which provides that it is the supreme law and

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[21] Per Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), at para 84.

that law or conduct inconsistent with it is invalid and the obligations imposed on it must be fulfilled."[22]

37. This Court has recognised that even facially neutral provisions in legislation, may have unconstitutional effects:

> " [90] … The purpose and effect of a statute are relevant in determining its constitutionality. A statute can be held to be invalid either because its purpose or its effect is inconsistent with the Constitution. If a statute has a purpose that violates the Constitution, it must be held to be invalid regardless of its actual effects. The effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional. This will be the case where, for example, the legislation has a discriminatory impact on a particular racial group."[23]

38. Given these framework constitutional principles, we submit that it is particularly in this context that even facially neutral requirements imposed in the context of the Electoral Act, must be carefully scrutinised.[24]

39. We return to an application of these principles when we deal with the two constitutional challenges raised by OSA.

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[22] *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC), per Moseneke J, at paragraph 49, read with footnote 67.

[23] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC), at paragraph 90, per Ngcobo J.

[24] *New National Party of South* Africa, at paras 25 and 28.

C. DIRECT ACCESS

40. We submit that OSA has a direct and substantial interest in the issues presented in this application. These involve the processes set out in the Electoral Act for the holding of national and provincial elections. No respondent has challenged OSA's *locus standi*.[25]

41. Further, none of the respondents have opposed OSA's application for direct access to this Court.[26] Parliament abides the decision of this Court on direct access but admits that this matter is of significant importance.[27] The Minister of Home Affairs ("Minister") does not oppose the application for direct access to this Court.[28] The Independent Electoral Commission (third respondent - "IEC") abides the decision on the application for direct access to this Court.[29]

42. We submit that direct access ought to be granted for at least the following reasons:

(a) This matter is of significant public importance given the impending national and provincial elections which must take place 2024 and all of the parties accept that this is so.

(b) It would be impractical for OSA to approach a High Court first, which will entail a lengthy period and associated time and resources before the matter eventually reaches this Court, by which time the impending

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[25] The issue of the applicant's *locus standi* is dealt with in paragraphs 5-12 of the founding affidavit, p11-13.
[26] The application for direct access is dealt with in paragraphs 70-103 of the founding affidavit, p28-35.
[27] Parliament's Answering Affidavit, paragraph 112, p627.
[28] Minister of Home Affair's Answering Affidavit, paragraph 6, p196, read with paragraphs 30-34, p207-208.
[29] IEC's answering affidavit, paragraph 4, p512-513.

national and provincial elections would likely be over.

(c) Only this Court is empowered to make the ultimate decision on whether the Electoral Act is constitutionally compliant in respect of the matters challenged by OSA.

(d) The issues raised by OSA are of a constitutional nature, transcend the interests of the parties in this matter and involve issues which go to the heart of our democracy.

(e) The challenges raised by OSA have reasonable prospects of success.

(f) All the parties in this matter accept that this matter is urgent.

43. Based on the foregoing, it is submitted that it would be in the interests of justice for this Court to exercise its discretion in favour of OSA by granting it direct access, in the circumstances of this application, in accordance with section 167(6) of the Constitution, read with Rule 18.[30]

D. FIRST CHALLENGE: THE SIGNATURE REQUIREMENT

Rights asserted

44. OSA contends that the signature requirement imposed on independent candidates, who wish to contest national and provincial elections, constitutes an unfair barrier to entry, which is arbitrary and which constitutes an unjustifiable infringement of the rights of independent candidates in section

[30] *Moko Acting Principal, Malusi Secondary School* 2021 (3) SA 323 (CC) at paras 16-19; *Ashebo v Minister of Home Affairs and Others* [2023] ZACC 16, footnote 1.

19(3)(b) of the Bill of Rights.[31]

45. The rights asserted by OSA must of course be read against the backdrop of the web of interlinked rights and constitutional values underpinning these fundamental rights as set out earlier in **SECTION B**.

46. Parliament denies these claims and presents 10 reasons to justify these signature requirements.[32]

47. The Minister denies these claims and offers four reasons to justify the signature requirements.[33]

48. It is submitted that none of these answers justify the limitation of the rights asserted by OSA.

The legal provisions

49. The respondents point out that the registration requirement of 1000 signatures continue to be applicable to political parties.[34] The present position is therefore as follows.

50. Section 15 of the Electoral Commission Act 51 of 1996 makes provision for a political party to register. In so far as the registration of political parties are

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[31] Founding affidavit, paragraph 151, p49 This challenge is dealt with in the founding affidavit from paragraphs 127-151, p41-49.
[32] Parliament's answering affidavit, paragraph 75, p606-611.
[33] Minister's answering affidavit, paragraphs 92-115, p224-233.
[34] Parliament's answering affidavit, paragraph 20, p564-565; Minister's answering affidavit, paragraph 99.3.1, p229; IEC's explanatory affidavit, paragraphs 16 and 17, p518-519.

concerned, this is provided for chiefly in 15(1) to (3).[35]

51. The respondents have pointed to Regulation 3(1)(a) published on 7 January 2004. Regulation 3(1)(a) requires that a political party must demonstrate in its Deed of Foundation, the following numbers of support from registered voters:

(a) 1000 if an application is for the entire Republic;

(b) 500 if an application is for a particular province; and

(c) 300 if an application is for a district or municipality.[36]

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[35] "CHAPTER 4
REGISTRATION OF PARTIES (ss 15-17)

15 Registration of parties

(1) The chief electoral officer shall, upon application by a party in the prescribed manner and form, accompanied by the items mentioned in subsection (3), register such party in accordance with this Chapter in respect of-

(a) the entire Republic;
(b) a particular province; or
(c) a particular district or metropolitan municipality, provided that a party registered for a –

(i) particular province may under such registration only participate in elections for that provincial legislature and for all the municipal councils in that province;
(ii) metropolitan municipality may under such registration only participate in elections for that metro council; or
(iii) district municipality may under such registration only participate in elections for that district council and for the local council falling within the area of that district municipality.

(2) The form shall, inter alia, make provision for the following:
(a) the name of the party;
(b) the distinguishing mark or symbol of the party in colour; and
(c) the abbreviation, if any, of the name of the party consisting of not more than eight letters.

(3) The application shall be accompanied by-
(a) that party's deed of foundation which has been adopted at a meeting of, and has been signed by the prescribed number of persons who are qualified voters;
(b) the prescribed amount, if any; and
(c) .....
(d) that party's constitution."

[36] The explanatory affidavit of the IEC sets out the history of this regulatory process, at paragraphs 21-23, p520-522.

52. However, section 26 of the original Electoral Act remains in place and has not been amended.[37] Section 26 provides for "requirements for parties to **contest** [an] election."

53. Section 26 requires that a political party must be "a registered party" and "has submitted a list of candidates in terms of section 27".

54. In its explanatory affidavit, the IEC attempts to draw a distinction between "registration" and "contestation".[38] Yet, it nevertheless accepts that both types of signature requirements "are clearly complementary". It expands this to contend that both types of signatures are "ultimately to prevent frivolous participation in elections."

55. What is clear is that prior to the amendments introduced in section 27, political parties were only required to demonstrate that they had the support of 1000 voters, they had to submit their lists of candidates, apart from other requirements such as the payment of deposits and the furnishing of declarations. These were the qualifications necessary for political parties to "contest" the elections.

56. The new position is the following.

57. In terms of section 27(2)(cB), all unrepresented political parties, that is, political

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[37] Sections 26-31 appear in Part 3 of the Electoral Act, which deals with "Parties contesting election, and lists of candidates (ss 26-31)."

[38] IEC's explanatory affidavit, paragraphs 16-17, p519=520.

parties who are not represented in the National Assembly or in any provincial legislature, are required to submit signatures from 15% of voters who "support the party" equating to 15% "of the quota for that region in the preceding election."[39] This means that this requirement only applies to new parties who intend to contest the election.[40]

58. Part 3A has been inserted in Chapter 3 of the Electoral Act to deal with independent candidates. In terms of section 31B(3), independent candidates are required to demonstrate support from registered voters constituting 15% of the quota for that region in the previous election.[41]

59. It is common cause on the papers that in real terms, this means that independent candidates will be required to demonstrate support from registered voters of between:

(a) 10, 000 to 14, 000 signatures to contest the national election; and

(b) 4, 000 to 9, 000 signatures to contest in the provincial election.[42]

60. In terms of section 27, presently registered political parties who are represented in the National Assembly or a provincial legislature do not have to demonstrate this level of support from registered voters. Although not expressly stated, the assumption is that such political parties have

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[39] This applies equally to regional seats in the National Assembly and for elections to provincial legislatures.

[40] The requirement for political parties to be registered and to submit their lists of candidates remains the same.

[41] This applies equally to contesting elections to the National Assembly and to provincial legislatures.

[42] These figures are provided by the IEC at paragraph 42, p534-535, and accord with the figures set out by OSA in its founding affidavit at paragraph 132, p43-44.

demonstrated support from voters in the past and therefore need not demonstrate their ability to continue to contest elections.

61. Unlike these already represented parties, the signature requirements now imposed on independent candidates (and unrepresented parties) for them to be eligible to contest national and provincial elections, equates to the following increases:

(a) from 1000 signatures for registration to contest elections at the national level, the signature requirement for independent candidates is between 10,000 and 14,000 which represent increases of between 1000 and 1,400 percent; and

(b) from 500 signatures for registration as a political party to contest provincial elections, the signature requirement for independent candidates increases to between 4,000 and 9,000 signatures, which represent increases of between 800 to 1,800 percent.

62. Parliament explains that this "contestation" requirement is new.[43] Parliament contends that "until now there has not arisen a need for a signature requirement." This is despite it indicating that there are presently 331 registered national political parties.[44]

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[43] Parliament's answering affidavit, at paragraph 75.7.2(c), p610. As does the Minister in his answering affidavit, at paragraph 99.3.4, p229-230.

[44] Parliament's answering affidavit, at paragraph 75.7.2(a), p609.

63. Further, Parliament contends that the reason for the inclusion of this new requirement is that up to now "parties have generally elected not to incur the expense of contesting an election unless they have at least some possibility of gaining a seat in National Parliament [or] the Provincial Legislature." Why this will change in the future, is not explained by Parliament.

64. Parliament's explanation for the introduction of this new "contestation" requirement is:

> "…[T]he new contestation threshold ensures that neither political parties nor independent candidates - contests an election frivolously; in order to make a point or to achieve a purpose other than to represent their constituents in elected office. The contestation threshold is aimed at the seriousness of a political party and independent candidate to contest an election."[45]

65. The Minister contends that is new "contestation" requirement, only emerged after the *New Nation* judgment (in June 2020) and which "caused Parliament to consider this issue squarely for the first time."[46]

66. In other words, despite almost three decades into our democracy, with its many elections, the importance of limiting participation to 'serious contenders' alone, only became a substantive issue after the judgment in *New Nation.* The

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[45] Parliament's answering affidavit, at para 75.7.2(d), p610.
[46] Minister's answering affidavit, paragraph 99.3.3, p229.

precipitating factor therefore can only have been the constitutional duty to extend participation in the electoral system to independent candidates.

67. Yet none of the respondents has explained the bases for the computation of this signature requirement, save to point out that this was debated and reduced over time, on the advice of lawyers.[47]

68. In its answering affidavit, the IEC has presented statistics to demonstrate that there has been increased participation by political parties over time,[48] including in the numbers of political parties who have not gained representation,[49] which it contends will continue to include "some frivolous participation." There is no indication from the IEC as to what percentage, could be said to have constituted "frivolous" participation in past elections. Nor is there any reliable prediction from the IEC as to what might be expected in as "frivolous" participation in future elections.[50] Nor have the Minister or Parliament provided any detail about past "frivolous participation".

69. The IEC continues to support a "low level threshold for proof of support" from those who wish to contest elections. Yet, the IEC accepts that at present "… it is … impossible to know how many independent candidates qualify to contest the elections until the close of the candidate nomination."[51]

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47 Parliament's answering affidavit, paragraph 75.8, p610-611.
48 IEC's explanatory affidavit, at paragraph 25, p522-523.
49 IEC's explanatory affidavit, paragraph 26, p523.
50 Although the IEC contends that the present signature requirement is "the minimum requirement to address the trend of increasing unsuccessful and frivolous participation in the elections," at paragraph 43.3 of its explanatory affidavit, p536.
51 IEC's explanatory affidavit, paragraph 28, p524.

Nevertheless, the IEC supports the signature requirement as one that is necessary to "address the trend of increasing unsuccessful and frivolous participation in elections."[52]

70. Apart from the limited participation of independent candidates in local government elections, none of the respondents have presented any forecast or prediction of how many independent candidates are likely to contest the elections for the National Assembly and provincial legislatures in 2024, nor of how many of those might be classified as frivolous participants or those who are not serious about standing for public office.

71. Instead, both the Minister and Parliament contend that the signature requirements imposed on independent candidates is a legitimate policy choice and which Parliament is empowered to enact.[53] As indicated earlier, Parliament does not have untrammelled power in this regard. Further, nothing prevents this Court from exercising its constitutional mandate to assess the rationality and justification for this new "contestation" requirement.[54]

72. Secondly, both the Minister and Parliament contend that the signature

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[52] IEC's explanatory affidavit, at paragraph 43.3, p536.

[53] Minister's answering affidavit, paragraph 101, p231; Parliament's answering affidavit, paragraph 75.10, p611.

[54] *Mwelase and Others v Director-General, Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) at para 46.

"… The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable."

requirements imposed on independent candidates are unobjectionable because they apply equally to political parties and to independent candidates alike.[55] This is not strictly correct: political parties presently in the National Assembly and provincial legislatures are exempt from this requirement.

73. Nor is there any explanation offered for imposing the same requirements upon independent candidate and political parties, when the Minister and Parliament have been at pains to point to differences between the two contesters in elections.

74. There can be no objection to reasonable and legitimate qualification criteria for participation in elections. Indeed, this Court has recognised that such criteria for voters, is permissible, provided these are grounded in a rational basis designed to meet a legitimate governmental objective.[56]

75. This is equally so in the context of section 9(1) of the Bill of Rights, which guarantees equality before the law and equal protection and benefit of the law. This encompasses more than simply equal treatment before the law, but a constitutional commitment towards equality of "outcomes and opportunity."[57]

76. In this regard, the constitutional beacon of substantive equality, over simple formal equality, is well established:

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[55] Parliament's answering affidavit, paragraph 75.3, p606, where it is contended that this requirement means that political parties and independent candidates "compete on a level playing field"; Minister's answering affidavit, paragraphs 96.1 and 98.1, p225 and p226-227 respectively.

[56] *New National Party*, at paragraphs 25 and 28.

[57] *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC), at para 26.

> "This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution."[58]

77. We submit that it is significant that none of the respondents has explained why independent candidates must meet the same signature threshold that political parties must meet, nor why this qualification is necessary (almost three decades later) to protect the integrity of the elections.

78. Nor is there any explanation for why new entrants in the form of independent candidates must meet the signature requirement that applies to some but not all political parties.

79. In this regard, it is significant that this Court has already recognised that there are crucial differences between well-resourced political parties and less resourced contestants in elections, such as independent candidates or

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[58] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para 27.

ratepayer's associations.

80. In *Kham and Others v Electoral Commission and Another* [59], this Court described these differences, in the context of an objection procedure in by-elections, as follows:

> "[53] Section 15 is simply not structured to deal with objections of the type that the applicants were making in sufficient time to enable by-elections to be held on a corrected voters' roll. It may well provide a workable procedure for adoption by large and well-resourced political parties, who can monitor the roll throughout the year as voters are added to it or removed from it. They have their own records regarding voters and other means to enable them to cross-check against the voters' roll any registration that they regard as doubtful. In addition, they are likely to have available sophisticated computer programs that enable them to correlate the contents of the voters' roll with other information and enable them to detect errors.
>
> [54] But resources of this nature are not freely available to independent candidates such as the applicants, or ratepayers' bodies participating in municipal elections, or smaller political parties seeking to make a political breakthrough. To restrict their capacity to object to the voters' roll to a mode of objection suited only to the large and the well resourced, would be a substantial check on their ability to participate meaningfully in elections and their constitutional right to stand as

[59] 2016 (2) SA 338 (CC), at paragraphs 53 and 54.

candidates for public office. It would be a particularly acute problem at the level of local government where one finds the majority of such candidates and groupings. That construction of s 15 would not be in accordance with the spirit, purport and objects of the Bill of Rights as required by s 39(2). The clear and ample rights to participate in the political process protected by s 19 of the Bill of Rights would be unnecessarily constricted by this interpretation. It follows that the applicants were not confined to objections under s 15 of the Electoral Act to pursue their objections to the registration of voters in wards where they were not entitled to be registered."

81. There can be no gainsaying that there are marked differences between the ability of an individual, to contest elections as an independent candidate, as compared to an organised group such as a political party.

82. Self-evidently and objectively, independent candidates are different from political parties. A single candidate who intends to run for public office is inherently limited in resources, compared to political parties who comprise more than one individual.

83. Furthermore, the 2024 elections will be the first time that independent candidates will be able to stand for public office in the National Assembly or provincial legislatures. There is little "institutional knowledge" available to independent candidates in this new endeavour.

84. What cannot be ignored is the difference in resources and experience between independent candidates who will be contesting elections for the first time in 2024, compared to political parties who have already obtained seats in the National Assembly and provincial legislatures, some of whom have been in those legislative structures since the dawn of democracy in 1994, 29 years ago.

85. The Minister's advisers pointed pertinently to the self-evident differences between political parties and independent candidates. They did this in November 2022 when they pointed out that "it is obvious that a political party would have a greater ability to motivate voters to assist it to register to contest the elections, than an independent candidate would."[60]

86. Despite these differences, no governmental respondent has demonstrated any rational basis for why independent candidates must meet the same "contestation" criteria for (new) political parties, when these entrants into the electoral arena are self-evidently different from political parties.

87. These resource, capacity and ability constraints are heightened, when juxtaposed against the larger, historically established political parties, who presently hold seats in the National Assembly and provincial legislatures.

88. At the very least, the right to equality before the law and the right to equal protection and benefit of the law, in section 9(1) of the Bill of Rights, required

[60] Parliament's answering affidavit, annexure "PA13" at typed page 19, p829.

a consideration of these crucial differences between independent candidates and political parties. The right to stand for and to be voted into public office applies equally to political parties and to independent candidates. Yet, the signature requirement introduced in the Electoral Act "imposes [these] burdens" "unevenly and without a rational criterion or basis."[61]

89. The IEC supports the 15% threshold applicable to independent candidates and contends that this is rational and fair, by referring to two data sets.[62] These statistics are based on the numbers of voting districts per regional tier for National Assembly elections and for provincial legislatures. Just the first data set alone demonstrates the disproportionate impact that the signature requirements place on independent candidates, to contest elections. What these statistics demonstrate, is the following. For an independent candidate to contest an election for the regional tier in the National Assembly elections alone:

(a) in the Eastern Cape, an independent candidate would have to obtain the equivalent of 3 signatures from voters in each of 4869 voting districts;
(b) in the Free State, an independent candidate would have to obtain the equivalent of 8 signatures from voters in each of 1582 voting districts;
(c) in Gauteng, an independent candidate would have to obtain the equivalent of 5 signatures from voters in each of 2799 voting districts;
(d) in KwaZulu-Natal, an independent candidate would have to obtain the

[61] *Van der Merwe* at paragraph 197.
[62] IEC's answering affidavit at paragraphs 40-44, p532-536.

equivalent of 3 signatures from votes in each of 4972 voting districts;

(e) in Limpopo, an independent candidate would have to obtain the equivalent of 4 signatures in each of 3223 voting districts;

(f) in Mpumalanga, an independent candidate would have to obtain the equivalent of 7 signatures in each of 1813 voting districts;

(g) in North West, an independent candidate would have to obtain the equivalent of 7 signatures in each of 1737 voting districts;

(h) in Northern Cape, an independent candidate would have to obtain the equivalent of 15 signatures in each of 732 voting districts; and

(i) in Western Cape, an independent candidate would have to obtain the equivalent of 9 signatures in each of 1572 voting districts.

90. The time, resources and energy that independent candidates would have to invest in this endeavour, to secure those signatures, to be ready to contest elections in 2024, are self-evidently immense. This is against the backdrop that the IEC indicates that the nominations process is currently set to close on 29 February 2024,[63] some six months away.

91. Based on the foregoing, it is submitted that there can be no dispute that even the facially neutral signature requirements (for new entrants alone), constitutes an irrational and therefore unfair and unequal burden placed on independent candidates, who wish to contest national and provincial elections.

92. The third broad area raised by Parliament, is the need to prevent ballots from

[63] IEC's answering affidavit, paragraph 66, p546.

being too long, or complicated, which it contends could result in voter confusion.[64] The Minister asserts these arguments too when he asserts that this sifting mechanism is necessary to protect "the integrity of the electoral system as a whole".[65]

93. However, these are matters that are systemic to any election; these concerns do not arise from the participation of independent candidates.

94. The management of elections is a constitutionally imposed obligation vesting in the IEC.[66] Although the IEC supports the signature requirement, and points to various practical considerations, it does not argue that it will be impossible to conduct elections without the signature requirement being imposed on independent candidates.[67] In its own words, these "practical imperative[s]" point to the desirability "for retaining a low-level threshold for proof of support."[68]

95. There is a confusing statement in the explanatory affidavit of the IEC. This emerges from a consideration of paragraph 12.1 read with footnote 8. The IEC contends that the signature requirement is intended to demonstrate that "candidates have a serious intention of contesting elections … do not participate frivolously and have some prospect of doing so successfully." The IEC qualifies this statement by asserting "It is … important to note that support

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64 Parliament's answering affidavit, paragraph 75.2 (relying upon advice received by the Minister), p606.
65 Minister's answering affidavit, paragraph 98.2, p227.
66 Section 190: "Functions of Electoral Commission."
67 IEC's explanatory affidavit, paragraphs 28-32, p524-527, read with paragraph 12.2, p516,

for the participation of a political party or candidate in an election does not necessarily indicate an intention to vote for that party or candidate." This is a self-defeating argument, because it implies that the signature requirement does not have to demonstrate electoral support for the independent candidate: what then is the purpose of the requirement? Moreso, there is no prohibition on registered voters providing signatures to support the participation of more than one party or indepoendent candidate for a particular election.

96. As to the practical considerations raised by the respondents, similar arguments have already been considered and rejected by this Court in *August*.[69]

Limitations Analysis

97. The principles applicable to the section 36 limitations exercise to be undertaken in this case, are well established. This includes the question as to whether there is a relationship between the limitation and its purpose (the "rationality test") and whether there are less restrictive means to achieve the purpose ("the proportionality test").

98. The requirement of rationality is restricted to the threshold question of whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is the end of the enquiry and the measure is constitutionally offensive.

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[69] *August v Electoral Commission* 1999 (3) SA 1 (CC).

99. This Court has held that:

> "It is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right. Equally so, a law may be rationally related to the end it is meant to pursue and yet fail to pass muster under the rights limitation analysis."[70]

100. We submit that Parliament has failed to establish the newly introduced signature requirement as one that is rationally linked to a legitimate government objective.

101. We submit further that this remains the position even at an enquiry into proportionality when the means employed in legislation impact rights more than is necessary to achieve a governmental purpose.[71]

102. As we have noted earlier, the registration requirement linked to 1000 signatures for political parties, which enabled them to "contest" elections, has been in place for approximately three decades, save for the first elections where no criteria were set to contest elections.[72]

103. In the result we submit that the 15% signature requirement constitutes an unjustifiable infringement on the rights of independent candidates to stand for

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[70] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC), at para 37.

[71] *Prince v President of Cape Law Society and Others* 2002 (2) SA 794 (CC), at para 114; *Law Society*, at para 37.

[72] IEC's explanatory affidavit, at paragraph 21, p520-521.

public office in section 19(3b), the right to equality before the law and to equal protection and benefit before law in section 9(1) of the Bill of Rights, including the interlinked fundamental rights described in *New Nation* and the constitutional values identified in **SECTION B** above.

Remedy

104. If OSA is successful in this first challenge, then it is submitted that they are entitled to appropriate and just and equitable relief in terms of section 38 and section 172 of the Constitution.

105. This would entail the declaration of invalidity sought in terms of paragraph 3 of the Notice of Motion, the suspension of that declaration as set out in paragraph 5 and the interim reading in remedy set out in paragraph 6.1 of the Notice of Motion.

106. Given the urgent timelines associated with the 2024 elections, and the need for independent candidates to contest the elections, we submit that an order of invalidity which merely suspends the declaration of invalidity would not constitute just and equitable relief to independent candidates in these circumstances.

107. The interim reading in remedy sought by OSA is tailored to address the constitutional shortcomings identified by OSA. There can be no suggestion of any disruption to forthcoming elections in these circumstances, nor has any

been demonstrated by the respondents.[73]

E. SECOND CHALLENGE: THE RECALCULATION CHALLENGE

The complaint

108. The founding affidavit deals with the features of this challenge as they relate to the recalculation of votes, cast for independent candidates. OSA presents this challenge with support of an expert report prepared by Atkins.[74] Parliament relies upon the IEC's response to the report of Atkins.[75]

109. All the respondents contend that this challenge is incorrect and misplaced.[76] In particular each of the respondents points to the differences in nature between independent candidates and political parties. This is so as to suggest that the recalculation effects, are linked to the inherent fact that independent candidates can only ever occupy one legislative seat irrespective of the number of votes that they obtain, whereas political parties are able to contest and occupy more seats, through their candidate lists.

110. OSA's broad response to this is that the right to vote incontestably includes the right to an equal vote or to a vote of equal value and impact; the right to

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[73] *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* 2021 (3) SA 246 (CC), at para 143; *Blind SA v Minister of Trade and Industry and Competition and Others* CCT 320/21, [2022] ZACC 33 (21 September 2022), at para 103.

[74] This second constitutional challenge is set out at pages 43-64, p21-27 of the founding affidavit. The expert report of Atkins is annexure "G", p135-167.

[75] Parliament's answering affidavit, paragraph 85.7.2, p618: IEC's explanatory affidavit, paragraph 57, p543-544 in which the IEC accepts some of the premises of the Atkin's report, described later.

[76] Parliament's answering affidavit, paragraphs 76-85, p611-621; Minister's answering affidavit, paras 116-246, p233-274; IEC's explanatory affidavit, paragraphs 45-64, p36-546.

stand for public office demands an equal opportunity to do so, which must include the right to have votes of equal weight or value. The electoral system adopted by Parliament infringes this principle. If OSA is correct in these arguments then these rights, the interlinked web of rights and the related constitutional values described earlier in **PART B**, are equally infringed.

111. While it must be accepted that the Constitution vests the power to determine the electoral scheme in Parliament,[77] this power is not unfettered:[78] the electoral system must be compliant with the constitution.

112. It is important to note that this Court observed in *New Nation* that even the criterion for an electoral system to result "in general … in proportional representation," ought not be influenced by those who contest elections, but by the result achieved.

> "[78] … Outa argued correctly in my view, that proportionality does not equal exclusive party proportional representation. The focus of the section is on the 'result': whoever the participants may be, the system must be one that 'results' in general, in proportional representation."

113. It must also be accepted that no electoral system can achieve perfect proportionality. This is not what OSA (or Atkins) contends for.[79] Instead, the complaints in this challenge, are directed at the disproportionate favouring of

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77 *New Nation*, at paragraph 15.
78 For all of the reasons and principles set out in **SECTION B** above.
79 IEC's explanatory affidavit, paragraph 56, p543.

larger political parties when recalculations are carried out.[80] This is because, when recalculation of votes occur, larger parties do not gain in proportion to the votes they have received, but in proportion to the number of quota seats obtained, which is skewed in favour of larger parties.[81]

114. The IEC accepts "that there is a numerical bias in favour of parties with more overall votes (ie under the amended quota)…".[82]

115. In this regard, OSA's complaint is that:

> "A proportional representation system should mean that a vote share is proportional to seat share. The recalculation method in the Amendment Act allows for political parties to benefit in a manner that is disproportionate to their vote share. They are benefitting more than their vote share at recalculation."[83]

116. Despite its critique of Atkins' conclusions, the IEC accepts the definition provided by Atkins that proportional representation contemplates a "system of election aimed at minimising the disparity between a party's share of seats, and their share of votes in an election for a legislative body."

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80 Founding affidavit, paragraph 158, p52.
81 Founding affidavit, paragraph 158, p52; Founding affidavit, annexure "G, "Atkins' report, middle, typed page 18 of 22, p152-156.
82 IEC explanatory affidavit, paragraph 57, p25.
83 Founding affidavit, paragraph 158, p52.

The recalculation process

117. Recalculations occur in five instances:

(a) when an independent candidate gains more votes than is needed for a seat;

(b) when a party forfeits seats by virtue of supplying fewer candidate names than the number of seats won in a particular election;

(c) when an independent candidate wins election to both the National Asembly and to a provincial legislature;

(d) when an independent candidate wins election in more than one region for the National Assembly; and

(b) when an independent candidate vacates a seat through death or resignation.

118. The recalculations are provided for in Items 5 and 7, 11 and 12 and 23 and 24 of Schedule 1A introduced in the Electoral Act.

(a) Item 23 deals with the vacating of an independent candidate seat through death or resignation.

(b) The next category of vacancy arises when an independent candidate contests for seats in provincial and national legislatures and must give up one of those seats because that candidate cannot occupy two seats.

(c) Items 11 and 12 deal with forfeiture of seats where an independent candidate receives more votes than is necessary for a seat;

119. Mr Atkins has demonstrated that the effect of the recalculation is that votes

cast for independent candidates are discarded (that is, when they are removed from the recalculation), a new quota is determined for seats, followed by a recalculation. The effect of the recalculation is that "the largest party is advantaged in each recalculation to an extent that it is always greater than their share of the votes. This is because parties gain in the recalculation in proportion to their share of the quota seats and not in proportion to their votes. Independent candidates and parties with no quota seats have no gain in the recalculation."[84]

120. In addition, this court has recognised in a minority judgment of four judges that "the system of proportional representation provided for in our Constitution means that a political party is entitled to representation in Parliament it proportion to the number of votes it obtains in an election relative to the total number of votes cast"[85] (albeit in a different context).

121. The concept of "equality of effect" of votes is well established in international law, to the effect that votes cast by citizens must have an equal effect on the allocation of seats in the legislature.[86] In our constitutional context, the right to equality is inextricably interlinked with our very system of democracy, encapsulated amongst others in the political rights in section 19 and the constitutional values and principles referred to earlier in **SECTION B**.

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84 Founding affidavit, annexure "G", Atkin's report on typed page 18 of 33, p152-167.

85 *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC), per Cameron J at para 116, read with footnote 186 which refers to the judgment of Yacoob J in *Ramakatsa* at para 15.

86 Founding affidavit, paragraphs 212-213, p 70 refers to international instruments and to foreign cases. These are not repeated here. Nevertheless, it is submitted that these concepts are consistent and supportive of the constitutional rights and values set out earlier in **SECTION B** above.

122. It is against this background that the second challenge must be assessed.

Breach of rights

123. OSA submits that the current recalculation system results in a breach of the following rights:[87]

(a) Section 19, read with section 9(1), in that a voter's vote for an independent candidate does not carry equivalent weight to voters who vote for political parties. Similarly, a voter's vote for the largest party carries more weight than voters who vote for smaller parties. The mathematical advantage that political parties have over independent candidates renders the election unfair in the sense that votes for the two types have different values and the two types "contestants" are treated unequally.[88]

(b) Inevitably, the discarding of votes for independent candidates will also affect the "choice" that voters have, because voters will know that their votes will ultimately be discarded[89] or carry reduced weight.[90] . It should be noted that discarding of votes has a different numerical effect from votes under the previous system that are described as wasted.

(c) Section 9(1) in that independent candidates do not benefit equally in the

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87 Founding affidavit, paragraph 181, p60.
88 Section 19(2) speaks to the right to free and fair elections.
89 Founding affidavit, paragraph 209, p69.
90 Section 19(1) speaks to the freedom to make political choices.

recalculation as is the position with political parties. In essence there is unequal protection (or a disparity in treatment) in the electoral system for independent candidates and smaller parties, compared to larger political parties, when these candidates vacate their office.[91]

124. OSA submits further that the current system results in an unavoidable 'discarding' of votes of independent candidates,[92] with the consequential distortion of proportional representation.[93]

125. In addition, in the recalculation, political parties gain more than is proportional to their share of the vote. This is because the current method provides that the quota for a seat decreases after the exclusion of independent candidate votes. This means that parties will gain an additional seat or a higher remainder seat, unlike independent candidates.[94]

126. Further, there is a distinction being between larger parties on one hand, and smaller parties and independent candidates on the other, it is important to note that the unfairness means that the larger parties will tend to gain seats, in comparison to smaller parties and independent candidates.

127. In the result, OSA proposes that a system such as the “most deserving remainder” method would ameliorate this disproportionality.[95] Indeed it would

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91 Founding affidavit, paragraphs 152, 181.2 and 210, p49, 60 and 69.
92 Founding affidavit, paragraph 184, p61.
93 Founding affidavit paragraphs 157-158, p51-52; *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), at para 27;
94 Founding affidavit, paragraphs 193-194, p63-64.
95 Founding affidavit, paragraph 223, p65.

better achieve the constitutional commitment to citizens electing their representatives in national and provincial legislative bodies.[96]

Justification by the respondents

128. The respondents deal with the complaints raised by OSA, primarily as follows.

129. As noted, they point to the differences in nature between independent candidates and political parties. Yet, this does not explain why a single vote for these categories of contestants, in the same election, must achieve different outcomes.

130. The bias towards political parties is acknowledged by the IEC, which accepts that the recalculation method benefits larger parties. However, the IEC has not expressly acknowledged that this bias is out of proportion to the larger parties' share of the votes, and characterises this bias as inevitable in the choice of electoral system which Parliament has chosen.[97] Again, this answer does not answer the constitutional complaint which is the inequality in outcomes and effects of a vote.

131. The Minister contends that this mathematical consequence is not an engineered outcome.[98] Yet, this does not explain or justify the inequality in outcomes and effects of a vote in an election.

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96 Section 42(3), read with section 1(d).
97 IEC's explanatory affidavit, paragraph 57, p543-544.
98 Minister's answering affidavit, paragraph 194.5, p258 read with Parliament's answering affidavit, paragraph 59 p544.

132. The Minister points to the introduction of independent candidates as the catalyst for such deviations but contends that this is the best system of proportional representation in the circumstances and that the power to make this choice vests in Parliament.[99] In other words, the inequality in outcomes and effect of a vote is said to be constitutionally acceptable. We submit that this does not.

133. The Minister points to the fact that independent candidates can only ever attain one seat, whereas political parties (through their candidate lists) can occupy more seats.[100] But again this does not explain the inequality in outcomes and effects amongst votes for political parties and votes for independent candidates. This is particularly so given that the Minister contends that "the purpose of the two tier system, is and has always been, to ensure proportionality in representatives from Parliament from regions with both larger and smaller populations."[101]

134. The IEC contends that the recalculation ensures that candidates who are not eligible to hold a seat or who have chosen to vacate a seat, cannot be allowed to influence the outcome of the recalculation.[102] On its own this principle is unobjectionable. However, the complaint raised by OSA is the electoral system chosen by Parliament is skewed in favour of larger political parties, by permitting them to benefit from the reduced "cost" of a seat in the recalculation

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[99] Minister's answering affidavit, paragraph 155.6, p246.
[100] Minister's answering affidavit, paragraph 180, 254.
[101] Minister's answering affidavit, paragraph 17, p199.
[102] IEC's answering affidavit, paragraph 52, p541-542.

process.

135. Parliament's view is that the discarded votes of independent candidates are inevitable. It contends further that if independent candidates want more electoral seats, then it is open to these candidates to start a political party. Parliament nevertheless contends that the present system of recalculation accords with the will of the voters because it has been adopted by Parliament.[103] Again, this does not provide an answer to the skewed outcomes in favour of political parties, arising from the unequal outcomes and effects of votes, which ordinarily ought to rank equally.

136. All the respondents contend that these matters invoke the separation of powers doctrine on the basis that the electoral system was a policy decision taken by Parliament and that this Court should defer to this policy choice. As noted earlier, this is not strictly correct. While it is so that the separation of powers principle establishes areas of competence, it is always the duty of this Court to assess whether constitutional provisions have been infringed[104] - that is its constitutional mandate.

137. It is important to note that OSA's challenge does not rest simply on the 'discarding' of votes. The discarding of votes is referred to so as to demonstrate the numerical processes yielding the mathematical and electoral

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[103] Parliament's answering affidavit, paragraphs 81.1 and 81.6, p613-615.
[104] *Mwelase,* para 46, cited earlier in footnote 54.

outcomes. This is in particular as it relates to the reduced quota for seats which are then allocated to political parties.

138. Although the respondents refer to "inter-party" proportionality, this is not the system contemplated in the Constitution, which speaks to an electoral system which results in general in proportional representation. The electoral system chosen by Parliament, skews the allocation in favour of larger political parties and therefore the resultant outcome of an election.

139. The system proposed by OSA, does not insist that vacancies should be filled by independent candidates, but by the contestant with the next highest remainder of votes. This it is submitted would accord with the equality of votes including equality in outcomes and effect. Of course, OSA accepts that no system can attain perfect proportionality - it does not contend for this.

140. In the result, it is submitted that the answers provided by the respondents do not justify the limitation of the rights identified in this challenge. In this regard we rely upon the same principles identified with respect to the first challenge, in paragraphs 97-103 above.

Remedy

141. We dealt in paragraphs 104-107 above with the principles upon which OSA seeks relief to support the declarations of invalidity, suspension and interim-reading in. We do not repeat these matters.

142. We assert the same bases for the relief sought with respect to this second challenge. That is, the relief identified in the Notice of Motion in paragraphs 4, 5 and 6.2 (both paragraphs 6.2) to 6.3.

143. Again, we note that the IEC has not contended that elections will be impossible to hold as a result of this relief.[105]

G. CONCLUSION

144. Based on the foregoing, we submit that OSA has made out a case for the relief sought in the Notice of Motion.

145. We regret that these written submissions will not have been filed before the close of business on Friday 18 August 2023, but will be filed in this Court early in the morning of Monday 21 August 2023, with emailed copies to the respondents sent prior to then. An application for condonation accompanies these written submissions and we tender our sincere apologies to this Court and to the respondents.

Counsel for OSA

AA Gabriel SC
MZ Suleman
SS Mdletshe
CJ Moodley

19 August 2023

[105] IEC's explanatory affidavit, paragraphs 65-70, p546-548 where the IEC details the steps it would have to take to restructure its processes for the 2024 election.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN, GAUTENG

Case Number: 158/23

in the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

APPLICANT'S LIST OF AUTHORITIES

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1. *Ashebo v Minister of Home Affairs and Others* [2023] ZACC.
2. *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC).
3. *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC).

4. *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC).
5. *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC).
6. *Moko Acting Principal, Malusi Secondary School* 2021 (3) SA 323 (CC).
7. *Mwelase and Others v Director-General, Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC).
8. *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC).
9. *New Nation Movement NPC and Others* v *President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC).
10. *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC).
11. *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).
12. *Prince v President of Cape Law Society and Others* 2002 (2) SA 794 (CC).
13. *Ramakatsa and Others v Magashule and others* 2013 (2) BCLR 202 (CC).
14. *Richter v Minister of Home Affairs and Others* 2009 (3) SA 615 (CC).
15. *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC).
16. *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae* (No 2) 2003 (1) SA 495 (CC).
17. *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC).

18. *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC).

Counsel for OSA

AA Gabriel SC
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CJ Moodley

19 August 2023

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 158/23

In the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
ELECTORAL COMMISSION OF SOUTH AFRICA	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

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PRACTICE NOTE FOR MINISTER OF HOME AFFAIRS

THE NATURE OF THE MATTER

1 This is an urgent application for direct access. The second respondent (**"the Minister"**) does not oppose direct access. The Minister does oppose the merits of the application.

2 Before *New Nation Movement*,[1] there was an absolute bar to independent candidates contesting the elections. This Court in *New Nation Movement* declared the Electoral Act[2] was inconsistent with the Constitution because of that impediment.

3 Pursuant to *New Nation Movement*, Parliament has now adopted a modified electoral system that removes the impediment and now allows for independent candidates to contest the election. Parliament has done so, by enacting the Electoral Amendment Act 1 of 2023 (**"the Amendment Act"**). The Amendment Act was promulgated pursuant to a lengthy deliberative process (including both public consultations as well as - internal and external expert advice).

4 The applicant (**"OSA"**) challenges two aspects of the Amendment Act:

4.1 First, it contends that the eligibility requirement for contesting an election of obtaining signatures of registered voters totalling 15% of the quota for a seat in the legislature concerned, is unfair, irrational and creates an unreasonable barrier to entry for independent candidates ("**first constitutional challenge**").

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1 *New Nation Movement NPC and others v President RSA* 2020 (6) SA 257 (CC).

2 73 of 1998.

4.2 Secondly, it takes issue with the manner which the electoral system recalculates the seat allocation where seats are forfeited in the National Assembly or provincial legislatures, or where vacancies arise in a legislature, and contends that this unduly favours the largest political parties and distorts proportionality ("**second constitutional challenge**").

THE ISSUES TO BE ARGUED

5 In relation to the first challenge:

5.1 Does the 15% quota violate the Constitution?

5.2 If so, what is the appropriate remedy?

6 In relation to the second challenge:

6.1 Does Parliament's choice of how to deal with seat recalculation unconstitutional?

6.2 If so, what is the appropriate remedy?

ESTIMATED DURATION OF THE ARGUMENT

7 One day

THE RECORD

8 The entire record is in English

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SUMMARY OF ARGUMENT

9 In relation to the first challenge, the signature requirement is a necessary component of the right to stand for public office.

9.1 It is well-accepted that electoral systems must have eligibility requirements to ensure that only serious contestants (whether that be political parties or independent candidates) enter elections. Without such requirement, the right to stand for public office would be meaningless and the freeness and fairness of elections would be undermined. It serves a legitimate constitutional purpose.

9.2 OSA takes issue with the threshold chosen by Parliament –15% of the quota for a seat in the legislature in the previous election. Its arguments however do not address the plain fact that all that is required is to demonstrate that less than a fifth of voters needed for a seat support the candidate. If a contestant cannot demonstrate that level of support, they have no hope of winning a seat in the election.

10 In relation to the second challenge, OSA's argument is based on misconceptions about the various constitutional requirements for the electoral system.

10.1 Perfect proportionality in any electoral system is impossible.

10.2 The very introduction of independent candidates has a distortionary effect on proportionality, as they can only ever hold a single seat no matter the votes they receive. Accordingly, they must forfeit any additional seats they may obtain. As citizens disassociating from

others, there must be a mechanism for dealing with a situation where a seat is vacated by an independent candidate.

10.3 The recalculation mechanisms adopted by Parliament – after lengthy deliberations – strike an appropriate balance of ensuring that the forfeited or vacated seats are filled in a manner which results as best as possible in proportionality.

STEVEN BUDLENDER SC
ADIEL NACERODIEN
MITCHELL DE BEER
Counsel for the Minister

Chambers, Sandton and Cape Town
23 August 2023

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 158/23

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ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
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WRITTEN SUBMISSIONS FOR THE MINISTER OF HOME AFFAIRS

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INTRODUCTION

1 In *New Nation Movement*,[1] this Court held that the Electoral Act[2] was inconsistent with the Constitution because it made no provision at all for independent candidates to contest elections for the National Assembly and provincial legislatures.

2 This Court suspended its declaration of invalidity, recognising that Parliament had reasonably explained that revising the electoral system to accommodate independent candidates would be a complex exercise.[3]

3 Parliament has now enacted the Electoral Amendment Act.[4] The amendments brought about by that the Amendment Act resolve the constitutional difficulty identified by this Court in *New Nation Movement.* The Amendment Act means that in the forthcoming 2024 elections, independent candidates will indeed be able to run for election to the National Assembly and Provincial Legislatures.

4 The applicant – the OSA – does not like the manner in which Parliament has cured this constitutional defect. It has its own preferred solutions. So it approaches this Court insisting that Parliament's choices are unconstitutional.

5 The OSA's first constitutional challenge contends that the eligibility requirement for contesting an election of obtaining signatures of registered voters totalling

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1 *New Nation Movement NPC and others v President RSA* 2020 (6) SA 257 (CC).

2 73 of 1998.

3 *New Nation Movement* at para 125.

4 1 of 2023

15% of the quota for a seat in the legislature concerned, is unfair, irrational and creates an unreasonable barrier to entry for independent candidates.

5.1 But as we demonstrate in what follows, this is not sustainable.

5.2 It is well-accepted that electoral systems can and should have eligibility requirements to ensure that only contestants with some plausible prospects enter elections. This applies to both independent candidates and political parties. Without such eligibility requirements, the right to stand for public office and the freeness and fairness of elections are undermined. The provisions concerned therefore plainly serve a legitimate constitutional purpose.

5.3 Indeed, OSA's real concern is not the principle. It is instead that it takes issue with the actual threshold chosen by Parliament – 15% of the quota for a seat in the legislature in the previous election.

5.4 But the OSA puts up no evidence <u>at all</u> to demonstrate that it is impossible or seriously difficult for a candidate or party to obtain these signatures. Nor does it ever explain how, if candidate Smith is unable to obtain the required number of signatures (15% of the quota), he nevertheless has any plausible prospect of getting more than six times this number of voters to support him in an election and thus get elected.

6 The OSA's <u>second constitutional challenge</u> takes issue with the manner which the electoral system recalculates the seat allocation where seats are forfeited in a legislature or where vacancies arise in a legislature, and contends that this unduly favours the largest political parties and distorts proportionality.

6.1 But this argument is based on misconceptions about the various constitutional requirements for the electoral system.

6.2 For a start, perfect proportionality is impossible to achieve. This is especially so where independent candidates have been introduced – which poses particular challenges to achieving proportionality.

6.3 The recalculation mechanisms adopted by Parliament – after lengthy deliberations – strike an appropriate balance of ensuring that the forfeited or vacated seats are filled in a manner which results as best as possible in proportionality.

7 In what follows, we deal with the following issues in turn:

7.1 First, we provide the proper context to understanding the Amendment Act.

7.2 Second, we set out the principles that emerge from this Court's jurisprudence on challenges to electoral schemes.

7.3 Third, we deal with each of the constitutional challenges in turn.

8 Before doing so, we emphasise two preliminary matters.

8.1 The Minister accepts the OSA should be granted direct access to this Court in order to ensure finality ahead of the 2024 elections. Nothing further is said on this issue.

8.2 We note that the OSA has rightly abandoned its complaints that the President did not assent to the Electoral Amendment Act in time for it to be validly enacted.[5] Nothing further is said on this issue either.[6]

THE AMENDMENT ACT IN CONTEXT

9 In *New Nation Movement*, this Court held that sections 19(3)(b), 19(1) and section 18, read together, required that independent candidates must be given an opportunity to contest the national and provincial elections.[7] For this reason, the Court declared the Electoral Act unconstitutional.

10 The Court's holding was narrow and specific. It was that individual citizens are permitted to contest elections for the National Assembly and provincial legislatures by disassociating from others.[8] In other words, the electoral system must provide for persons who do "*not want to be shackled by party politics and constraints.*"[9]

11 This Court rightly also recognised that the electoral system had to comply with other requirements. Amongst these was the requirement in sections 46(1)(d) and 105(1)(d) of the Constitution that the electoral system prescribed by national legislation must be one that "*results, in general, in proportional representation*".

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5 OSA heads of argument, pp 16-17

6 The issue is, in any event, addressed by the President in his explanatory affidavit (pp 181ff)

7 *New Nation Movement* at paras 17-19, 48-49 and 59.

8 *New Nation Movement* at paras 20-61.

9 *New Nation Movement* at para 52.

12 As this Court rightly explained in *New Nation Movement,* it is possible to design a system that accommodates both independent candidates and political parties and which still "*results, in general, in proportional representation*".[10] But as we explain later, the introduction of independent candidates adds significant complexities, which have to be taken into account in designing an electoral system that accommodates independent candidates.

13 The task for Parliament following the *New Nation Movement* judgment was to do exactly that: amend the electoral system so that it allows independent candidates to run for office, but also still "*results, in general, in proportional representation*". In doing so, it had to be borne in mind that perfect proportionality is impossible.[11] Thus, this Court's judgment required Parliament to design an electoral system which balanced various constitutional obligations.

14 Lastly, this Court made clear that it was not its job to decide whether one electoral system was "better" than another. That was a matter for Parliament:

> *"[L]et me mention that a lot was said about which electoral system is better, which system better affords the electorate accountability, etc. That is territory this judgment will not venture into. The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system. This Court's concern is whether the chosen system is compliant with the Constitution."*[12]

15 Parliament ultimately took the view that the existing electoral system could indeed be modified and adjusted to accommodate independent candidates, while adhering to the proportional representation requirement.

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[10] *New Nation Movement* at paras 78-80.

[11] Minister AA paras 74 onwards, pp 235*ff.*

[12] *New Nation Movement* at para 15 (emphasis added).

16 At the same time, Parliament was cognisant of the fact that there were calls for broader electoral reform from some sectors of the public and civil society. Such changes could not be implemented in time for the 2024 elections.[13] Parliament therefore decided that – alongside its modifications to the electoral system to allow independent candidates to contest the 2024 elections – it would enact legislative provisions creating an Electoral Reform Consultation Panel, which would facilitate the public debate on the basis of the experience of the 2024 elections.[14]

THE APPLICABLE LEGAL PRINCIPLES

17 The 1993 Interim Constitution set out the details of the electoral system in considerable detail. This was understandable given the fraught context.

17.1 Section 40(1) of the 1993 Interim Constitution provided that "*The National Assembly shall consist of 400 members elected in accordance with the system of proportional representation of voters as provided for in Schedule 2 and the Electoral Act, 1993*".

17.2 Schedule 2 of the 1993 Interim Constitution then dealt with virtually all details of the electoral mechanics – how many ballots would be cast, the 200/200 split and so on.

18 But the present Constitution adopts a strikingly different approach.

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[13] Minister AA para 55 pp 497-498.

[14] See section 23 of the Amendment Act. The Panel's functions are "*to independently investigate, consult on, report on and make recommendations in respect of potential reforms of the electoral system for the election of the National Assembly and the election of the provincial legislatures, in respect of the elections to be held after the 2024 elections*" (section 23(2)(a)).

19 Apart from the first elections under the present Constitution,[15] the constitutional drafters took a deliberate decision to vest the power to design the electoral system in Parliament, subject to certain constitutional guardrails.

20 Section 46(1) of the Constitution therefore provided only that:

> *"The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that-*
>
> *(a) is prescribed by national legislation;*
>
> *(b) is based on the national common voters roll;*
>
> *(c) provides for a minimum voting age of 18 years; and*
>
> *(d) results, in general, in proportional representation."*

21 Section 105(1) provides the same in respect of members of a provincial legislature.

22 This Court has repeatedly had occasion to consider the manner in which the Constitution deals with the electoral system. It has, on each occasion, stressed the wide latitude given by the Constitution to Parliament in this regard.

22.1 In *New National Party*, for example, this Court held that: [16]

> *"The right to vote contemplated by s 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. <u>The details of the system are left to Parliament</u> ... "*

22.2 In *AParty v Minister of Home Affairs*, this Court held: [17]

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[15] Which were dealt with by Item 6 of Schedule 6 to the 1996 Constitution.

[16] *New National Party* at para 14.

[17] *AParty and Another v Minister of Home Affairs and Another, Mofoko and Others v Minister of Home Affairs and Another* 2009 (3) SA 649 (CC) at para 6

> *"Parliament has the constitutional authority and duty to design an electoral scheme to regulate the exercise of the right to vote. This is apparent from ss 46(1), 105(1) and 157(5) of the Constitution ...."*

22.3 This Court added that the design of the electoral system was "*a matter that lies peculiarly with Parliament's constitutional remit."*[18]

22.4 Most recently, in *New Nation Movement* this Court reiterated this point again:[19]

> *"… The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system. This Court's concern is whether the chosen system is compliant with the Constitution."*

23 We respectfully submit that this Court is unquestionably correct in its approach. Sections 46(1) and 105(1) of the Constitution expressly leave the choice of electoral system at national and provincial levels in the hands of Parliament.

24 In both instances, the Constitution expressly provides that South Africa's electoral system shall be as "*prescribed by national legislation*". This is quintessentially a matter that the Constitution vests in Parliament.[20]

25 The Constitution does not itself determine the national and provincial electoral system, save to say that the electoral system must comply with various requirements. These are:

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[18] *A Party v Minister of Home Affairs* at para 80

[19] *New Nation Movement* at para 15

[20] *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC) at paras 120-126; *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC) at paras 53-69.

25.1 the system must be based on the national common voters roll;

25.2 the system must provide for a minimum voting age of 18 years;

25.3 the system must result, in general, in proportional representation; and

25.4 the system must permit independent candidates to contest elections.

26 There are a number of possible electoral systems that comply with these requirements, just as there are many electoral systems that are consistent with democracy.[21]

27 The Constitution leaves the decision on the preferred electoral system to Parliament and gives it a wide scope in making such decision.

28 We accept, of course, that Parliament's choices are constrained by the Constitution. This Court's jurisprudence has made it quite clear that provisions which disenfranchise citizens or preclude them from standing for office are impermissible.

28.1 In *August*, the Court declared that prisoners were entitled to vote and directed the Commission and Minister of Home Affairs and Minister of Correctional Services to make arrangements necessary to enable the prisoners to register as voters on the national common voters' roll.[22]

28.2 In *NICRO*, the Court struck down legislative provisions which deprived convicted prisoners serving sentences of imprisonment without the

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[21] *United Democratic Movement v President of the RSA (No 2)* 2003 (1) SA 495 (CC) at para 17

[22] *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC).

option of a fine of the right from participating in elections during the period of their imprisonment.[23]

28.3 In *Richter* and *AParty* the Court declared invalid legislative provisions which precluded South African citizens abroad from voting.[24]

28.4 Most recently, in *New Nation Movement* this Court declared the Electoral Act unconstitutional because it completely precluded independent candidates from contesting elections.

29 Therefore, the Court has rightly declared invalid bright-line exclusionary provisions in electoral legislation as they apply to voters or candidates.

30 But that must be contrasted with cases challenging the granular design of electoral systems, where legitimate competing options presented themselves and Parliament had selected one of those.

30.1 This is seen most clearly in *New National Party.*[25]

30.2 There, Parliament had enacted a requirement that a citizen needed a bar-coded ID book to vote. It was common cause that only 80% of South Africans had the bar-coded ID book and five million people eligible to vote did not.[26]

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[23] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC).

[24] *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* 2009 (3) SA 615 (CC), *AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another* 2009 (3) SA 649 (CC).

[25] *New National Party*,. See also *Democratic Party v Minister of Home Affairs and Another* 1999 (3) SA 254 (CC).

[26] At para 30

30.3 Nine members of this Court rejected a challenge to the law. They did so by explaining the limited constitutional grounds for such a challenge:

> *"It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.*
>
> *A second constraint is that the electoral scheme must not infringe any of the fundamental rights enshrined in chapter 2 of the Constitution. The onus is once again on the party who alleges an infringement of the right to establish it…."*[27]

30.4 This passage was expressly adopted by this court in *New Nation Movement.*[28] It is an important passage given some of the arguments advanced by the OSA.

30.4.1 The passage makes clear that there is no free-floating reasonableness or proportionality requirement merely because one is dealing with the electoral legislation.

[27] At para 19 (emphasis added)

[28] *New Nation Movement* at para 75

30.4.2 On the contrary, in the absence of a showing that a provision of the Bill of Rights has been limited, the electoral legislation is tested only against the rationality threshold.[29]

30.5 Similarly, in *UDM* 2002, the Court rejected a challenge to amendments to the Constitution and legislation which permitted floor-crossing by members of political parties. The Court explained: [30]

> *"This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional."*

30.6 This too was endorsed by this Court in *New Nation Movement*.[31]

31 The amended system in the Electoral Act for the National Assembly does not disenfranchise any citizen from voting or preclude them from running for public office. It permits independent candidates to run and permits voters to cast votes for independent candidates.

32 The decisions made by Parliament challenged in this application are plainly ones made within its remit to design and specify mechanisms for the electoral system.

33 Lastly, we emphasise that even if reasonableness were the test for assessing electoral legislation (which it is not), this still does not entitle the OSA to ask this

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[29] On the distinction between rationality review and reasonableness review of legislation, see: *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) at paras 6-8.

[30] At para 11

[31] *New Nation Movement* at para 15

Court to second-guess Parliament's judgment. As this Court explained in *Grootboom*:

> *"… A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, … The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."* [32]

FIRST CONSTITUTIONAL CHALLENGE: SIGNATURE REQUIREMENT

34 OSA's first constitutional challenge is directed at the eligibility criteria for first-time independent candidates relating to the prescribed number of signatures required.

Eligibility criteria are intrinsic to the right to stand for public office and necessary to ensure free and fair elections and to give effect to the right to vote

35 Before we address OSA's argument, it is necessary to have the correct starting point.

36 In its written submissions, the OSA simply assumes that the signature requirement violates rights. That is not, however, the correct approach to the issue.

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[32] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 41. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 48.

37 It is necessary to regulate the exercise of the right to stand in elections for public office in order to give substantive content to the right. The right to stand for public and right to vote in elections are not rights that are exercised in the abstract or in a vacuum. The Constitution indeed anticipates this by requiring that elections be held in terms of an electoral system which is prescribed by Parliament.

38 This is necessary in order to ensure:

38.1 the elections are free and fair;

38.2 the right to vote is effective and meaningful; and

38.3 the right to stand for public office is effective and meaningful.

39 The existence of, and the proper functioning of an electoral system, is therefore a constitutional requirement. The right to stand for public office contemplated by section 19(3)(d) is accordingly a right to contest free and fair elections in terms of an electoral system prescribed by national legislation which complies with the requirements of the Constitution.

40 This was the exact holding of this Court in *New National Party*, addressing the constitutionality of the requirement that voters require a bar-coded identity document in order to register to vote.[33] Yacoob J held as follows:

> *"The Constitution recognises that it is necessary to regulate the exercise of the right to vote so as to give substantive content to the right. …*

[33] *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

The existence of, and the proper functioning of a voters roll, is therefore a constitutional requirement integral both to the elections mandated by the Constitution and to the right to vote in any of them.

The right to vote contemplated by section 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. The details of the system are left to Parliament. …

The requirement that only those persons whose names appear on the national voters roll may vote, renders the requirement that South African citizens must register before they can exercise their vote, a constitutional imperative. It is a constitutional requirement of the right to vote, and not a limitation of the right.

… It is in this context that the statutory provision for the production of certain identity documents must be located. The absence of such a provision could render the exercise of the right to vote nugatory and have grave implications for the fairness of the elections. The legislature is therefore obliged to make such provision."[34]

41 While the present challenge concerns candidate eligibility requirements – rather than voter eligibility requirements – precisely the same conclusion is true.

42 Without eligibility requirements, hundreds of independent candidates and political parties could stand in an election despite having no hope of being elected. This would undermine the political rights set out in section 19. It would lead to longer and more confusing ballot papers. It would require more time for the counting of votes. This would undermine the freeness and fairness of the elections concerned and would violate voters' section 19 rights. And it would make the Electoral Commission's task considerably harder and more expensive – for no reason.

[34] At paras 13-17.

43 Thus, inherent to the right to stand for public office is the necessity of having to comply with contestation requirements. The process in which political parties and independent candidates are registered needs to be managed and regulated in order to ensure that elections are free and fair.

44 For these reasons, a voter support requirement to register to contest an election does not limit the right to stand for public office; it simply regulates the electoral process to ensure free and fair elections; it gives substantive content to the right.

45 Of course the requirement must still satisfy the minimum constitutional requirement of rationality: there must a rational link between the requirement and a legitimate government purpose.[35] In other words, in assessing the validity of the signature requirement, the correct level of scrutiny is one of rationality.

The OSA's complaint

46 Section 31B(3) of the Act requires that, when registering to contest an election, an independent candidate must demonstrate voter support of 15% of the previous quota needed to obtain a seat in the legislature concerned.

47 For the provincial legislatures between 4 000 and 9 000 signatures will be needed to get onto the ballot, depending on the province concerned. For the National Assembly between 10 000 and 14 000 signatures will be needed to get onto the ballot, depending on the region concerned.[36]

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[35] *New National Party* at para 19.

[36] Commission EA para 9 p 515.

48 While OSA impugns this requirement as it pertains to intendent candidates, it does not attack section 27(2)(*c*B) of the Amendment Act which makes the identical requirement applicable to unrepresented political parties seeking to contest the elections.

49 The OSA contends that the signature requirement is:

49.1 substantively unfair because it creates a barrier to entry for independent candidates;[37]

49.2 irrational to the extent that the 15% requirement is not rationally linked to any legitimate government purpose;[38]

49.3 disproportionate to the aim and object of the Amendment Act.[39]

50 OSA asks that section 31B(3) of the Amendment Act be declared invalid and contends that the 15% quota threshold should be replaced with the requirement of "*1 000 signatures*".[40] OSA's arguments are unsustainable.

The requirement is rationally related to a legitimate purpose

Purposes of the requirement

51 The central purpose of the requirement is to protect the freeness and fairness of election.[41] It does so by:

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[37] FA at para 151.1 p 49.

[38] FA at para 151.2 p 49.

[39] FA at para 151.3 p 49.

[40] NOM para 3 and 6.1 pp 2-3.

[41] Minister AA para 94 p 224 para 98.2 p 227; Parliament AA para 75 and subparas pp 606-611.

51.1 ensuring that prospective independent candidates or political parties seeking to contest the elections in fact have some plausible chance of gaining sufficient public support to be elected; and

51.2 in turn, ensuring that ballot papers are kept within reasonable bounds.

52 Voters cast votes on ballots. Indeed, ballots are central to efficacy of the electoral system.

53 The OSA is correct that, until now, the only requirement for a political party contest an election was effectively obtaining 1000 signatures.

54 But the OSA seemingly ignores the evidence which has led to Parliament's decision to change the approach. That evidence[42] shows that the trend over the past 30 years is that more and more parties have contested elections; and a smaller proportion of contesting parties have actually obtained a seat in the legislature concerned. For example in the 2019 election:

54.1 There was a higher number of political parties participating than ever before – 48. This was even before independent candidates were introduced.

54.2 Of these 48 parties, only 14 gained seats in the National Assembly.[43]

54.3 Almost half of the parties, 22, did not even obtain 15% of the required quota.[44]

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[42] Commission EA paras 24-26 pp 522-523.

[43] See **PAM6** p 465.

[44] Commission EA para 25.4 pp 522-523.

55 The result of this trend is therefore an ever more lengthy and ever more complex ballot paper, for no apparent purpose. This raises obvious problems.[45] The longer and more complex a ballot is, the more there is a likelihood for spoilt votes. A longer ballot will also be more likely to cause confusion and make it difficult for voters to select the contestant they wish to support. It would also take longer for voters to vote and in turn for Commission officials to tally ballots.

56 An eligibility requirement that is too easy to satisfy would only serve to exacerbate these problems. It is in light of these concerns that the signature requirement was adopted.

57 The requirement is plainly linked to the achievement of that purpose. It is rational.

The 15% threshold

58 OSA also contends baldly that the chosen threshold of 15% is not rationally connected to the purposes sought to be achieved.[46] This is incorrect.

59 If an independent candidate or political party seeking to contest an election is unable to gather enough support to equate to 15% of the votes to be required to obtain a seat, it difficult to understand how it can seriously be suggested that the candidate or party is likely to get more than six times more in order to meet the quota for a seat in the election. Certainly, the OSA provides no explanation in this regard.

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[45] Commission EA para 29.1 p 524.

[46] FA para 147 p 48.

60 This is enough to demonstrate a rational link between the requirement and its purpose: the requirement will sift-out prospective candidates who have no meaningful chance of obtaining a seat.

61 Parliament's approach of linking the signature requirement to the quota for a previous seat in the legislature concerned is one of many approaches in which the purpose could be obtained. It could, for example, also have selected a fixed number of signatures.

62 In our submission, linking the number of signatures to the previous quota better serves the purpose than a fixed number would. A fixed number will not always a bear proportional relationship to the number of votes needed to gain a seat and would likely need constant revision. But what is "better" is irrelevant.[47] It is certainly eminently rational.

63 OSA's complaint that the 15% figure is disproportionate is also unsustainable. In the first instance, a rationality inquiry does not ask whether some means at achieving an end are better or more proportionate than others.[48] If objectively speaking the purpose will be achieved, the provision is valid even if other means could achieve the same purpose.

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[47] See *Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2014 (3) SA 134 (CC) at para 6: *"The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature"*

[48] Id. See also *Democratic Alliance v President of RSA and others* 2013 (1) SA 248 (CC) at para 32, *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 51.

64 This is especially so in the context of setting limits and drawing lines. After all, "*the line has to be drawn somewhere*"[49] and the fact that some people fall on one side or the other does not render it arbitrary.[50]

65 But even applying a more stringent proportionality analysis – which would weigh competing approaches in light of their impact – the 15% threshold is proportional.

65.1 The requirement only applies to those parties and independent candidates who have not previously been elected and only requires them to get less than one-sixth of the quota from the previous election.

65.2 There is no evidence at all explaining why or how this creates an insuperable or unreasonable bar to independent candidates,

66 Moreover, ither jurisdictions have adopted a similar requirement to ours. In Denmark, for example, a prospective contestant for the 2019 elections needed to obtain 20 194 signatures[51] – far in excess of what is required by the amended Electoral Act in South Africa.

67 Indeed, the 15% signature requirement in the Electoral Act can be compared very favorably with the requirement in issue in the US Supreme Court case of *Williams v. Rhodes*.[52]

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[49] *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (CC) at para 31

[50] *South African Navy and Another v Tebeila Institute of Leadership, Education, Governance and Training* [2021] 6 BLLR 555 (SCA); (2021) 42 ILJ 1431 (SCA) at para 21.

[51] Commission EA para 38.1 p 531.

[52] *Williams v. Rhodes* 393 U.S. 23 (1968).

67.1 There, the Warren Court struck down an eligibility requirement for third parties to contest elections for the Electoral College in the State of Ohio – i.e. not the Democrats or Republicans – to obtain the signatures of 15% of the total number of ballots cast in the previous election – in other words 15% of the total electorate.

67.2 This amounted to 433 100 signatures.[53] The applicant had obtained more than 450 000 signatures, but after the deadline.[54]

67.3 Justice Black pointed out that Ohio previously and 42 other States only required third parties to obtain signatures of 1% of the electorate to be eligible to contest the election.[55]

67.4 In Ohio at the time this would be 28 733 signatures.[56]

67.5 He described this requirement as "*relatively lenient*"[57] and "*a very low number of signatures*".[58] And he also pointed out that this requirement served the purpose of limiting the number of parties who sought to contest the elections.[59]

68 Our case strikingly different from that struck down in *Williams*. When the 15% of a quota used by the Act is converted to a percentage of registered voters in the

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[53] At 26-27.

[54] At 26-27.

[55] At 33.

[56] If 433 100 is 15%, then 1% would be 28 733.33 signatures (i.e. 433 100 / 15 = 28 733.33).

[57] At 33 fn 9

[58] At 33.

[59] At 33.

relevant region, the effect of the Electoral Act is to requires a prospective contestant to obtain less than 1% of registered voters to be eligible to contest the election.[60] The only outlier is the Northern Cape and even there the figure is 1.67%[61] Moreover, our Act requires far fewer signatures than the "*very low number*" discussed by Justice Black – a maximum of 14 000 signatures compared to more than 28 000 in the example Justice Black gave.

69 The figure of 1% of registered voters is relevant for another reason. The Venice Commission published a 2002 Code of Good Practice in Electoral Matters.

69.1 Clause 1.3 of the Code provides:

"i. The presentation of individual candidates or lists of candidates may be made conditional on the collection of a minimum number of signatures;

ii. The law should not require collection of the signatures of more than 1% of voters in the constituency concerned"

69.2 Except for the outlier of the Northern Cape, therefore, every region complies with the Venice Commission's recommendation regarding 1%.

69.3 It is therefore hard to see how it can be contended that the requirement in the Amendment Act is disproportional or unreasonable.

70 OSA contends that the requirement results in a "*substantively unequal outcome*" between independent candidates and political parties and "*creates an unfair*

[60] Commission EA para 42 and subparas pp 534-535.

[61] Id.

barrier to entry for independent candidates".[62] There is however no evidence of an unequal effect of the requirement. It applies in the same manner to both parties and candidates who are not already represented in the legislature.

71 OSA also argues that the requirement while being facially neutral has indirect unfair effect.[63] The difficulty for OSA is that has not adduced any evidence to establish any indirect effects of the signature requirement. In the absence of any evidence, its argument simply cannot succeed.[64]

72 In its written submissions, OSA complains that while Parliament treated independent candidates differently, the signature requirement applies in the same manner.

72.1 It then contends that this is somehow unfair since political parties may be better resourced than independent candidates.[65]

72.2 It is of course true that political parties may be better resourced than independent candidates. This arises from the fundamental fact that political parties are groups of citizens and can pool resources in favour of a larger goal, whereas an independent candidate is defined by their choice to disassociate.

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[62] Founding affidavit para 129 p 41.

[63] OSA written submissions para 37.

[64] *Democratic Party v Minister of Home Affairs* 1999 (3) SA 254 (CC) at paras 12-13 (this Court holding that because there was no evidence before the Court showing that the impugned provisions would have had the effect suggested by the applicant, it could not be found that the provisions, on that count, to be unconstitutional).

[65] OSA written submissions paras 79-88.

72.3 There is a simple reason why prospective political parties and independent candidates must both obtain the same threshold of voter support to be eligible for an election. Ultimately, parties and independent candidates are contesting for the support of the same electorate – they both in effect need to obtain the same support from voters to be allocated a seat. Having the same signature requirement is linked to that fundamental fact.

72.4 In any event, imposing the same eligibility requirements on independent candidates and political parties accords with best international practices.[66]

The requirement is reasonable and proportional

73 Should the Court find that the either signature requirement *per se* or the 15% threshold adopted by Parliament do amount to a limitation of the section 19(3)(c) right to stand for public office, then such limitation is reasonable and justifiable in terms of section 36(1) of the Constitution.

74 The limitations analysis is, at its core, a proportionality inquiry.[67] We have explained above how the signature requirement and 15% threshold satisfy a proportionality and reasonableness analysis.

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[66] See Commission EA para 35 and subparas pp 528-530.

[67] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 104.

75 In respect of the figure of 15%, it was not chosen at random.[68] The initial proposal was for the requirement to be 50% of the previous quota.[69] This figure was then reduced to 20% and ultimately 15% after much deliberation by the National Assembly Portfolio Committee and NCOP Select Committee.[70] The question is not whether another – greater or smaller – number of signatures could have been selected. The question is whether in selecting 15%, Parliament acted rationally and proportionally.[71] As we have already explained, it did.

Proposed remedy (if any)

76 For the reasons we have set out, we submit that the first constitutional challenge should be dismissed and, accordingly, no question of a remedy arises. If, however, the Court were to find that the OSA's first constitutional challenge were well-founded, we make the following submissions.

77 First, the OSA's proposed reading-in requiring 1000 signatures is manifestly unsustainable. As we have explained, that was the requirement in place in the 2019 elections and it led to a situation where the longest ballot-paper yet had to be produced – for no apparent reason given that more than 70% of the parties

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[68] FA para 147 p 48. See also OSA written submissions para 67: "*Yet none of the respondents has explained the bases for the computation of this signature requirement, save to point out that this was debated and reduced over time, on the advice of lawyers.*"

[69] Parliament AA para 75.8 p 610.

[70] Minister AA para 22.6 p 201 and Parliament AA para 75.8 p 610.

[71] Cf *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 52 dealing with an administrative decision to set a relevant factor at a certain percentage of a quota. While the Court was addressing the test for reasonableness of administrative action, the analysis applies equally in the present scenario.

did not get seats.[72] The position regarding the lengthy ballot paper will only worsen once independent candidates are included.

78 Second, once the reading-in is rejected, the only remaining remedy is the suspension of any declaration of invalidity, until at least after the 2024 elections.

78.1 The 2024 elections must go ahead and cannot be postponed later than what it permitted by the Constitution.[73]

78.2 The Commission's affidavit explains that it requires certainty within the next month about what the requirements of the electoral system will be for the 2024 elections.[74] There is accordingly not enough time before the 2024 election for further substantive amendments to be made by Parliament.

SECOND CONSTITUTIONAL CHALLENGE: RECALCULATION AND REALLOCATION OF SEATS

79 In the second challenge, OSA contends that the method used to recalculate quotas for the reallocation of forfeited or vacated seats favours the largest party or parties, and is unconstitutional. The thrust of its argument is that that this distorts proportionality and that political parties benefit in a manner which is disproportionate to their vote share.

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[72] Commission EA para 75.4 p 522.

[73] *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* 2022 (5) BCLR 571 (CC).

[74] Commission EA paras 65-70 pp 546-548.

80 The Minister's affidavit sets out the manner in which seats allocated in terms of Schedule 1A of the Act in great detail.[75] We do not repeat what is stated there, but ask that it be read as part of these submissions.

81 It is important to bear in mind upfront that the introduction of independent candidates in the electoral scheme causes particular challenges for achieving proportional representation.

81.1 Political parties can hold more than one seat in the National Assembly. That means that political parties can relatively easily be represented in the National Assembly proportionally in relation to their support. For example, if a party wins 0,25% of the vote, it can be awarded 1 of the 400 National Assembly seats. But if the party wins 3% of the vote, it can be awarded 12 of the 400 National Assembly seats. And so on.

81.2 But the position for independent candidates is different.

81.2.1 By definition, an independent candidate contests the election alone. Indeed, at the core of this Court's judgment in *New Nation Movement* was a vivid explanation that a person who wants to be elected to the National Assembly should not have to join a political party if she objects to doing so.[76]

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[75] Minster AA paras 123-163 pp 235-249.

[76] See *New Nation Movement* at paras 48 to 58, including:

"*[53] …. We cannot dismissively say if you stand for political office through a political party, it makes no difference; you still do stand for political office. It may make all the difference to some. And it does to Ms Revell. She explains that, as a representative and leader of the Korana nation, a section of the Khoi and San people, she is averse to forming or joining a political party. Hers is not a for-the-sake-of-it objection. I understand her point perfectly. I read it to mean that, as a leader of a nation, she does not want to be constrained by that kind of partisanship that comes with being a member of a political party. That partisanship makes you ultimately answerable to the party. Being free of those shackles will make Ms Revell directly answerable to her nation, not to a political party. That is*

81.2.2 But this means that a given independent candidate can only ever occupy one seat in the National Assembly. Whether she wins 0,25% of the vote, 1% of the vote or 3% of the vote, she can only ever occupy 1 seat. And that means that her seats will not be proportional to the vote she receives.

81.3 Similarly, when a MP representing a political party resigns or dies, filling the vacancy is not complicated. The political party simply chooses the next person from its list. But an independent MP, by definition, has no party or list – they have chosen to dissociate from any political party. Filling the vacancy therefore has to take place via different method.

82 While these are not insuperable obstacles, they are significant added complexities, which must be carefully accounted for in designing an electoral system that accommodates independent candidates. Parliament thus had to determine a method for dealing with these issues.

83 This chapter of our submissions is structured as follows:

83.1 we first explain the circumstances in which a seat will be forfeited and the method used to reallocate these seats;

the choice she is making. In my book, it is a valid choice. Surely, her example is not isolated. There must be many and varied other examples. Subject to the Lavigne threshold, we cannot make light of them."

83.2 we then explain how a vacancy arising from a seat held by an independent candidate needs to be filled and the method used to do so;

83.3 thereafter, we address the core of OSA's challenge to that method and explain that it does not impermissibly deviate from the requirement that the system must result, in general, in proportional representation; and

83.4 finally, we explain why the remedy sought by OSA cannot be granted whatever the Court finds on the merits.

Forfeiture of seats in initial allocation

84 The Electoral Act uses the droop quota to allocate seats. The first allocation is provisional since there may be leftover seats. Any leftover seats are allocated using the highest or largest remainder method.

85 Forfeiture occurs during this initial provisional allocation of seats.

86 There are three circumstances in which a seat will be forfeited.

86.1 First is where a party submits a regional or national list with fewer names of candidate than the number of seats allocated to the party:

86.1.1 the party will forfeit the number of seats that it has no candidates for;[77]

[77] Schedule 1A item 7(1) (national) and item 12(1) (provincial).

86.1.2 this forfeiture mechanism was present in the former electoral system;[78]

86.2 Second is where an independent candidate obtains more than one seat in a single region in the initial allocation – the independent candidate will forfeit the additional seat or seats;[79]

86.3 Third is where an independent candidate contests more than one region and obtains two or more seats, they will be allocated a seat in region where they received the highest proportion of votes, and any excess seats are forfeited.[80]

87 If a seat is forfeited, it needs to be reallocated.

88 Parliament chose to utilise a system that recalculates the initial provisional allocation of seats.[81]

88.1 The party or candidate forfeiting seats is disregarded in the recalculation. The provisional allocation of seats less the number of seats forfeited, becomes its or their final allocation of seats.

[78] Schedule 1A item 7(1) of the Electoral Act before its amendment by Act 1 of 2023.

[79] Schedule 1A item 7(2)(a) (national) and item 12(2)(a) (provincial).

[80] Schedule 1A item 7(2)(b) (national) and item 12(2)(b) (provincial).

[81] Schedule 1A item 7(3) to (6) (national) and item 12(3) to (5) (provincial).

88.2 An amended droop quota of votes per seat is determined by removing the seat or seats finally allocated to the party or candidate as well as the votes cast in their favour. The amended quota is calculated—

88.2.1 by dividing the total number of votes cast, less the number of votes cast in favour of the party or candidate whose seat or seats have been forfeited,

88.2.2 by the number of seats, plus one, in the region or province, less the number of seats finally allocated to the party or candidate; and

88.2.3 the result plus one, disregarding fractions, is the amended quota of votes per seat for the recalculation.

88.3 The seats are then allocated to the parties and independent candidates by applying the amended quota to the vote count: i.e., by dividing the total votes cast in support of each party or independent candidate by the amended quota.

88.4 Not all the seats may be allocated as the contesting parties and candidates may not, between them, obtain sufficient votes to meet the full quota of seats.

88.5 Unallocated seats are awarded based on the largest or highest remainder method where the surplus votes accruing to each party or independent candidate – in other words the remaining votes they obtained that did not meet the threshold of the quota for a seat –

compete for the remaining seats, in sequence of the highest number of surplus votes.

Vacancies

89 Sections 47 and 106 of the Constitution provide for the qualification criteria for members of the National Assembly and provincial legislatures. They each provide for circumstances where a member will cease their membership and each require, in subsection (4), that vacancies must be filled in terms of national legislation.

90 Independent candidates are in a different position to political parties are in different positions where vacancies arise.

90.1 A party provides a closed list of candidates. If one of its representatives holding a seat vacates their seat, the party can fill the seat with the next candidate on the list.

90.2 An independent candidates contests an election alone, and if she obtains a seat, holds it as an individual. She cannot simply be replaced by another person.

91 Parliament considered various options in which a vacancy arising from a seat held by an independent candidate could be filled. There were three options:[82]

91.1 First would be leaving the seat vacant open until the next election;

[82] Minister AA paras 153-154 p 245.

91.2 Second would be to hold a by-election; and

91.3 Third would be to adopt a mechanism to reallocate the seat using the votes cast in the previous election.

92 The first two options were ruled out. It would be unfeasible to hold by-elections within the regions or provinces and leaving a seat open was rejected.[83]

93 Thus, Parliament selected the third option – to use the votes cast in the previous election to reallocate the seat.

94 There are different methods that could be used to achieve this third option.

95 Parliament elected to adopt a similar method to that used in respect of forfeited seats that recalculates the quota.[84]

95.1 The votes in favour of the independent candidate causing the vacancy are disregarded.

95.2 The seats allocated to independent candidates already in office are also disregarded as are votes in their favour: by definition, they cannot obtain another seat.

95.3 An amended quota of votes per seat is determined—

95.3.1 by dividing the total number of votes cast <u>less</u> the number of votes cast in favour of the vacating individual candidate <u>minus</u>

[83] Minister AA paras 153-154 p 245.

[84] Schedule 1A item 23.

the number of votes cast in favour of individual candidates that have already been allocated a seat;

95.3.2 by the number of seats, plus one, reserved in the region province less the number of seats already held by independent candidates; and

95.3.3 the result plus one, disregarding fractions, is the amended quota of votes per seat for the recalculation.

95.4 The number of seats to be allocated to the parties and the independent candidates participating in the recalculation (i.e. those independent candidates who do not already have seat) is then determined by applying the amended quota to the vote count.

95.5 Unallocated seats are awarded based on the largest or highest remainder method.

95.6 Importantly, the system protects any party or independent candidate that may stand to lose a seat in the recalculation arising from a vacancy. They will retain the seat and there is a further recalculation.[85]

The OSA's complaint

96 As we understand it, OSA argues that the method used for reallocating seats if there is a forfeiture or vacancy deviates from the requirement that the system must result, in general, in proportional representation.

[85] Schedule 1A item 24.

97 The basis for the argument is that:

97.1 Disregarding votes in this manner violates the principle of proportional representation insofar as the share of seats will not reflect vote share[86] and undermines "*equality of effect of votes*";

97.2 In lowering the quota used in the reallocation process, political parties get a "*second bite at the cherry*" and that larger political parties are likely to gain more seats in the reallocation;[87] and

97.3 The seats allocated in political parties in the reallocation will no longer be proportional to the original vote cast, but rather proportional to the recalculated quota.[88]

The complaint is unsustainable

98 This argument is unsustainable.

99 First, as the Minister's answering affidavit addresses in detail, any electoral system will have the phenomena of votes being discarded.[89]

99.1 Including independent candidates in the electoral system necessarily leads to discarded votes. This is not objectionable.

99.2 Voters who support independent candidate are not undermined. If their candidate obtains a seat, they have achieved their aim – to put that

[86] FA paras 191-192 p 63.

[87] FA para 157.2 p 51.

[88] FA para 158 p 52.

[89] Minister AA paras 169-171 and subparas pp 251-252.

independent candidate in office. In addition, in respect of the National Assembly, they also still have the opportunity to cast the second ballot for a political party to influence overall proportionality.

99.3 If their candidate did not obtain enough votes to fulfil a quota for a seat, then that is the democracy in action. They cannot complain that they are not represented having made a choice to support an unpopular and unsuccessful candidate.

100 Second, the recalculation methods are adopted precisely in order to reallocate seats in a manner which as best as possible results, in general, in proportional representation.[90]

100.1 We have explained above how it is political parties that can put forward candidates in a proportional manner since they are groups of citizens contesting elections and not individuals.

100.2 The rationale of excluding the votes cast in favour of the candidate or party forfeiting a seat is to ensure that the most eligible candidate remaining (whether that be an independent candidate or political party) is allocated the seat. Once the candidate or party forfeits a seat they are no longer eligible, and their support is not relevant in that determination.[91]

[90] Minister AA para 191 p 257.

[91] Commission EA para 52.1 p 541.

100.3 The same holds true for an independent candidate who vacates a seat – the fact that they have vacated their seat means that votes in their favour cannot be used to determine who is eligible to take up the seat.[92]

100.4 OSA complains that the Minister, Parliament and Commission refer to inter-party proportionality and contends that "*this is not the system contemplated in the Constitution*".[93]

100.5 Yet it also accepts that independent candidates distort proportionality (as they can only hold a single seat).

100.6 The appropriate way to balance and address these issues is for Parliament to choose, within constitutional constraints.

100.7 The "*in general*" standard gives Parliament some latitude in designing the electoral system

101 Third it is important to emphasise that citizens who vote for an independent candidate are well-aware of what that entails, including the limitations inherent in the fact that an independent candidate can only ever hold a single seat.

101.1 Such a voter exercises their choice to vote for an independent candidate instead of a political party knowing that their chosen representative can only ever hold one seat and may vacate their seat.

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92 Commission EA para 52.2 pp 541-542.

93 OSA written submissions para 138.

101.2 In addressing the challenge to the constitutional amendments that permitted floor-crossing, this Court held in *UDM* that:[94]

> *"[49]… The rights entrenched under section 19 are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.*
>
> *[50] The fact that political representatives may act inconsistently with their mandates is a risk in all electoral systems. …. Persons who voted for that party may feel betrayed by such a decision, but they cannot contend that the change infringed their rights under section 19. Their remedy comes at the time of the next election when they decide how to cast their votes."*

101.3 Just how voters have "*no control*" over the conduct of their representatives in Parliament between elections, those who choose to vote for independent candidates have no control over the fact that their candidate may vacate their seat. This is inherent in supporting an independent candidate: it does not violate the right to vote.

102 Fourth, it is also important to address in detail the contentions that there is some unequal effect in voting in recalculation methods adopted by Parliament.

102.1 OSA's contentions about unequal effect are expressly linked to its argument that the amended electoral system offends against the principle of proportional representation.[95]

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[94] *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party Intervening ; Institute for Democracy in South Africa as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC)

[95] OSA written submissions paras 123-125.

102.2 It is in the first place curious that OSA – whose arguments are focussed on proportional representation – relies on jurisprudence from the US Supreme Court in support of its argument. While the US Supreme Court has held that voters should have an "*equally effective voice*" in elections,[96] its electoral system uses constituencies and – as is well known – does not require proportional representation.[97]

102.3 Moreover, OSA does not fully develop its arguments in relation to: (a) what it means for voters to have an "*equality of effect*"; and (b) how the amended system is in violation of such principle.

102.4 It does not substantiate its mere assertions that the discarding of votes in relation to forfeitures and vacancies results in votes for political parties and independent candidates having "*different weight*" or being treated unequally.[98]

103 Fifth, while stating that it accepts that "*no electoral system can achieve perfect proportionality*",[99] OSA contends that the system is unconstitutional as it favours the largest political parties.[100]

103.1 The respondents accept that the recalculation of the quota may in some instances favour larger political parties.[101] We emphasise that this is not always the case – the Commission has also shown how this

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[96] *Reynolds v Sims* 377 U.S. 533, 565 (1964), cited in FA para 213 p 70.

[97] See *UDM* para 29.

[98] OSA written submissions para 123(a) and (b).

[99] OSA written submissions para 113.

[100] FA para 154 p 50.

[101] Minister AA para 194 and subparas pp 257-258.

the recalculation may also favour other parties depending on a number of factors.[102]

103.2 But even where the recalculation of the quota favours larger political parties,[103] this is simply a logical mathematical consequence of the fact that larger political parties obtain more seats is a consequence of their support amongst the electorate. Every electoral system will naturally favour larger parties – in the sense that parties with more support will obtain more seats in the legislature. That is democracy at work.

103.3 This Court has in any event held that an electoral system which may disadvantage some contestants (in this case independent candidates and parties with less support) does not make the electoral system unconstitutional. In *UDM*, the Court held explicitly as follows:[104]

> *"The fact that a particular system operates to the disadvantage of particular parties does not mean that it is unconstitutional. For instance, the introduction of a constituency-based system of elections may operate to the prejudice of smaller parties, yet it could hardly be suggested that such a system is inconsistent with democracy."*

104 Finally, what this all demonstrates is that there is no violation of the right to vote or the right to equal treatment when standing for public office, as OSA suggests.[105]

104.1 In the electoral context, the right to stand for public office exists in the electoral system. The electoral system must comply with various

[102] Commission EA para 57 and subparas pp 543-544.

[103] Minister AA para 194 and subparas pp 257-258.

[104] *UDM* at para 47.

[105] OSA written submissions para 123.

requirements of the Constitution. Sometimes those requirements pull in different directions.

104.2 Thus the requirement that independent candidates must have an opportunity to contest national and provincial elections comes up against the requirement that the system must result, in general, in proportional representation.

104.3 In deciding how to address the particular issues that arise from forfeited or vacant seats, Parliament chose to adopt mechanisms which recalculate the quota and reallocate seats so as to ensure that the two constitutional requirements are met.

104.4 Other methods could potentially have been used. But selecting the appropriate method is ultimately a decision for Parliament to make.

104.5 OSA's arguments do not remotely demonstrate that this choice was out of constitutional bounds.

The OSA's proposed solution is itself unconstitutional

105 The OSA suggests that allocating forfeited or vacated seats using the highest or largest remainder system (instead of recalculating and reallocating seats) would "*ameliorate*" the supposed disproportionality and should be read-into the Electoral Act.[106]

[106] FA para 157.4 p 52, OSA written submissions para 127.

106 But the OSA's proposed solution contains the seeds of its own destruction. Its proposed solution produces a problem of "*low remainders*". It allows for a situation where a seat may be allocated to a party or candidate with low overall voter support who does not enjoy anything close to proportional support of the electorate. This is patently antithetical to the principles in our Constitution, including the obligation to achieve proportional representation.

107 Notably, OSA's own expert acknowledges the difficulty that the proposed solution would entail and states unequivocally that it would need to be addressed.[107] Yet:

107.1 The Notice of Motion and founding affidavit are entirely silent on the issue – as was pointed out by the Minister in his answering affidavit.[108]

107.2 The written submissions filed on OSA's behalf also do not deal with the problem at all.[109]

107.3 And even OSA's own expert merely offers that if the highest remainder method were used in place of the recalculation and reallocation method adopted by Parliament, further choices would need to be made about a "*hybrid model*"[110] which would allocate forfeited or vacated seats using a combination of the highest remainder and highest average methods in order to minimise the risk inherent in OSA's own proposed solution. He does not seek to suggest what sort of hybrid model could

[107] See the discussion of "*Concern Over Low Remainders*" pp 165-166.

[108] Minister AA paras 238-239 p 271.

[109] See OSA written submissions paras 141-143.

[110] Atkins' report p 166 (internal p 32).

be adopted. Instead, he says that a "*limit*" of highest remainder seats would need to be "*agreed*" upon.[111]

108 To understand the problem, recall that the highest remainder method works by allocating any seats leftover after the allocation using the quota. In effect, what happens is that the parties and candidates who have any votes remaining that were not enough in number to obtain a quota are ranked from the highest number of remaining votes to the lowest. Any seats not allocated in using the quota are then allocated to the parties or candidates in order of who has the highest remaining votes.

109 The inherent risk of using this method is that the that seats may, in the words of OSA's expert, be "*awarded on the basis of low absolute numbers of votes*".[112]

110 In other words, a seats or seats may be allocated to parties or candidates who received very few votes, but had the most leftover after the calculation of the quota. The proposed solution therefore creates the risk of awarding a seat to someone who does not enjoy anything close to proportional support of the electorate

111 The system in the Electoral Act recognises this risk and avoids it.[113]

111.1 While the highest remainder method is used to allocated surplus compensatory seats that are not allocated in the initial allocation it is

[111] Atkins' report p 166 (internal p 32).

[112] Atkins' report p 165 (internal p 31).

[113] Schedule 1A item 6(c).

limited to only five remaining seats. After five seats, the parties or candidates who are remaining, will have very few votes.

111.2 Any unallocated seats in excess of five are allocated to the parties with the "*highest average*" number of votes per seat that has already allocated.

111.3 The reason for this is so that political parties with little support are not able to gain a seat in the National Assembly.

111.4 The purpose is therefore to avoid a situation where a party with very few votes (much lower than a quota) obtains a seat. OSA's expert acknowledges this.[114]

112 If the electoral system were capable of allocating a seat to a contestant with very low voter support, it would obviously violate the constitutional requirement of proportional representation. This is because a seat in a legislature with a fixed number of seats would be given to a contestant who does not enjoy anything close to proportional support of the electorate.

113 In other words, while OSA complains about the solution Parliament designed to grapple with the introduction of independent candidates to the electoral system, its very own solution would – on its own version – produce a violation of the proportional representation requirement.

114 This demonstrates precisely how unsustainable OSA's second challenge is.

[114] Atkins' report p 165 (internal p 31).

Proposed remedy (if any)

115 For the reasons we have set out, we submit that the second constitutional challenge should be dismissed and, accordingly, no question of a remedy arises. If, however, the Court were to find that the OSA's second constitutional challenge were well-founded, we make the following submissions.

116 First, we emphasise that OSA asks the Court to read-in the highest remainder method *simpliciter* in place of the recalculation method adopted by Parliament.[115] It makes no effort to explain what additional reading-in should be done, even though its own expert recognises the need for this.

116.1 OSA thus asks the Court to read-in a mechanism which – on its own version – has the risk of allocating seats in the National Assembly or provincial legislature to a contestant who enjoys very little support in the electorate – and far less support than is needed for a quota.

116.2 It therefore seeks a remedy which would violate a core constitutional requirement for the electoral system. This is obviously impermissible.

117 Second, once the reading-in is rejected, the only remaining remedy is the suspension of any declaration of invalidity, until at least after the 2024 elections. We have explained why this is so in paragraph 78 above.

[115] NOM paras 6.2, 6.2 (repeated) and 6.3 p 3.

CONCLUSION

118 For these reasons, direct access should be granted but the application should be dismissed.

119 Alternatively, should the Court declare any provision of the Act invalid, it should suspend its declaration of invalidity until after the 2024 elections.

120 The Minister does not seek costs.

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23 August 2023

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 158/23

In the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

FOURTH AND FIFTH RESPONDENTS' (PARLIAMENT)

PRACTICE NOTE

NATURE OF THE PROCEEDINGS

1. The applicant, One Movement South Africa NPC ("**OSA**"), has, by way of direct access, brought an application challenging section 31B(3) and Items 5, 7, 11, 12, 23 and 24 of Schedule 1A of the Electoral Act as amended by the Electoral Amendment Act 1 of 2023 **"the Electoral Act"**. The provisions concern:

1.1. The number of registered voters' signatures required for unrepresented independent candidates to contest a national or provincial election (section 31B(3)).

1.2. The recalculation of seat allocations when seats are forfeited in the National Assembly[1] or provincial legislatures[2] or when vacancies arise in a legislature.[2]

THE ISSUES THAT WILL BE ARGUED

2. Parliament will present argument on the following issues:

2.1. An overview of Parliament's constitutional mandate to prescribe an electoral system with reference to the principles of appropriate respect, deference and polycentricity.

2.2. The complexity of the issues presented by the amendments to the Electoral Act as well as the caution and thoroughness exercised by Parliament in the process that it followed.

2.3. The applicable legal principles in respect of the claims of irrationality and infringement of section 19 rights.

2.4. The challenge to the signature threshold requirement has no merit.

2.5. The recalculation challenge has no merit.

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[1] Items 5 and 7 of Schedule 1A to the Electoral Act.
[2] Items 23 and 24 of Schedule 1A to the Electoral Act.

2.6. The remedy as proposed by the OSA is not just and equitable.

THE PORTION OF THE RECORD THAT SHOULD BE READ

8. Applicant's notice of motion, founding affidavit and annexures (1 - 173);

9. First respondent's explanatory affidavit (181 - 190);

10. Second respondent's answering affidavit and annexures (194 - 501);

11. Third respondent's explanatory affidavit (508 - 549);

12. Fourth and Fifth respondents' answering affidavit and annexures (556 – 858 except for 694 – 713; 639 – 667; 798 – 810, which are repeated in the submissions of the Minister).

AN ESTIMATE OF THE DURATION OF ORAL ARGUMENT

13. Parliament will require 1 hour.

A SUMMARY OF THE ARGUMENT

14. As to the signature challenge:

14.1. The OSA's attack on the rationality of the 15% threshold is – when stripped to its essence – an attack founded on reasonableness disguised as rationality.

14.2. The OSA mounts no real challenge to the rationale of the signature threshold requirement and whether it achieves a legitimate governmental purpose. It recognises that some sort of threshold is indeed required.

14.3. The OSA takes issue with the precise threshold chosen by Parliament. The nub of its argument is that there is a better way to achieve the government's stated purpose of ascertaining the seriousness of a candidate seeking to stand for public office and ensuring free and fair elections.

14.4. Parliament will argue:

14.4.1. That the signature threshold is rational and linked to a legitimate governmental purpose and that OSA conflates the new signature requirement for contesting elections with the pre-existing requirement to register political parties.

14.4.2. Given recent trends, the 1000 signature requirement does not serve as an indicator of voter support and does not protect against the risk of an unmanageable number of contestants.

14.4.3. The signature threshold does not infringe any right in the Bill of Rights because it ensures rather than frustrates the right to vote in a free and fair election. The measures adopted by Parliament ensure that any independent candidate if they take reasonable steps in pursuit, can contest elections and seek public office.

14.5. The OSA proposes a remedy, the consequence of which is to prescribe a different way for the government to achieve its stated purpose.

14.6. It is precisely this sort of attack that falls outside of a challenge founded on rationality and nor has any basis for a rights infringement been shown.

15. As to the recalculation challenge:

15.1. There can be no dispute that the Constitution requires a system of proportional representation, in general.

15.2. There can be no dispute that Parliament is seized (subject only to the constitutional constraints) with adopting legislation in respect thereof.

15.3. It is common cause that perfect proportionality cannot be achieved and that deviations from absolute proportionality are permitted.

15.4. It is common cause that both the recalculation methodology (as adopted in the Electoral Act) and the alternatives proposed by the OSA both yield a measure of deviation from absolute proportionality.

15.5. In reaching its decision, Parliament ultimately considered that: (a) what is a system that best reflects the will of the voters; (b) if the seat was to go to the next eligible independent candidate, that could, in theory be a candidate who only received one or two votes, instead of a party that received many thousands of votes. That, Parliament determined would evidently not fulfil the requirements of proportionality.

15.6. Furthermore, disregarding votes in the recalculation of seats is to ensure that the election of candidates who are not eligible to hold a seat or have chosen to vacate a seat do not continue to influence the outcome of the reallocation of that seat.

15.7. Against the aforegoing backdrop, the single issue that arises is whether this Court ought to prefer the approach of the OSA instead of that of Parliament. We submit not in light of the jurisprudence of this Court.

16. As to relief: in the event that this Court is to find that there is merit to the challenge, Parliament submits that an appropriate order which constitutes just and equitable relief would be the following: (a) a declaration of constitutional invalidity as contemplated by section 172(1)(a) of the Constitution; (b) an Order suspending the declaration of invalidity for 36 months to enable Parliament to address the defects. Parliament will argue that the interim relief sought by the OSA is not just and equitable.

AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED

17. Particular reliance will be placed on the following authorities:

17.1. Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC) (2010 (2) SACR 101; 2010 (5) BCLR 391; [2010] ZACC 4)

17.2. AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs 2009 (3) SA 649 (CC) (2009 (6) BCLR 611; [2009] ZACC 4)

17.3. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15)

17.4. Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25)

17.5. New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020)

17.6. New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5)

17.7. UDM v President of the RSA (ACDP Intervening; IDASA as Amici Curiae) (No 2) 2003 (1) SA 495 (CC) (2002 (11) BCLR 1179; [2002] ZACC 21)

17.8. Democratic Party v Minister of Home Affairs and Others 1999 (3) SA 254 (CC) 1996 (6) BCLR 607; [1999] ZACC 4

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Friday, 25 August 2023

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 158/23

In the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

HEADS OF ARGUMENT ON BEHALF OF

THE FOURTH AND FIFTH RESPONDENTS

CONTENTS

A. INTRODUCTION

1. This application presents two fundamental questions, namely, whether is it competent and appropriate for this Court to determine, on the basis of the case made out in the founding affidavit: (a) that a signature threshold of 15% as provided for in section 31B(3) of the Electoral Act No 73 of 1998 ("**the Electoral Act**") "*creates an unreasonable barrier to entry for independent candidates to register for elections*"[1] ("**the signature threshold challenge**"); and (b) that the recalculation formula (when seats are forfeited in the National Assembly[2] or provincial legislatures[3] or when vacancies arise in a legislature[4]) "*disproportionately favours political parties with larger votes over parties with smaller votes and independent candidates*" ("**the recalculation challenge**").[5] The Fourth and Fifth Respondents ("**Parliament**") contend that they have acted within the bounds of the Constitution read in light of this Court's jurisprudence in amending the Electoral Act. The Applicant, One Movement South Africa NPC ("**OSA**") contends otherwise. The fundamental question is whether the views of the OSA ought to prevail over those of Parliament. We submit not.

2. As is apparent from the answering affidavits filed of record, both the issues that underpin the subject challenge were the subject of robust engagement and debate in the course of the amendment process. The views of stakeholders, including the OSA, were weighed against each other, those of experts and those of represented members (all underpinned

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[1] NM, p 2, par 3.
[2] Items 5 and 7 of Schedule 1A to the Electoral Act.
[3] Items 11 and 12 of Schedule 1A to the Electoral Act.
[4] Items 23 and 24 of Schedule 1A to the Electoral Act.
[5] NM, p 2, par 4.

by sound and ongoing legal advice from highly esteemed independent Counsel) to reach the final version of the Electoral Amendment Act No 1 of 2023 ("**the Amendment Act**").

3. The Amendment Act introduced the changes required by the judgment in **New Nation Movement NPC and Others v President of the Republic of South Africa and Others** (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020) ("**New Nation Movement**").

4. These Heads of Argument are structured as follows:

   4.1. In **Part B**, we provide an overview of Parliament's constitutional mandate to prescribe an electoral system with reference to the principles of appropriate respect, deference and polycentricity.

   4.2. In **Part C**, we explain the complexity of the issues presented by the amendments to the Electoral Act as well as the caution and thoroughness exercised by Parliament in the process that it followed.

   4.3. In **Part D**, we address the applicable legal principles in respect of the claims of irrationality and infringement of section 19 rights.

   4.4. In **Part E**, we address the challenge to the signature threshold requirement.

   4.5. In **Part F**, we address the recalculation challenge.

   4.6. In **Part G**, we address the question of remedy.

5. Before addressing each of these issues in turn, there are two preliminary points we make:

5.1. First, this application has been brought by way of direct access.[6] The Second Respondent ("**the Minister**") does not oppose the OSA's request for direct access and accepts that the ordinary course of having the matter heard by the High Court is not permitted in the present circumstances.[7] The Minister recognises the imperative that finality be reached as soon as possible.[8] Parliament abides the outcome of the application for direct access.[9] These Heads of Argument are premised on the assumption that this Court will grant direct access.

5.2. Second, several pages of the founding affidavit were dedicated to an argument that because the President did not assent to the Bill by 28 February 2023, this meant that the period of suspension given to Parliament to remedy the defect, lapsed in the absence of remediation and that the Electoral Act "*could no longer be remedied*". However, the OSA no longer persists with this challenge.[10] We accordingly do not address this issue in our Heads of Argument.

B. PARLIAMENT'S CONSTITUTIONAL MANDATE TO PRESCRIBE AN ELECTORAL SYSTEM: APPROPRIATE RESPECT, DEFERENCE AND POLYCENTRICITY

6. There are 400 seats in the National Assembly. The seats in the National Assembly are as determined in terms of section 46 of the Constitution and Item 1 of Schedule 1A of the Electoral Act.

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[6] FA, p 28, Section G, par 70 and ffl read with NM, p 2, par 2.
[7] AA (Minister), p 207, par 30 and 31.
[8] AA (Minister), p 208, par 32.
[9] AA (Parliament), p 560, par 11.
[10] Applicant's HoA, p 5, par 16 and 17.

7. Section 46 (1) of the Constitution provides that the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that: (a) is prescribed by national legislation; (b) is based on the national common voter's roll; (c) provides for a minimum voting age of 18 years; and (d) results, in general, in proportional representation.

8. According to section 46(2) of the Constitution, an Act of Parliament must provide a formula for determining the number of members of the National Assembly.

9. Subject to these framework requirements, this Court has, on multiple occasions, emphasised the wide remit given by the Constitution to Parliament to enact an electoral system. By way of example:

   9.1. In **New National Party v Government of the Republic of South Africa** 1999 (3) SA 191, this Court explained that the right to vote is a right to vote in a free and fair election *"in terms of an electoral system prescribed by national legislation…[t]he details of the system are left to Parliament."*[11]

   9.2. In **AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another** 2009 (3) SA 649 (CC), this Court identified the key issue as being *"the question of the constitutional validity of the electoral system – a matter that lies peculiarly with Parliament's constitutional remit."*[12]

   9.3. In **New Nation Movement**, this Court reiterated:

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[11] At par 11.
[12] At par 80. See too par 6.

> *"The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system."*[13]

10. The choice of the electoral system at national and provincial levels is – by constitutional design – left in the hands of the people's representatives, Parliament. This is because, in terms of the Constitution, the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.[14] The National Council of Provinces ("**the NCOP**"), in turn, represents the provinces and ensures that their interests are taken into account in the national sphere of government.[15]

11. It is for Parliament (representing the people and the provinces) to wrestle and weigh the benefits of the different types of electoral schemes available and to design a system that meets the framework requirements of the Constitution, including allowing for independents to stand for public office and ensuring that the electoral system enacted results, in general, in proportional representation. This is what Parliament has done.

12. Yet, the OSA seek to challenge decisions as to <u>how</u> Parliament balanced competing considerations, rights and interests and the manner in which it gave effect to this Court's Order in **New Nation Movement**.

13. In holding Parliament accountable as against its constitutional mandate, this Court will also be guided by its jurisprudence:

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[13] At par 15.
[14] Section 42(3) of the Constitution.
[15] Section 42(4) of the Constitution.

13.1. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) (**Bato Star**) at par 48 this Court held[16]:

> *"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."*

13.2. This Court further held in **Bato Star** (at para 46), citing **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd** 2003 (6) SA 407 (SCA) ([2003] 2 All SA 616; [2003] ZASCA 46) at par 47 that deference entails a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be

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[16] See too: **Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch** 2020 (1) SA 368 (CC) (2019 (12) BCLR 1479; [2019] ZACC 38) at par 42.

sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.[17]

14. In referring to the aforesaid case-law, we make clear that:

14.1. The principle of deference as developed by this Court does not call for immunity from judicial accountability or "*judicial timidity or an unreadiness to perform the judicial function*" but rather "*appropriate respect*" which flows "*not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself*".[18]

14.2. Legislative choices must be rationally related to a legitimate government purpose in that they must not be arbitrary or capricious and must not infringe rights.[19]

14.3. As the evidence makes clear, a highly complex technical and policy-laden task was undertaken after "*substantive debate and deliberations about how to achieve an appropriate balance of the Constitution's objectives and requirements for the electoral system*".[20]

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[17] See too: **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253; [1996] ZACC 26) at par 35 and **International Trade Administration Commission v SCAW SA (Pty) Ltd** 2012 (4) SA 618 (CC) (2010 (5) BCLR 457; [2010] ZACC 6) at par 91 and 95.
[18] **Bato Star**, par 46.
[19] **New National Party of South Africa v Government of the Republic of South Africa and Others** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) (**New National Party**) at par 19 and 20.
[20] AA (Minister), p 224, par 91. See too: AA (Parliament), p 5589, par 7, 8 and 9.

C. THE COMPLEXITY OF THE ISSUES AND THOROUGHNESS OF THE PROCESS ADOPTED BY PARLIAMENT IN SEEKING TO ENSURE A CONSTITUTIONALLY COMPLIANT OUTCOME

15. The OSA does not appear to appreciate the significance of the extensive process followed by the Minister and Parliament, the numerous legal opinions sought and given and the careful balancing exercise that was undertaken by Parliament.

16. The Minister has explained that: (a) between February and October 2022, the National Assembly's Portfolio Committee on Home Affairs ("**the Portfolio Committee**") met more than 20 times to discuss and deliberate on the proposed amendments to the electoral system in the Bill[21]; (b) the NCOP Select Committee on Security and Justice ("**the Select Committee**") met eight times in quick succession between 2 November and 25 November 22 and considered the further submissions made by members of the public[22]; (c) the Bill, together with the NCOP's proposed amendments, was referred back to the Portfolio Committee and was ultimately passed by the National Assembly in February 2023.[23] The Bill was assented to by the President on 17 April 2023.[24]

17. The detailed process that was followed is addressed by Parliament in no less than 30 pages of its answering affidavit.[25] In summary:

    17.1. Cabinet had established a Ministerial Advisory Committee ("**the MAC**") to investigate and report on electoral reform.[26]

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[21] AA (Minister), p 215, par 61.
[22] AA (Minister), p 219, par 72.
[23] AA (Minister), p 508, par 94 and 96.
[24] AA (Minister), p 508, par 97.
[25] AA (Parliament), p 569, par 27 and ffl (Section C).
[26] AA (Parliament), p 570, par 31.

17.2. A team of four independent Counsel were briefed to prepare an initial draft of the Amendment Bill and to advise on its constitutional implications.[27]

17.3. On 10 January 2022 the Electoral Amendment Bill was introduced in Parliament.[28]

17.4. Between the period February and 20 October 2022, the Portfolio Committee heard oral submissions from members of the public, obtained the views of the IEC, obtained various legal opinions from Counsel, analysed and carefully considered the various input that it had received.[29] The IEC made specific submissions on the filling of vacancies and proposed an alternative to leave vacant seats by independent candidates unfilled so as to ensure that there was no differentiation between vacancies in seats to political parties as compared to independent candidates.[30]

17.5. The NCOP passed the Bill (incorporating its proposed amendments) on 29 November 2022 returning it to the National Assembly for concurrence.[31]

17.6. On 10 February 2023 the Portfolio Committee adopted the Bill and recommended its adoption to the National Assembly. On 23 February 2023 the National Assembly passed the Bill.[32]

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[27] AA (Parliament), p 571, par 37.
[28] AA (Parliament), p 577, par 45.
[29] AA (Parliament), p 578, par 46 and ffl.
[30] AA (Parliament), p 580, par 48.2.
[31] AA (Parliament), p 600, par 62.
[32] AA (Parliament), p 602, par 65 and 66.

D. THE LAW: RATIONALITY AND SECTION 19 OF THE CONSTITUTION

Rationality

18. It is trite that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with the threshold of rationality.[33]

19. The guiding principles in respect of a constitutional challenge founded on irrationality are well-established. The key principles relevant to the present matter as distilled from the jurisprudence of this Court are as follows:

    19.1. It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are, in effect, arbitrary and inconsistent with this requirement.[34]

    19.2. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry.[35] Differently put, this Court has determined that the Constitution requires that public power vested in the Executive and other functionaries must be exercised in an objectively rational manner.[36]

    19.3. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the

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[33] **Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1) para 85 (**Pharmaceutical Manufacturers Association**).
[34] **Pharmaceutical Manufacturers Association,** par 85.
[35] **Pharmaceutical Manufacturers Association**, par 86.
[36] **Pharmaceutical Manufacturers Association**, par 89.

power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately.[37]

19.4. This Court held in **Albutt v Centre for the Study of Violence and Reconciliation and Others** 2010 (3) SA 293 (CC) (2010 (2) SACR 101; 2010 (5) BCLR 391; [2010] ZACC 4) para 51:

> *"The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."*

Own Emphasis

19.5. A person seeking to impugn the constitutionality of a legislative provision cannot simply rely on the fact that the State objective could have been achieved in a better way. As long as there is a rational relationship between the method and object, it is irrelevant that the object could have been achieved in a different way.[38]

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[37] **Pharmaceutical Manufacturers Association**, par 90.

[38] **Bel Porto School Governing Body and Others v Premier, Western Cape, and Another** 2002 (3) SA 265 (CC) (2002 (9) BCLR 891; [2002] ZACC 2). See too: **Prinsloo v Van der Linde and Another** 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759; [1997] ZACC 5) para 36 and **Law Society of South Africa and Others v Minister for Transport and Another** 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25) at par 35.

19.6. The fact that rationality is an important requirement for the exercise of power in a constitutional State does not mean that a court may take over the function of government to formulate and implement policy. "*If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature. Provided a legitimate public purpose is served, the political merits or demerits of disputed legislation are of no concern to a court.*"[39]

19.7. The requirement that a legislative scheme must be rational is not directed at testing whether legislation is fair or reasonable or appropriate, but is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. Rationality is a lower threshold than a limitations analysis under section 36 of the Constitution. However, to constitute a justifiable limitation, a provision must necessarily be rational.[40]

19.8. It is to be emphasised (as this Court has previously held): "*[T]hat rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is permissible only where it is necessary and unavoidable to do so*."[41]

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[39] **Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others** 2008 (5) SA 171 (CC) (2008 (10) BCLR 969; [2008] ZACC 10) at par 63.

[40] **Law Society of South Africa and Others v Minister for Transport and Another** 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25) para 35. Referred to in **Amcu v Chamber of Mines of SA** 2017 (3) SA 242 (CC) (2017 (6) BCLR 700; [2017] ZACC 3) at par 66. See too: **Democratic Alliance v President of the Republic of South Africa and Others** 2013 (1) SA 248 (CC) (2012 (12) BCLR 1297; [2012] ZACC 24) at par 29 to 32 and **Electronic Media Network Limited v e.tv (Pty) Limited** 2017 (9) BCLR 1108 (CC) at paras 84-85.

[41] **Electronic Media Network Limited v e.tv (Pty) Limited** 2017 (9) BCLR 1108 (CC) at paras 85.

19.9. The claim based on an infringement of section 9(1) of the Constitution also reduces to a rationality enquiry. The jurisprudence of this Court has made clear there can be no breach of these rights, even where there is a differentiation between different categories of people, provided "*there is a rational connection between the measure and the legitimate governmental purpose of facilitating the effective exercise of the important right to vote*."[42]

19.10. In the context of the threshold in respect of defection, this Court has held that the fact that a particular system operates to the disadvantage of particular parties does not mean that it is unconstitutional. By way of example, it referred to the introduction of a constituency-based system of elections which may operate to the prejudice of smaller parties, and observed that *"it could hardly be suggested that such a system is inconsistent with democracy. If defection is permissible, the details of the legislation must be left to Parliament, subject always to the provisions not being inconsistent with the Constitution. The mere fact that Parliament decides that a threshold of 10% is necessary for defections from a party, is not, in our view, inconsistent with the Constitution*."[43]

19.11. This Court has held in **Democratic Party** "*there are very few laws of general application that will not, directly or indirectly, have the potential to affect different categories of people in different ways, whether for example, by reason if where they live, their standard of literacy or political beliefs.*"[44] This Court

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[42] **New National Party of SA v Govt of the RSA** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) at par 48.
[43] **UDM v President of the RSA (ACDP Intervening; IDASA as Amici Curiae) (No 2)** 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179; [2002] ZACC 21) at par 47.
[44] **Democratic Party v Minister of Home Affairs and Others** 1999 (3) SA 254 (CC) 1996 (6) BCLR 607; [1999] ZACC 4 at par 12.

emphasised the need for evidence as to the impact of a statutory provision on the applicants and that in the absence of evidence "*whatever the different impact, if any, might be, it is not possible to determine whether such impact constitutes unfair discrimination within the principles endorsed by this Court, unless it is established that such different impact is caused by the impugned legislation, and is not the result of some other cause."*[45]

19.12. The OSA relies on the decision of **Kham v Electoral Commission** 2016 (2) SA 338 (CC) (2016 (2) BCLR 157; [2015] ZACC 37) seemingly in support of an argument that it provides a basis for treating independent candidates differently from political parties.[46] This reliance is however misplaced and does not vindicate the OSA's argument. This is so because, the relevance of section 15 of the Electoral Act in **Kham** related to its proper interpretation and more particularly, whether it provided an exclusive mechanism for lodging objections.[47] To this extent, in engaging on the proper interpretation of section 15, this Court considered the impact of the restrictive interpretation sought to be given to section 15 and more particularly, its consequences for, *inter alia*, the applicants in that matter who were independent candidates.[48] It was on that basis that this Court concluded that such a construction of section 15 would not be in accordance with the spirit, purport and objects of the Bill of Rights as required by section 39(2).[49] **Kham**, however, provides no support for a proposition that

[45] **Democratic Party**, par 12.
[46] Applicant's HoA, p 25, par 80.
[47] At par 51.
[48] At par 52-54.
[49] At par 54.

a differential threshold applies to independent candidates as compared to political parties based on their comparative resourcing.

Section 19 of the Constitution

20. Section 19 of the Constitution provides:

> *"(1) Every citizen is free to make political choices, which includes the right—*
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> *(a) to form a political party;*
>
> *(b) to participate in the activities of, or recruit members for, a political party; and*
>
> *(c) to campaign for a political party or cause.*
>
> *(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.*
>
> *(3) Every adult citizen has the right —*
>
> *(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and*
>
> *(b) to stand for public office and, if elected, to hold office."*

21. We submit that there is no infringement of the right to free and fair elections and nor is there any infringement of the right to "*vote in elections*" and "*to stand for public office*".

22. The significance and import of these rights has been made clear in the jurisprudence:

22.1. It is necessary to regulate the exercise of the right to vote so as to give substantive content to the right.[50] In practical terms, this means that the right to vote necessitates an electoral system and the calling of elections.[51] In **New**

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[50] **New National Party** at par 13.
[51] **Richter v The Minister of Home Affairs and Others** 2009 (3) SA 615 (CC) para 53. See too: **Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others** 2005 (3) SA 280 (CC) para 28.

National Party, this Court explained that: *"[T]he mere existence of the right to vote without proper arrangements for its effective exercise does nothing for democracy; it is both empty and useless."*[52]

22.2. "*The importance of the right to vote is self-evident and can never be overstated. There is, however, no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy, for without it there can be no democracy. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.*"[53]

22.3. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised.[54]

22.4. There is no internationally accepted definition of the term "*free and fair elections*". Whether any election can be so characterised must always be assessed in context. Ultimately it involves a value judgment. This Court has distilled the following elements as being of fundamental importance to the conduct of free and fair elections: (a) every person who is entitled to vote should, if possible, be registered to do so; (b) no one who is not entitled to vote should be permitted to do so; (c) insofar as elections have a territorial

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[52] **New National Party of South Africa v Government of the Republic of South Africa and Others** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489) at par 11.
[53] **New National Party of South Africa v Government of the Republic of South Africa and Others** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489) at par 11.
[54] **New National Party of South Africa v Government of the Republic of South Africa and Others** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) para 12.

component, as is the case with municipal elections where candidates are in the first instance elected to represent particular wards, the registration of voters must be undertaken in such a way as to ensure that only voters in that particular area (ward) are registered and permitted to vote; (d) the Constitution protects not only the act of voting and the outcome of elections, but also the right to participate in elections as a candidate and to seek public office.[55]

22.5. In the context of a challenge founded on an infringement of the right to vote a "*facial analysis*" must be undertaken. This Court determined "*the issue we have to determine is not whether the Department or other organs of State have performed their functions in a manner which has resulted in a denial of the vote to a substantial number of South Africans, but <u>whether the measure itself constitutes such denial and is on that account an infringement of the right to vote</u>*." To establish this, this Court held that the appellant must show that the machinery, mechanism or process provided for by the Electoral Act is not reasonably capable of ensuring that those who want to vote and who take reasonable steps in pursuit of the right are able to exercise it.[56]

The justification enquiry

23. If this Court is to reach a justification enquiry, we submit that the State has shown a reasonable and justifiable limitation that meets with the threshold under section 36 of the Constitution.

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[55] **Kham v Electoral Commission** 2016 (2) SA 338 (CC) (2016 (2) BCLR 157; [2015] ZACC 37) at par 34.
[56] **New National Party of SA v Govt of the RSA** 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) at par 37.

24. Section 36(1) of the Constitution provides as follows:

> *"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
>
> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose."*

25. The applicable legal principles pertaining to a limitation enquiry are now well-established. We emphasise four that are particularly relevant for this matter:

26. First, section 36(1) requires a balancing of different interests. "*On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand, there is the importance of the purpose of the limitation.*"[57] Overall, what must be assessed is whether the limitation is proportional (whether it invades the fundamental right as little as possible, balancing the harm caused against the purpose served) and whether it is reasonable (having regard to its purpose and effect).[58] The task of the Court is to evaluate whether the limitation is proportional in light of its purpose, particularly in light of the "*existence of less restrictive means to achieve this purpose.*"[59]

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[57] **National Coalition for Gay & Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC) at par 35.
[58] **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1999 (1) SA 6 (CC) at par 35.
[59] Ibid.

27. Second, while the State bears the onus of showing a justification, in **Minister of Home Affairs v Nicro & others** 2005 (3) SA 280 (CC)[60] Chaskalson CJ explained:

> *"This [meaning the limitation analysis] calls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them."*

28. Third, a limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends.[61] Consequently, a provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused.[62] That said, the State ought to be given a margin of appreciation in relation to whether there are less restrictive means available to achieve the stated purpose.[63]

29. Fourth, a key consideration is whether there is a legitimate government purpose to be served by the impugned provision.[64] In this regard, rights may be limited in order to meet a constitutional imperative[65] and further that rights may be limited in order to protect the rights of others.[66]

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[60] At par 35.
[61] **S v Manamela and Another (Director-General of Justice Intervening)** 2000 (3) SA 1 (CC) at par 34.
[62] **Islamic Unity Convention v Independent Broadcasting Authority and Others** 2002 (4) SA 294 (CC) at par 49.
[63] **S v Makwanyane and Another** 1995 (3) SA 391 (CC) at par 104.
[64] **Richter v Minister of Home Affairs** 2009 (3) SA 615 (CC) at par 78.
[65] **SANDU v Minister of Defence** 1999 (4) SA 469 (CC) para 35.
[66] **Beinash and Another v Ernst and Young and Others** 1999 (2) SA 116 (CC) para 17.

The analysis

30. As to the analysis to be applied, the matter of **New National Party** is instructive:

31. First, just as this Court determined that it is for Parliament to determine the means by which voters must identify themselves[67], so too, we submit, it is for Parliament to determine the eligibility criteria for independent candidates and political parties to participate in elections. As this Court held, there are important safeguards aimed at protecting the right[68]: (a) there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily; (b) the electoral scheme must not infringe any of the fundamental rights enshrined in chapter 2 of the Constitution.[69]

32. Second, an objector who challenges the electoral scheme on these grounds bears the onus of establishing: (a) either the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose[70]; or (b) the infringement of a right.[71]

33. Third, the decisive question in that matter was: when can it legitimately be said that a legislative measure designed to enable people to vote in fact results in a denial of that right?[72] Likewise, the decisive question in this matter is: when can it legitimately be said that a legislative measure designed to enable independent candidates to stand for election in fact results in a denial of that right?

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[67] **New National Party,** par 19.
[68] **New National Party**, par 19.
[69] **New National Party**, par 19 and 20.
[70] **New National Party**, par 19.
[71] **New National Party,** par 20.
[72] **New National Party,** par 20.

34. Fourth, a statutory provision would infringe the right to vote "*if it is shown that, as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right.*"[73] Applied to the present matter, we submit that the OSA would have to show that it is a "*probable consequence*" that independent candidates who would want to stand for election, would not be able to, on account of the signature threshold, even though they acted reasonably in pursuit of doing so. In so doing, OSA bears the onus of establishing that the machinery or process provided for is not reasonably capable of achieving that purpose.[74]

35. Fifth, decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of Courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Reasonableness will only become relevant (in the context of a justification enquiry) if it is established that the scheme, though rational, has the effect of infringing a right.[75]

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[73] **New National Party**, par 23.
[74] **New National Party**, par 23.
[75] **New National Party**, par 24.

E. THE CHALLENGE TO THE SIGNATURE THRESHOLD

36. The signature threshold forms part of the qualification criteria adopted by Parliament for independent candidates and (unrepresented) political parties to contest seats in the National Assembly and provincial legislatures. [76]

37. To contest an election, section 31B(3) of the Electoral Act introduces a requirement in which independent candidates must obtain the identity number and signatures of voters who support the candidate totalling 15% of the quota of the region or province in the previous election.[77] A similar requirement applies to unrepresented political parties.

38. In this section, we address the following issues in turn: (a) the evolution of the signature threshold; (b) the basis on which OSA's challenge to the signature threshold must fail.

The evolution of the signature threshold

39. When the Amendment Bill was initially introduced, it required that independent candidates provide voter support by submitting lists of voter signatures in order to be eligible to contest an election. The initial Bill had delegated the determination of the signature threshold to the IEC, but the Portfolio Committee deemed it appropriate to determine this issue in the Electoral Act through the use of a formula.[78] In a memorandum from Counsel dated 25 November 2021, it was noted that a careful balance had to be struck in ensuring that serious contestants are not precluded from contesting the elections as independent candidates, while not making the qualification criteria too easy so that ballot papers are impractically lengthy and impossible to use in the elections.[79]

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[76] AA (Parliament), p 604, par 71.
[77] EA (IEC), p 514, par 8.
[78] AA (Minister), p 216, par 67.1.
[79] AA (Parliament), p 576, par 41.13 to 41.15.

40. At first, the Portfolio Committee discussed adopting eligibility criteria and setting a signature requirement as high as 50% of the previous quota.[80]

41. During the public hearings, conflicting submissions were made – some in support of there being a high number of signatures as proof of political support and others in support of a reasonable number of signatures that would not further disadvantage independent candidates.[81] The variances were stark. Some persons contended for a high number of signatures as proof of up to a third of what was required to get a seat (up to 27 000 of 82 000 could be required for a seat).[82]

42. In a presentation made by Parliament's Constitutional Legal Services Office to the Select Committee and the Portfolio Committee, *inter alia*, the filling of vacancies and wasted votes were addressed. It expressed the view that it appeared to be constitutionally unjustifiable for a seat to remain vacant for the remaining term on the vacating of it by an independent candidate and that such a regime undermined and disadvantaged voters of independent candidates as compared to party voters.[83]

43. The Portfolio Committee received legal advice from Counsel on several occasions in respect of its proposed voter support requirement, including in: (a) the 21 July 2022 memorandum[84]; and (b) the 26 September 2022 memorandum.[85] According to the legal advice received:

    43.1. An eligibility requirement (like the signature requirement) to contest an election by showing a certain level of voter support – was eminently rational, sensible

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[80] AA (Minister), p 217, par 67.3.
[81] AA (Parliament), p 581, par 49.
[82] AA (Parliament), p 581, par 49.
[83] AA (Parliament), p 583, par 52.
[84] AA (Parliament), p 589, par 55.
[85] AA (Parliament), p 591, par 56.

and – in principle – constitutionally permissible. If an independent candidate is unable to gather enough support to be nominated to contest an election, they would be highly unlikely ever to obtain enough votes to obtain the quota for a seat.[86]

43.2. Applying a formula in the statute would constitute a rational approach but if the formula required signatures from 50% of the quota it was too high and carried a risk of being found to be unconstitutional.[87]

43.3. The absence of eligibility requirements could risk a situation of an unwieldy ballot, full of candidates who have no hope of being elected. This could cause confusion and ultimately could undermine the freeness and fairness of the election.[88]

43.4. However, eligibility requirements could not unduly impede the participation of serious independent candidates in an election and if it did, it would constitute an unjustifiable infringement on the right to stand for election in section 19.[89]

43.5. It was difficult to draw the line between an appropriate eligibility requirement and one which unduly limits the right. However, Counsel advised that a Court would likely show Parliament deference in making this determination.[90]

43.6. There was concern that the threshold that was being mooted at the time of 50% was too high and carried the risk of being found to be unconstitutional.

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[86] AA (Parliament), p 589, par 55.1.
[87] AA (Parliament), p 589, par 55.3.
[88] AA (Parliament), p 590, par 55.3.1.
[89] AA (Parliament), p 590, par 55.3.2.
[90] AA (Parliament), p 590, par 55.3.3.

Parliament was advised that a lower threshold of – no more than 20% – would more likely pass constitutional muster.[91]

43.7. A signature threshold of 30% also appeared to be too high and may be an unjustifiable limit on section 19 rights.[92]

44. The version of the draft B1B-2022 Bill that the National Assembly eventually passed reduced the required threshold from 50% to 20%, though at that stage, the requirement applied only to independent candidates.

45. During the deliberations of the Select Committee of the National Council of Provinces ("**Select Committee**"), the IEC made further submissions that there should be parity in the treatment between independent candidates and political parties. The IEC explained that the Bill should impose similar requirements on unrepresented political parties to demonstrate support at the point at which they nominate candidates – which is over and above the requirements for signature at registration as parties.[93]

46. Counsel supported the view expressed by the IEC in an opinion provided to the Select Committee on 13 November 2022.[94] Counsel further advised that an eligibility requirement that applied to registered parties not represented in the legislative body and independent candidates would be appropriate.[95] Counsel supported the inclusion of a proviso that independent candidates who were elected to the National Assembly or a provincial legislature in the preceding election be exempted from this requirement. [96]

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[91] AA (Parliament), p 591, par 55.3.8.
[92] AA (Parliament), p 593, par 56.2.
[93] AA (Parliament), p 595, par 59.6.
[94] AA (Parliament), p 595, par 60 read with PA13.
[95] AA (Parliament), p 599, par 60.4.5.
[96] AA (Parliament), p 599, par 60.4.5.

47. The Select Committee made various amendments to the Bill, including those proposed by the IEC and Counsel: (a) making the eligibility requirement applicable to all new entrants to the legislature being contested and (b) creating an exemption for those who already hold a seat given that they have already demonstrated support in the electorate.

48. As stated, the NCOP passed the Bill (incorporating its proposed amendments) on 29 November 2022 and returned it to the National Assembly for concurrence.[97]

49. On 1 February 2023 Counsel provided a further opinion on the Bill as amended by the NCOP. According to the advice, a 20% eligibility requirement strikes an appropriate balance between competing interests. However, if the National Assembly was concerned that the eligibility requirement was set too high at 20%, this could be further reduced to 15%. [98] Parliament ultimately exercised its discretion and reduced the signature threshold to 15%.

The basis on which the OSA's challenge to the signature threshold must fail

50. The OSA argues that the signature threshold imposed on independent candidates, who seek to contest the national and provincial elections constitutes an unfair barrier to entry, which is arbitrary and which constitutes an unjustifiable infringement of the rights of independent candidates in section 19(3)(b) of the Bill of Rights.[99]

51. As a point of departure, it must be emphasised that the OSA accepts (as it must) that Parliament may impose qualification criteria for participation in elections.[100] In so doing, the OSA recognises that according to the jurisprudence of this Court such criteria must

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[97] AA (Parliament), p 600, par 62.
[98] AA (Parliament), p 602, par 64.5.5.
[99] Applicant's HoA, p 14, par 44.
[100] Applicant's HoA, p 23, par 74.

be grounded in "*a rational basis designed to meet a legitimate governmental objective*".[101] Despite this acceptance, the OSA appears to argue (impermissibly) for a threshold of reasonableness to apply.[102]

52. This challenge is built on five specific complaints:

52.1. First, that the signature threshold means that, in real terms, independent candidates will be required to demonstrate support from registered voters of between: (a) 10 000 to 14 000 signatures to contest a national election; and (b) 4000 to 9000 signatures to contest in a provincial election.[103]

52.2. Second, registered political parties who are represented in the National Assembly or in provincial legislature do not have to demonstrate this level of support.[104]

52.3. Third, despite almost three decades into our democracy, the signature threshold has only been imposed after the constitutional duty to extend participation in the electoral system to independent candidates.[105]

52.4. Fourth, that the Respondents have not offered any explanation for imposing the same requirements on independent candidates and political parties despite having identified differences between these contesters in the elections.[106]

52.5. Fifth, none of the Respondents have explained the basis for the computation of the signature threshold, save to have stated that it was debated and reduced over

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[101] Applicant's HoA, p 23, par 74.
[102] Applicant's HoA, p 23, par 74.
[103] Applicant's HoA, p 18, par 59.
[104] Applicant's HoA, p 18, par 60 and 61; p 24, par 78.
[105] Applicant's HoA, p 20, par 66 and p 24, par 77.
[106] Applicant's HoA, p 23, par 73.

time, on the advice of lawyers.[107] More specifically, it is argued that aside from the limited participation of independent candidates in local government elections, none of the Respondents "*have presented any forecast or prediction"* of how many independent candidates are likely to contest the elections *"nor how many of those might be classified as frivolous participants or those who are not serious about standing for public office.*"[108]

53. We address these complaints on the following basis: (a) the first is uncontentious and the consequence of the 15% threshold; (b) the second, third and fourth complaints are addressed in the paragraphs that immediately follow; (c) the last complaint is addressed thereafter at paragraph 67.

The signature threshold meets a legitimate government objective, and is rational as well as reasonable

54. In its founding affidavit, the OSA alleges: (a) that independent candidates will be required to attain certain numbers of signatures for national and provincial legislatures[109]; (b) despite the purpose sought to be achieved[110], the signature threshold "*does not fulfil any legitimate government purpose*" and "*less restrictive means, such as the 1000 signatures requirement, would achieve the same objective*"[111].

55. This complaint was carefully and comprehensively answered by Parliament, the Minister and the IEC. Notably, the IEC explains the purpose of the requirement as being: (a) to ensure that candidates have a serious intention of contesting the elections, that they do not participate frivolously and that they have some prospect of doing so successfully[112];

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[107] Applicant's HoA, p 21, par 67.
[108] Applicant's HoA, p 22, par 70.
[109] FA, p 43, par 132.
[110] FA, p 44, par 133 and 134.
[111] FA, p 45, par 137. See too: FA, p 48, par 147 and 148.
[112] EA (IEC), p 516, par 12.1.

and (b) that it enables the IEC to run free and fair elections more efficiently given that too many candidates on a ballot can compromise voters' ability to vote according to their preferences, as it increases the risk of confusion between candidates and causes spoilt ballots.[113]

56. Parliament met the challenge with reference to no less than ten reasons.[114] The OSA does not meaningfully engage with most of these reasons:

57. First, the purpose of the signature requirement is to minimise the prospect of frivolous entries into the election race. This, in turn facilitates free and fair elections whereby: (a) those running for elections are serious and *bona fide*; (b) those voting in the elections elect independent candidates and/or political parties who represent the will of the people.[115] The OSA's only response to this is that this threshold requirement has not been imposed in the past[116] notwithstanding there presently being 331 registered national political parties.[117] That, however, misses the point – as this is the first time that independent candidates are competing in the election, it will result in an inevitable increase in numbers. For this reason alone, the historic state of affairs does not constitute the appropriate benchmark.

58. Second, the signature requirement avoids a situation whereby the ballot contains thousands of names of candidates who have no prospect whatsoever of achieving a sufficient number of seats.[118] In response to the concerns raised by Parliament[119] and

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[113] EA (IEC), p 516, par 12.2.
[114] AA (Parliament), p 606, par 75.
[115] AA (Parliament), p 606, par 75.1.
[116] Applicant's HoA, p 20, par 66.
[117] Applicant's HoA, p 19, par 62.
[118] AA (Parliament), p 606, par 75.2.
[119] AA (Parliament), p 606, par 75.2.

the Minister[120] that the signature threshold prevents ballots from being too long or complicated and resulting in voter confusion and that this requirement ensures the integrity of the electoral system as a whole (thereby ensuring that elections are free and fair), the OSA makes two points, neither of which addresses this very legitimate concern on the part of the Respondents. According to the OSA: (a) "*these are matters that are systemic to any election; these concerns did not arise from the participation of independent candidates*"[121]; and (b) the IEC does not argue that "*it will be impossible to conduct elections without the signature requirement being imposed on independent candidates*".[122] We submit: (a) the source from which the difficulty emanates does not bear on the legitimacy of the difficulty as raised; (b) there is no basis for imposing a legal threshold of impossibility, support for which is not found in any of the case-law that the OSA refers to; and (c) the method and approach to the elections does not in any way bear on the fundamental concerns that have been raised – simply put, a long and complicated ballot will result in voter confusion. The IEC also deals with this concern in some detail in its affidavit.[123]

59. Third, it ensures that political parties and independent candidates compete on a level playing field. Section 27(2)(cB) of the Electoral Act makes clear that it is a neutral provision.[124] This point is also emphasised by the Minister.[125] In response, the OSA raises a different challenge by taking issue with the fact that political parties presently in the National Assembly and provincial legislatures are exempt from this requirement –

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[120] AA (Minister), p 227, par 98.2.
[121] Applicant's HoA, p 30, par 93.
[122] Applicant's HoA, p 30, par 94.
[123] EA (IEC), p 524, par 29 and 30.
[124] AA (Parliament), p 606, par 75.3.
[125] AA (Minister), p 225, par 96.1 and p 227, par 98.3.

this argument is made without any regard to the explanation given by Parliament.[126] Parliament has explained, that the signature threshold does not apply every time a political party or independent candidate contests an election - those who already hold a seat are exempt from the requirement, given that they have already demonstrated support in the electorate.[127] So too, the IEC has provided a detailed explanation in this regard[128] as has the Minister, who emphasises that it does not apply in perpetuity.[129] In summary, given the purpose of the signature threshold, there is good reason that it applies only to new entrants.

60. Fourth, a balance had to be struck between: (a) ensuring that persons contesting the election are serious about the election and have some prospect of being elected; and (b) not placing barriers which unnecessarily and unjustifiably dissuade participation in contesting elections.[130] The OSA does not engage with this at all, despite its acceptance that government is entitled to impose qualification criteria.[131]

61. Fifth, the current challenge is founded on the alleged impact of the provision. However, a 15% threshold has the same impact for political parties and independent candidates. The difference lies in the number of votes that independent candidates expect to obtain as compared to political parties which arises as a result of the differences between independent candidates on the one hand and political parties on the other.[132] The Minister has explained that given the parity in approach on this issue, the 15% threshold is substantially fair.[133] Other than emphasising the differences between political parties and

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[126] Applicant's HoA, p 23, par 74 and par 78.
[127] AA (Parliament), p 565, par 20.5.
[128] EA (IEC), p 515, par 10, 11.
[129] AA (Minister), p 225, par 96.2.
[130] AA (Parliament), p 607, par 75.4.
[131] Applicant's HoA, p 23, par 74
[132] AA (Parliament), p 607, par 75.5.
[133] AA (Minister), p 226, par 98.1.

independent candidates and raising "*the time, resources and energy that independent candidates would have to invest*"[134], the OSA does not engage with this. The OSA also does not engage at all with the IEC's evidence that the equal treatment of parties and independent candidates in respect of the requirements for participating in elections accords with international best practice.[135]

62. Sixth, the threshold of 15% is eminently reasonable given that it amounts to no more than demonstrated support of less than one fifth of the total number of votes required for a seat in the election.[136] According to the Minister, the 15% threshold "*does not produce impossible or unrealistic numbers of signatures to obtain*".[137] The IEC has explained in this regard that there is no international standard for parties and independent candidates to prove their support before participating in an election and that there is wide disparity on the signature requirement. The IEC has however explained (with reference to Denmark) what it considers to be a useful comparator.[138] The OSA does not engage with this.

63. Seventh, the OSA applies an incorrect comparator in referring to the registration threshold of 1000 signatures.[139] The IEC has also provided a detailed explanation in respect of the difference between the registration threshold and the contestation threshold and more particularly the purpose to be served by each of these thresholds.[140] The Minister has done likewise.[141] Despite this error in the OSA's case having been identified in Parliament's answering affidavit, the OSA persists in its contention that the

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[134] Applicant's HoA, p 29, par 90. See too: p 26, par 81 to 84.
[135] EA (IEC), p 528, par 35.
[136] AA (Parliament), p 608, par 75.6.
[137] AA (Minister), p 225, par 96.3.
[138] EA (IEC), p 531, par 37 and 38.
[139] AA (Parliament), p 608, par 75.7.
[140] EA (IEC), p 517, par 13 to 17.
[141] AA (Minister), p 229, par 99.3.

amendment results in an increase from 1000 signatures for registration to the current numbers.[142]

64. Eighth, the signature requirement was the subject of much debate and contestation. It was also the subject of careful consideration by the Department's lawyers. The debate started at a threshold of around 50% and was consistently reduced. Even though Parliament was advised that a threshold of no more than 20% – would be more likely to pass constitutional muster, it ultimately opted for a threshold of 15%. This threshold was made applicable to unrepresented political parties and independent candidates in accordance with sections 27(2)(cB) and 31B(3)(a).[143]

65. Ninth, the signature requirement does not result in a breach of any constitutional rights or provisions. Properly construed, the real complaint is that the 15% threshold places an undue burden on independent candidates.[144] In response, the OSA invokes section 9(1) and the right to substantive equality.[145] A section 9(1) enquiry however strikes at the very core of whether there is a legitimate government objective that is to be served by the signature threshold. This threshold of a legitimate government objective, we submit, there undoubtedly is for reasons that Parliament, the Minister and the IEC have addressed. The fact that the OSA contends otherwise, is not sufficient to unseat the Respondents' evidence in this regard.

66. Finally and in any event, the signature requirement is a policy-laden decision which, the OSA has failed to demonstrate is irrational. The OSA misunderstands the argument. It is not, as the OSA appears to suggest that Parliament is contending for "*untrammelled*

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[142] Applicant's HoA, p 19, par 61. See too p 17, par 54 and 55.
[143] AA (Parliament), p 610, par 75.8.
[144] AA (Parliament), p 611, par 75.9.
[145] Applicant's HoA, p 23, par 74 and 75.

power".[146] It is that the OSA has failed to meet the constitutional threshold for irrationality; it has also failed to demonstrate an infringement of a right, and in any event, an unjustifiable infringement of one.

67. Turning now to the OSA's criticism that none of the Respondents "*have presented any forecast or prediction"* of how many independent candidates are likely to contest the elections *"nor how many of those might be classified as frivolous participants or those who are not serious about standing for public office*"[147]:

67.1. First, there is no basis in law for imposing any such obligation on the Respondents. It is submitted that the evidence that the Respondents have provided is sufficient to meet the challenge as brought. Indeed, the threshold that the OSA contends for does not accord with the *dictum* of this Court in **Minister of Home Affairs v Nicro and others**[148] as referred to above.

67.2. Second, the threshold that the OSA seeks to impose on government, is an unattainable one. It requires that government anticipate the number of independent candidates as well as frivolous candidates who will participate in an election. This is not possible. Indeed, the IEC has made this clear. However, most notably, its evidence shows that based on trends, it is reasonable to expect increased numbers in respect of unsuccessful parties, and some frivolous participation.[149]

67.3. Third, the IEC has explained:

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[146] Applicant's HoA, p 22, par 71.
[147] Applicant's HoA, p 22, par 70.
[148] **Minister of Home Affairs v Nicro and others** 2005 (3) SA 280 (CC) at par 35.
[149] EA (IEC), p 524, p 28.

67.3.1. There is a clear trend of: (a) a continuing increase in participating parties with a rapid rise in the last election; and (b) at the same time, a continuing increase in the number of parties not gaining representation and forfeiting their deposit.[150]

67.3.2. The trend indicates that the signature requirement for registration of a party, even when increased to 1000 signatures, does not serve as an indicator of voter support to justify a candidature as a serious contender in the election. In the most recent election, nearly three-quarters of participants were unsuccessful and forfeited their deposits.[151] Furthermore, the 1000 signature requirement also does not protect against the risk of an election with an unmanageable number of contestants, which is "*substantially heightened with the introduction of independent candidates as participants*".[152]

68. It is notable that the OSA does not engage with the Minister's concern that the effect of the challenge (if upheld) is that it would lower the threshold for independent candidates (who are unrepresented) to contest while retaining a higher threshold for similarly placed political parties.[153] There is no rational basis for such a differentiation.

69. In summary, the OSA's attack on the rationality of the 15% threshold is – when stripped to its essence – an attack founded on reasonableness disguised as rationality. The OSA mounts no real challenge to the rationale of the signature threshold requirement and whether it achieves a legitimate governmental purpose. It recognises that some sort of

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[150] EA (IEC), p 523, par 25-26.
[151] EA (IEC), p 523, par 27.
[152] EA (IEC), p 523, par 27.
[153] AA (Minister), p 228, par 98.4.

threshold is indeed required - it takes issue with the precise threshold chosen by Parliament. The nub of its argument is that there is a better way to achieve the government's stated purpose of ascertaining the seriousness of a candidate seeking to stand for public office. It proposes a remedy, the consequence of which is to prescribe a different way for the government to achieve its stated purpose. It is precisely this sort of attack that falls outside of a challenge founded on rationality.

There is no rights infringement

70. In its founding affidavit, the OSA refers to the political rights in section 19 of the Constitution and more specifically section 19(3)(b) which provides for the right to stand for public office and if elected, to hold office.[154] However, it makes out no case in support of this assertion.

71. As established in **New National Party**, in analysing the signature threshold this Court must determine whether the measures adopted ensure that anyone, <u>if they take reasonable steps in pursuit,</u> can contest elections and seek public office.

72. Aside from referring to certain figures in respect of the signature threshold, the OSA makes out no case that the 15% will meet this threshold as established in **New National Party** and **Democratic Party**.

73. The OSA, in its Heads of Argument, leverages resource capability and capacity constraints to argue that independent candidates should have different requirements applied to them, and a failure to recognise these constraints constitutes a breach of their

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[154] FA, p 45, par 138.

right to equality.[155] However, no explanation is provided as to why and how the 15% creates a barrier and the impact thereof.

74. In light of this, it cannot seriously be contended that this places an unreasonable barrier to entry to any serious candidates if they take reasonable steps in pursuit thereof. Parliament's primary argument is that the signature requirement enables rather than infringes any right in the Bill of Rights. However, in the event that an infringement is found, Parliament submits that the limitation is reasonable and justifiable for the reasons set out above.

F. THE RECALCULATION CHALLENGE IN THE EVENT OF FORFEITURE AND VACANCIES

75. The OSA's challenge as made in the founding affidavit reduces to this:

75.1. The Electoral Act's method of recalculating the votes after a vacancy occurs "*results in a bias in favour of the largest party or parties*".[156]

75.2. The recalculation to allocate the excess seat or seats that may arise, include votes that have already been allocated, which, the OSA argues "*allows votes cast for parties to be counted at least in part, more than once giving parties a second bite at the cherry*".[157]

75.3. The advantage conferred on parties in the recalculation process is proportional to the number of seats obtained by parties in the quota seat calculations as opposed to the original votes cast in favour of each party.[158]

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[155] Applicant's HoA, p 27, par 88.
[156] FA, p 50, par 154.
[157] FA, p 53, par 161.
[158] FA, p 53, par 162.

76. In its Heads of Argument, the OSA argues that:

76.1. The bias in favour of larger parties results in a breach of section 19(1) read with section 9 (1) in that a voter's vote for independent candidates does not carry equivalent weight to voters who vote for political parties. According to the OSA: "*The mathematical advantage that political parties have over independent candidates renders the election unfair in the sense that votes for the two types have different values and the two types "contestants" are treated unequally."*[159]

76.2. The discarding of votes will also affect the choice of voters, given that voters will know that their votes will ultimately be discarded.[160]

76.3. The electoral scheme enacted by Parliament "*leads to an unacceptable level of disparity between vote share and seats*" and will be unconstitutional "*as it will yield disproportionate outcomes, stifle a voter's right to make an informed vote and their right to be represented.*"[161]

77. We address the following issues in turn: (a) the evolution of the recalculation threshold; (b) the basis on which the OSA's challenge to the recalculation threshold must fail.

78. However, before doing so, we make the following key observations in respect of this aspect of the challenge: (a) there can be no dispute that the Constitution requires a system of proportional representation, in general; (b) there can be no dispute that Parliament is seized (subject only to the constitutional constraints that we have referred to) with

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[159] Applicant's HoA, p 39, par 123.
[160] Applicant's HoA, p 40 par 124.
[161] FA, p 62, par 190.

adopting legislation in respect thereof; (c) it is common cause that perfect proportionality cannot be achieved and that deviations from absolute proportionality are permitted; (d) it is common cause that both the recalculation methodology (as adopted in the Electoral Act) and the alternatives proposed by the OSA both yield a measure of deviation from absolute proportionality. Against this backdrop, the single issue that arises is whether this Court ought to prefer the approach of the OSA instead of that of Parliament. We submit not in light of the jurisprudence of this Court.

The evolution of the vacancy recalculation

79. The initial draft of the Bill presented to the Portfolio Committee proposed that vacancies in seats of independent candidates should be filled at the next election. The IEC made a submission in which it contended that the Constitution requires that vacancies must be filled in terms of national legislation and that vacancies ought not to be left unfilled until the next election.[162]

80. An opinion was obtained from Counsel on 12 May 2022 in respect of, *inter alia*, the provision that left vacancies unfilled until the next election. Counsel advised that by-elections would be a huge and costly administrative burden for the IEC. A possible option of a forfeiture procedure was raised for when a vacancy of independent candidates arises, whereby any votes cast for such candidates would be forfeited and the procedure for allocating seats would be followed again by the IEC.[163]

81. In a presentation made by Parliament's Constitutional Legal Services Office, the following explanation was given in response to the concerns raised on vacancies: (a)

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[162] AA (Parliament), p 579, par 48.2.
[163] AA (Parliament), p 582, par 51.

votes are an expression of the will of the people; (b) parties have party lists to fill vacancies; (c) although it may appear practical to not fill a vacancy (due to by-elections being costly), it seems constitutionally unjustifiable that a seat must remain vacant for the remaining term in the case of an independent candidate; (d) it puts voters of independent candidates at a disadvantage in comparison to party voters and undermines the very purpose of having independent candidates.[164]

82. On 8 July 2022 Counsel provided a further memorandum which referred to: (a) the initial proposal in the Bill of leaving vacated seats unfilled until the next election; (b) much criticism was received although very few suggestions were received as to how to fill seats in a sustainable and practical manner; (c) a possible alternative was to use the votes from the previous election to fill the seats but this risked the Bill being found to favour political parties; (d) the Bill had incorporated a forfeiture procedure.[165]

83. In a memorandum from Counsel dated 26 September 2022, the following points were made:

83.1. In respect of vacancies, political parties would be filled from the party's list, as was the pre-amendment case.[166]

83.2. The following proposal was recorded: (a) the votes and seat allocation to the independent candidate causing the vacancy would be disregarded; (b) the votes and seats allocated to the independent candidates already in office would be disregarded; (c) the result for the region or provincial legislature would be

[164] AA (Parliament), p 583, par 52.3.
[165] AA (Parliament), p 587, par 54.11.
[166] AA (Parliament), p 592, par 56.1.

recalculated respectively; (d) the vacant seat would be awarded to an eligible independent candidate or party that contested the preceding election.[167]

84. A further opinion was obtained from Counsel on 13 November 2022 which addressed the issue of wasted votes and vacancies.[168] That memorandum noted, *inter alia*:

84.1. While it is true that a seat allocated to an independent candidate that is vacated could be allocated to a political party and not another independent candidate, that is the system that best reflects the will of the voters. If, for example, the seat was to go to the next eligible independent candidate, that could, in theory be a candidate that only received one or two votes, instead of a party that received many thousands of votes. That would not fulfil the requirements of proportionality.[169]

84.2. There is a downside to this approach in that those voters who choose a specific independent candidate on their one ballot and who won a seat, would have their votes removed from the reallocation of the seat concerned. According to the memorandum, there are two answers to this: (a) the nature of the system of independent candidates and that a voter must vote knowing the limitations of the person they vote for; and (b) the voter in any event still had and presumably exercised their opportunity to vote for the compensatory seats on their other ballot, so their vote still impacts on the makeup of the National Assembly. [170]

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[167] AA (Parliament), p 592, par 56.1.
[168] AA (Parliament), p 596, par 60.2 and 60.3.
[169] AA (Parliament), p 597, par 60.3.3.
[170] AA (Parliament), p 598, par 60.3.4.

The recalculation meets a legitimate government objective, and is rational as well as reasonable

85. Parliament, the Minister and the IEC have identified several reasons as to why this challenge must fail. These reasons may be summarised as follows:

86. First, there is no perfect system of proportionality. As explained, this is particularly so once independent candidates are factored into the system.[171] The constitutional requirement is for a system that results, in general, in proportional representation, which is achieved under the current system. [172]

87. Second, the options to address the concerns raised in respect of vacancies were limited.[173] Through the Parliamentary process there were various possibilities that were considered including: (a) the possibility of leaving the seat vacant and filled only in the next election was considered; (b) the holding of a by-election.[174] There were difficulties with both proposals.

88. Third, ultimately the option was adopted that a seat allocated to an independent candidate that is vacated could be allocated to a political party and/or another independent candidate. Parliament ultimately considered that: (a) what is a system that best reflects the will of the voters; (b) if the seat was to go to the next eligible independent candidate, that could, in theory be a candidate who only received one or two votes, instead of a party that received many thousands of votes. That, Parliament determined would evidently not fulfil the requirements of proportionality.

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[171] AA (Parliament), p 616, par 85.1.
[172] AA (Parliament), p 616, par 85.2.
[173] AA (Parliament), p 616, par 85.3.
[174] AA (Parliament), p 616, par 85.4.

89. Fourth, irrespective of how many votes an independent candidate receives, such a candidate is restricted to a maximum of a single seat. This is in contrast to a political party that is capable of receiving (broadly speaking) the number of seats that are commensurate with the number of votes obtained (in accordance with the applicable quota).[175] In most electoral systems, there is the phenomenon of wasted or discarded votes.[176]

90. Fifth, as explained by the IEC, disregarding votes in the recalculation of seats is to ensure that the election of candidates who are not eligible to hold a seat or have chosen to vacate a seat does not continue to influence the outcome of the reallocation of that seat. According to the IEC, the recalculation method "*is also fundamentally about respecting voters' choices: votes for independent candidates that are not eligible to hold a seat are not factored into the re-calculation of seats for political parties or other eligible independent candidates.*"[177] Disregarding votes cast for independent candidates in the event of forfeiture or vacancies ensures that inter-party proportional representation is maintained in the legislature.[178]

91. Sixth, as regards the recalculation method, the IEC has explained:

    91.1. That it accepts that there is a numerical bias in favour of parties with more overall votes (i.e. larger parties) under the amended quota.[179] But, according to the IEC, that is not an inevitable outcome that will always hold good. In terms of the analysis it conducted, it concludes "*it is by no means the case that smaller*

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[175] AA (Parliament), p 563, par 17.1.
[176] AA (Minister), p 251, par 169.
[177] EA (IEC), p 541, par 52.
[178] EA (IEC), p 543, par 55.
[179] EA (IEC), p 543, par 57.

parties and eligible independent candidates cannot gain seats under the recalculation method."[180]

91.2. It is also not mathematically impossible for smaller parties to gain a seat in the recalculation – even where a large party dominates. [181]

91.3. The outcome of the amended quota is simply the mathematical consequence of taking into consideration the overall votes (while disregarding the votes for ineligible candidates), in reallocating the seats. This, according to the IEC is not an unfair or disproportionate outcome as it gives effect to the overall support for the respective participants.[182]

92. Seventh, as the Minister has explained:

92.1. The recalculation system that was chosen is because it is a method by which proportionality of support for parties can be ascertained. Since independent candidates inherently distort proportionality, it is rational that Parliament chose a mechanism for reallocating those seats having regard to the proportional support of political parties in the election.[183]

92.2. Votes do not count more where they are cast for larger parties. Larger parties get more seats because they have a higher proportion of support of voters. Votes thus do have equal value in the outcome – but perfect equality and proportionality is never possible. [184]

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[180] EA (IEC), p 543, par 57.
[181] EA (IEC), 544, par 58.
[182] EA (IEC), p 544, par 59.
[183] AA (Minister), p 258, par 195.
[184] AA (Minister), p 264, par 212.

93. Eighth, as regards the proposals made in the Atkins Report (which applies the largest remainder method to allocate the excess or vacated seats), the following must be emphasised:

93.1. It results in the vacated seat being awarded to the party or independent candidate that has the highest remainder of votes that did not meet the threshold for the quota for a seat. [185]

93.2. Parliament explains that it pertinently considered the highest remainder system before adopting the Electoral Amendment Act.[186] According to Parliament, one of the concerns with proceeding to give a seat to the highest remainder is that it could result in seats being given to parties and independent candidates with very little electoral support (for instance who received one or two votes) instead of a party that could have received many votes. That would violate the requirements of proportionality.[187]

93.3. The Atkins Report filed in support of this application recognises the inherent difficulty of challenging the recalculation. For instance:

93.3.1. The Report itself recognises that while an option exists by applying the next most deserving remainder, it also accepts "*while this may give rise to the problem of awarding a seat to a party or candidate with a low absolute number of votes, it is no more or less unfair than other provisions of our electoral system, where individual seats can similarly be awarded on low numbers. There is, in any event, an available*

[185] FA, par 224.
[186] AA (Parliament), p 618, par 85.7.
[187] AA (Parliament), p 621, par 85.9.2(e).

adjustment to the largest remainder method, as employed currently in the National Assembly".[188]

93.3.2. The Report also recognises that an objection that may be raised is that "*if additional seats are allocated according to the parties' and independent candidates' surplus of votes, then the possibility exists of seats being awarded on the basis of low absolute numbers of votes (as distinct from low surplus votes). This is a valid concern, and one that should be balanced carefully with the problems of unfairness and disproportionality*".[189]

94. Notwithstanding all of these very compelling arguments in response to the recalculation challenge, the OSA persists with it in its Heads of Argument. In light of the evidence that we have referred to, we make only the following submissions as to why the arguments are unsustainable:

94.1. First, the Constitution requires a system of proportional representation in general. This, the OSA accepts in its Heads of Argument.[190] It follows from this that subject to the constitutional constraints that we have referred to, Parliament is given a measure of latitude in adopting an electoral system.

94.2. Second, the basis for discarding votes in the recalculation of seats is entirely rational - it is to ensure that the election of candidates who are not eligible to

[188] FA, G, p 139.
[189] FA, G, p 165.
[190] Applicant's HoA, p 36, par 113.

hold a seat or who have chosen to vacate a seat do not continue to influence the outcome of the reallocation of that seat.

94.3. Third, the OSA's central premise for its argument, *viz*, that votes do not have equal value is not correct. As the Minister has explained, larger parties get more seats on recalculation because they have a higher proportion of support of voters.

94.4. Fourth, as the IEC has explained, while there is a numerical bias in favour of parties with more overall votes (i.e. larger parties), this is not an inevitable outcome in that smaller parties and eligible independent candidates can gain seats on recalculation.

94.5. Fifth, Parliament pertinently considered and rejected the highest remainder system. It did so for good reason as explained. Indeed, even Mr Atkins expressed some degree of reservation (rightly so). Despite this, it is the OSA's view that "*it would better achieve the constitutional commitment to citizens in electing their representatives in national and provincial legislative bodies.*"[191]

94.6. Sixth, the OSA's reliance on the concept of "*equality of effect*" of votes is without merit.[192] Given that, based on the submissions made, the threshold of rationality under a section 9(1) enquiry of the Constitution has been met, the arguments in respect of the right to equality do not bear any merit.

94.7. Finally, quite remarkably, the OSA asserts that it does not insist that vacancies should be filled by independent candidates, "*but by the contestant with the next*

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[191] Applicant's HoA, p 40, par 127.
[192] Applicant's HoA, p 38, par 121 and 123.

highest remainder of votes"[193] – this preference is expressed in the absence of any engagement with the concerns raised by the Minister, Parliament and the IEC.

95. We reiterate, the OSA's ultimate target of challenge is founded on the following: (a) an acceptance that absolute proportionality is not possible; (b) an acceptance that both its proposal and the Amendment Act deviate from perfect proportionality; (c) a preference for its own proposal notwithstanding the compelling reasons that Parliament has given against it. None of this rises to the threshold required of an applicant in a matter such as this.

G. REMEDY

96. For the reasons set out above, Parliament submits that this application should be dismissed.

97. In the event that this Court is to find that there is merit to the challenge, we submit that an appropriate order which constitutes just and equitable relief would be the following:

97.1. A declaration of constitutional invalidity as contemplated by section 172(1)(a) of the Constitution.

97.2. An Order suspending the declaration of invalidity for 36 months to enable Parliament to address the defects.

98. As regards the interim reading-in order proposed by OSA:

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[193] Applicant's HoA, p 44, par 139.

98.1. It is a highly invasive intrusion into Parliament's law-making powers in the Constitution and unduly encroaches on Parliament's legislative domain.

98.2. The proposed interim order seeks to do precisely what this Court was cautious not to do in **New Nation Movement** – it prescribes how Parliament should give effect to the requirement for a proportional representation system.

98.3. It imposes a methodology for the filling of vacancies which Parliament specifically considered and rejected (the highest remainder system). As discussed, this methodology also creates an internal inconsistency with unrepresented political parties.

98.4. It imposes a signature threshold of 1000 signatures in circumstances where various options were considered and rejected by Parliament. It bases this figure on an erroneous understanding of the purpose of the signature registration threshold which the Respondents' evidence shows serves an entirely different purpose. On the evidence, it is clear that 1000 signatures would not serve the purpose of the eligibility threshold.

99. We accordingly do not support the grant of any interim relief. As this Court has recognized, it and other Courts are "*acutely aware of the perils of trying to do too much. They intervene only when the evidence and arguments compel them to conclude that the executive or the legislature has done wrong, or has not done enough. And when the courts intervene, they do so with necessary trepidation.*"[194] We submit that neither the evidence nor the arguments presented justify the far-reaching relief sought in this application.

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[194] **Mwelase v D-G, Dept of Rural Dev & Land Reform** 2019 (6) SA 597 (CC) (2019 (11) BCLR 1358; [2019] ZACC 30) at par 53.

H. CONCLUSION

100. For reasons addressed in these Heads of Argument, we submit that this application falls to be dismissed.

KARRISHA PILLAY SC

LERATO J ZIKALALA

Counsel for the Third and Fourth Respondents

Chambers, Cape Town and Johannesburg
23 August 2023

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 158/23

In the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

LIST OF AUTHORITIES ON BEHALF OF FOURTH AND FIFTH RESPONDENTS

Item	Reference	Referenced in Parliament's Heads of Argument
LEGISLATION		
1.	The Electoral Act No 73 of 1998	p 1, par 1
2.	The Electoral Amendment Act No 1 of 2023	p 1, par 2
SOUTH AFRICAN CASE LAW		
3.	Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC) (2010 (2) SACR 101; 2010 (5) BCLR 391; [2010] ZACC 4)	p 11, par 19.4
4.	Amcu v Chamber of Mines of SA 2017 (3) SA 242 (CC) (2017 (6) BCLR 700; [2017] ZACC 3)	p 12, FN 40

5.	AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another 2009 (3) SA 649 (CC)	p 4, par 9.2, FN 12
6.	Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) (Bato Star)	p 6, par 13.1
7.	Beinash and Another v Ernst and Young and Others 1999 (2) SA 116 (CC)	p 19, FN 66
8.	Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) (2002 (9) BCLR 891; [2002] ZACC 2)	p 11, FN 38
9.	Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC) (2012 (12) BCLR 1297; [2012] ZACC 24)	p 12, FN 40
10.	Democratic Party v Minister of Home Affairs & Others 1999 (3) SA 254 (CC)	p 13, FN 44
11.	Electronic Media Network Limited v e.tv (Pty) Limited 2017 (9) BCLR 1108 (CC)	p 12, FN 40 & FN 41
12.	Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253; [1996] ZACC 26)	p 7, FN 17
13.	Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch 2020 (1) SA 368 (CC) (2019 (12) BCLR 1479; [2019] ZACC 38)	p 6, FN 16
14.	International Trade Administration Commission v SCAW SA (Pty) Ltd 2012 (4) SA 618 (CC) (2010 (5) BCLR 457; [2010] ZACC 6)	p 7, FN 17

15.	Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC)	p 19, FN 62
16.	Kham v Electoral Commission 2016 (2) SA 338 (CC) (2016 (2) BCLR 157; [2015] ZACC 37)	p 14, par 19.12, FN 55
17.	Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25)	p 11, FN 38; p 12, FN 40
18.	Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (5) SA 171 (CC) (2008 (10) BCLR 969; [2008] ZACC 10)	p 12, FN 39
19.	Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) ([2003] 2 All SA 616; [2003] ZASCA 46)	p 6, par 13.1 & par 13.2
20.	Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC)	p 15, FN 51; p 19, par 27, FN 60; p 34, par 67.1, FN 148
21.	Mwelase v D-G, Dept of Rural Dev & Land Reform 2019 (6) SA 597 (CC) (2019 (11) BCLR 1358; [2019] ZACC 30)	p 19, FN 194
22.	National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)	p 18, FN 57 and FN 58
23.	New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020) ("New Nation Movement")	p 2, par 3

24.	New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) (New National Party)	p 4, par 9.1; p 7, FN 19; p 13, FN42
25.	Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1) para 85 (Pharmaceutical Manufacturers Association)	p 10, FN33
26.	Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759; [1997] ZACC 5)	p 11, FN 38
27.	Richter v Minister of Home Affairs 2009 (3) SA 615 (CC)	p 15, FN 51; p 19, FN 64
28.	S v Makwanyane and Another 1995 (3) SA 391 (CC)	p 19, FN 63
29.	S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC)	p 19, FN 61
30.	SANDU v Minister of Defence 1999 (4) SA 469 (CC)	p 19, FN 65
31.	UDM v President of the RSA (ACDP Intervening; IDASA as Amici Curiae) (No 2) 2003 (1) SA 495 (CC) (2002 (11) BCLR 1179; [2002] ZACC 21)	p 13, FN 43

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

AND

CASE NO: CCT158/23

In the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

FILING NOTICE

BE PLEASED TO TAKE NOTICE THAT the Commission hereby files the following documents:

Documents: **The Electoral Commission's Written Submissions**

DATED AT CENTURION ON THIS THE 23rd DAY OF AUGUST 2023.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT: 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent

AND

Case CCT: 158/23

In the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

WRITTEN SUBMISSIONS FOR THE INDEPENDENT ELECTORAL COMMISSION

INTRODUCTION

1 These submissions are filed on behalf of the Independent Electoral Commission of South Africa ("**the Commission**"), which is cited as the Fifth Respondent in CCT144/23 (**"the ICA application"**) and as the Third Respondent in CCT 158/23 ("**the OSA application**"). Since the two applications have been set down for a joint hearing, the Commission has prepared a consolidated set of submissions.

2 The Commission abides in the disputes as it accepts that the determination of the electoral system for the National Assembly is fundamentally a legislative prerogative, subject to the requirements of the Constitution and section 46 in particular. This requires, inter alia, that such an electoral system "*results, in general, in proportional representation*" (section 46(1)(d)).[1]

3 Nevertheless, the Commission has filed explanatory affidavits in both applications in order –

3.1 to correct misconceptions in the founding affidavits and the accompanying reports of Mr Atkins[2] regarding the impugned features of the new electoral system for the National Assembly and their implications for independent candidates; and

3.2 to explain the practical implications of the relief the applicants seek for the Commission's preparations for the forthcoming national and provincial

[1] ICA application, Commission affidavit paras 3-4, p 137; OSA application, Commission affidavit para 4, p 512.

[2] ICA application, "MJA1" to Mr Michael Atkins' confirmatory affidavit (first Atkins report), pp 49ff; OSA application, annexure "G" (second Atkins report), pp 135ff.

elections in 2024.[3]

4 The Commission provided technical analysis to assist Parliament in the amendment of the Electoral Act to accommodate independent candidates, in accordance with its functions under s 5(1) of the Electoral Commission Act 51 of 1996.[4] These include to –

> *"(d) promote knowledge of sound and democratic electoral processes;*
>
> *…*
>
> *(h) undertake and promote research into electoral matters;*
>
> *(i) develop and promote the development of electoral expertise and technology in all spheres of government;*
>
> *(j) continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith".*

5 Considering its expertise on electoral matters and its participation in the legislative amendment process, the Commission is well-placed to assist the Court in understanding the new electoral system and its implications, including for the constitutional requirement that "*in general, proportional representation*" be maintained.[5]

6 In its submissions, the ICA complains that the Commission has provided no expert evidence to counter the analysis and conclusions in the Atkins report on which it relies.[6] That complaint is misplaced. The Commission is a specialist body charged with developing electoral expertise. It is entitled to rely on its own expertise and specialist knowledge of electoral matters, including its detailed knowledge of South Africa's

[3] ICA application, Commission affidavit para 5, p 138; OSA application, Commission affidavit para 4, p 513.

[4] ICA application, Commission affidavit para 6, p 138; OSA application, Commission affidavit para 4, p 513.

[5] ICA application, Commission affidavit para 7, p 138; OSA application, Commission affidavit para 4, p 513.

[6] ICA submissions para 65.

electoral history, in responding to these applications (as indeed, it did, in providing assistance to Parliament).[7]

7 In any event, save to contend that the Commission has failed to substantiate one particular claim,[8] the ICA has not taken issue with the Commission's analysis of the new electoral system and its practical implications. Likewise, the OSA has not taken issue with the Commission's analysis of the new electoral system or its practical implications.[9]

8 In what follows:

8.1 we begin by addressing the need for finality on the issues of direct access and the urgency in the determination of these applications;

8.2 we then summarise the main misconceptions that inform the applications, which the Commission is concerned to bring to the Court's attention. In doing so, we address the applicants' submissions insofar as they are directed at the Commission's evidence.

---

7 This Court has recognised the expertise and specialist knowledge of the Commission: see, for instance, Electoral Commission of South Africa v Speaker of the National Assembly and Others (CCT55/16) [2018] ZACC 46; 2019 (3) BCLR 289 (CC) (22 November 2018) para 123 (minority judgment per Theron J); Action SA v The Electoral Commission of South Africa (006/2021/EC) [2022] ZAEC 2 (18 January 2022) para 16; New National Party v Government of the Republic of South Africa and Others (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999) para 76.

8 That is the Commission's claim (in paragraph 40.5 of its affidavit, p 159) that, with the use of two ballots, the quota for the allocation of compensatory seats will be broadly similar to those that apply in the regional tier – i.e., approximately 85,000. The Commission further stated that "*A projection of the 2019 election results onto the new electoral system indicates that the compensatory tier quota would likely be higher than it would be in six of the nine regions (but this must still be confirmed by actual votes)"*. The ICA complains (at paragraph 77 of its submissions, in response to the Minister's answer) that there is no factual or mathematical basis for this contention. As is explained at paragraph 23.2 below, the figures in the first Atkins' report support this claim. However, should it be required, the Commission tenders to put up its own mathematical analysis supporting the claim.

9 The OSA has queried one statement in the Commission's affidavit which it describes as "confusing" – see OSA submissions para 95, with reference to footnote 8 to paragraph 12.1 of the Commission's affidavit. This statement is explained below at paragraph 29.

DIRECT ACCESS AND URGENCY

9 The ICA and OSA challenge provisions introduced in the Electoral Act[10] to accommodate, for the first time, the participation of independent candidates.

9.1 ICA challenges the 200/200 seat allocation model for regional and compensatory seats in the National Assembly (items 1(a) and (b) of Schedule 1A).

9.2 OSA challenges the signature requirements that an (unrepresented) independent candidate must submit to entitle him or her contest as an independent candidate in the national and provincial elections (s 31B(3)).

9.3 OSA also challenges the recalculation of seat allocations when seats are forfeited in the National Assembly (items 5 and 7 of Schedule 1A) or in a provincial legislature (items 11 and 12) or when vacancies arise in a legislature (items 23 and 24).

10 In both applications, the applicants seek, by means of an interim reading-in order, an amendment of the impugned provisions of the Electoral Act to apply to the forthcoming 2024 national and provincial elections ("**2024 NPE**").

11 The Commission explains that such changes to the Electoral Act will impact its preparations for the 2024 NPE. The current working date for the proclamation of the

[10] Electoral Act 73 of 1998, as amended by the Electoral Act 1 of 2023.

2024 NPE is 12 February 2024,[11] with the elections to be held on a date (yet to be declared) between 22 May 2024 to 14 August 2022.[12]

12 While the Commission has abided on the issue of direct access, it explains that finality in the determination of the applications is required as soon as possible and, to avoid materially prejudicing the Commission's 2024 NPE preparations, by mid-September 2023.

13 Specifically:

13.1 Replacing the 200/200 regional and compensatory seat allocation model with a 350/50 model, as ICA seeks, would necessitate amending the Commission's Results System.[13] The Commission estimates that effecting this amendment would require approximately four weeks. The Commission needs this process to be completed by mid-October 2023, so that there is sufficient time to have the Results System independently audited and for the audit findings to be addressed ahead of the elections. The Commission accordingly requires certainty and finality on this matter by mid-September 2023.[14]

13.2 Amending the signatures requirement in s 31B(3) must be resolved before the nomination of independent candidates closes, while allowing sufficient time for the collection of signatures. The current working date for the closure of

[11] ICA application, Commission affidavit para 49.1, p 165.

[12] ICA application, Commission affidavit para 46, p 163.

[13] This system enables the capturing and auditing of results, the generation of reports from the results capturing process, and the allocation of seats according the results.

[14] ICA application, Commission affidavit para 47.2, p 164.

nominations is 29 February 2024.[15] ICA has indicated that approximately six months is required for the collection of signatures.[16]

13.3 Lowering the signatures requirement to 1000 signatures, as OSA seeks, could also have very profound implications for the Commission's preparations of ballot papers for the 2024 NPE. This amendment could result in a substantial increase in the number of participants in the election, to require the redesign of ballots to include either a second column, or a second page. This would already set back the Commission's timetable, as the design of the ballots has been finalised, with the tender for production to be advertised in mid-August 2023.[17]

13.4 Amendments to the allocation of seats in the event of forfeiture and vacancies would also require changing the seat allocation method in the Commission's Results System. Again, to allow adequate time to revise, test and audit the Results System, finality on the seat recalculation method is required by no later than mid-September 2023.[18]

THE ICA APPLICATION

THE 200/200 SPLIT BETWEEN REGIONAL AND COMPENSATORY SEATS

14 The election of the 400 representatives in the National Assembly is based on a two-tier compensatory system: half the seats (200) are allocated based on the regional lists of candidates and the other half (200) are allocated based on the national lists of political parties. This is not a new phenomenon. South Africa has had such a two-tier electoral

[15] OSA application, Commission affidavit para 66, p 546.

[16] ICA founding affidavit para 61, p 36.

[17] OSA application, Commission affidavit para 68, p 547.

[18] OSA application, Commission affidavit para 69, p 548.

system since the 1994 national elections. Its purpose is twofold: to ensure that all regions (provinces) in the country are fairly represented in the National Assembly; and to ensure overall or inter-party proportional representation at a national level.[19]

15 The two-tier system has been amended to accommodate independent candidates by:

15.1 providing for independent candidates to contest the 200 regional seats;

15.2 allocating compensatory seats to political parties to restore inter-party proportionality in the National Assembly, after taking into account the seats already awarded to independent candidates;[20] and

15.3 unlike in previous elections, utilising two ballots: one for the regional vote, and another for the compensatory vote.[21] This ensures that all voters have two votes, regardless of who they support. If a system of one ballot was employed, the vote of a person who supports an independent candidate would only count towards the outcome of a region, whilst the vote of a person who supports a political party would twice be taken into account (i.e., first in the allocation of regional seats and then in the allocation of compensatory seats).[22] It cannot be assumed that all, or even most, voters supporting independent candidates will not cast a second vote supporting a political party. In municipal elections where independent candidates stand for election as ward candidates, most voters that

[19] ICA application, Commission affidavit paras 9-10, 11.4, 12 and 13.2, pp 140-143.

[20] ICA application, Commission affidavit paras 14-16, pp 144-148. This is akin to the electoral system employed in local government elections, where independent candidates can stand for election as ward candidates and voters complete two ballots: one for the ward candidate (which may be an independent ward candidate or a ward candidate nominated to represent a political party) and one for proportional representation as between the political parties (otherwise known as "the PR vote"). See Schedule 1 of the Local Government: Municipal Structures Act, 117 of 1998.

[21] ICA application, Commission affidavit para 13.3, p 143.

[22] ICA application, Commission affidavit para 13.4, p 143.

support independent candidates also choose to support a political party on the second ballot.[23]

16 The ICA and Mr Atkins acknowledge that the allocation of compensatory seats is necessary to restore proportional representation.[24] ICA contends, however, that the 200/200 split is irrational and unfair to independent candidates. ICA contends for a 350/50 split between regional votes and compensatory votes, to equalise the number of votes that an independent candidate must obtain to win a seat in the National Assembly and those that a political party must win.

17 As the Commission explains in its affidavit, the primary difficulty with the ICA's case is that its proposed 350/50 split creates the risk of overhang.

18 Overhang is when more seats are required to be allocated to restore proportionality as between the represented parties after the allocation of regional votes, than are available in the legislature.[25] The consequence is that seats for parties cannot be allocated in the National Assembly according to their inter-party proportional entitlement.

19 With the 200/200 split between regional and compensatory seats, there is no risk at all of overhang eventuating. On Mr Atkins assessment (which the Commission does not dispute), a 350/50 split between regional and compensatory seats carries what Mr Atkins "*a low to moderate risk*" of overhang.

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[23] ICA application, Commission affidavit para 13.5, p 144.

[24] ICA application, first Atkins report, para 60, p 66; and ICA founding affidavit paras 46 & 48, p 33.

[25] This can happen with regionally based parties with strong support but much less support in the rest of the country. Another possibility is when a small party wins a regional seat based on the largest remainder method but does not meet the threshold for a seat when the compensatory calculations are done. The consequence of such situations is that seats for parties cannot be allocated in the National Assembly according to their inter-party proportional entitlement. ICA application, Commission affidavit paras 29-30, p 153.

20 Specifically, Mr Atkins finds that based on the 2019 election data and assuming independent candidates win 1% of the regional tier votes, there is a 2,03% risk that a "main party" (i.e., a party that obtained obtained more than a single quota of votes) would obtain an additional seat; and a risk of 6,88% of overhang that a "minor party" (a party that did not meet a single quota) obtaining an additional seat. Based on the 2014 election data, there is a 0,93% risk that a main party would obtain an additional seat; and a risk of 15,08% that a minor party would do so.[26]

21 ICA submits that this is an acceptable risk, "*given the benefit it brings of equalising the vote between parties and independents*".[27] To support this conclusion, ICA points to the Lynge and Rosen report that the Commission produced.[28] However that report does not address the problem of overhang. Where Lynge and Rosen express the view that a deviation of one seat is within the bounds of "in general, proportional representation", they do so in assessing the unavoidable impact of applying the Droop method to whole numbers of votes cast and seats and in discounting fractions in the allocation of seats.[29] In this context, there can be no dispute with Lynge and Rosen's conclusion. What the ICA proposes is quite different: the adoption of a seat allocation model that creates an <u>avoidable</u> risk of a disproportionate outcome.

22 Should overhang occur, the critical problem for the Commission would remain. There is no mechanism under the current Electoral Act – and none is proposed in the ICA's interim reading order – for correcting the problem in allocating seats in the National Assembly to restore inter-party proportional representation. Practically, this means that

[26] ICA application, first Atkins report, Table B (showing results of analysis based on the 2019 and 2014 election data) at pp 73-76; and analysis of results at paras 86 to 89, p 77.

[27] ICA submissions paras 67 and 68.

[28] ICA application, Commission affidavit annexure "PSM4" at p 171ff.

[29] Lynge & Rosen report, "PSM4" to Commission's affidavit at p 178 ("the deviation can be attributed to rounding error").

should a minor party obtain an extra seat in the regional tier to which it is not proportionally entitled, there is no mechanism for determining which party must lose a seat in the allocation of compensatory seats to accommodate this (bearing in mind that the number of seats in the National Assembly is capped at 400). The Commission states that this presents the risk that it will be unable to declare the election results.[30] Moreover, in these circumstances, any declaration of the election results in the event of overhang would likely be subject to constitutional challenge.

23 The premise of the ICA's 350/50 seat allocation proposal – i.e. that it is necessary to equalise the quota in the regional and compensatory tiers to ensure fairness as between independents candidates and political parties – is also problematic for reasons the Commission has explained.

23.1 First, the ICA and Mr Atkins' assumption that the number of votes an independent candidate or party must win to obtain a seat in the regional tier should be equivalent to the quota in the allocation of compensatory seats is logically problematic.

23.1.1 The ICA and Mr Atkins ignore the fact that South Africa has a two-tier electoral system for national elections.[31] In a single tier election, such as the provincial elections, one quota applies to the election of all representatives; but in a two-tier system different quotas apply to the regional tier and the compensatory tier.

23.1.2 The two tiers serve distinct purposes: the regional tier serves to ensure regional representation in the national law-making process, whereas

[30] ICA application, Commission affidavit para 33.3 and 35, p 155.

[31] ICA application, Atkins report paragraphs 32 to 56 (section F), pp 60-65.

the compensatory tier serves to ensure that the outcome is proportional in general. The two-tiers are thus inherently different. They are not the same in terms of the size of the constituency (district magnitude), size of the voter base (voters' roll), nor in the number of seats in contention. The notion underpinning the ICA and Mr Atkins' critique, that the number of votes per seat in the regional tier must be equal (or approximately equivalent) to the number of votes per seat obtained in the compensatory tier is, therefore, unfounded.

23.1.3 It bears emphasis that, in the regional tier where independent candidates compete, all candidates – whether party or independent – must meet the same regional quota to be elected to the National Assembly. Independent candidates do not need any more votes to be elected than party candidates; and a vote for an independent carries equal weight to a vote for a political party.

23.2 Second, the disparity in the number of votes an independent candidate must obtain to win a seat in the National Assembly (under the regional tier) and the votes political parties must obtain to win a seat in the compensatory tier is not what the ICA and Mr Atkins claim. The quota for a compensatory seat takes account of <u>both</u> the total regional votes and compensatory votes cast (i.e., the votes cast for political parties on the two national ballots), and amounts to approximately 85,000. Mr Atkins' own analysis (in the first Atkins report) indicates that this is so.

23.2.1 The table at paragraph 38 of Mr Atkins' report reflects the regional quotas (per province) for the 2019 national election. The regional quotas ranged from 68,474 votes in the Northern Cape to 92,601 votes

in Gauteng, with a weighted average across all the regions of 83,511 votes.[32]

23.2.2 Mr Atkins acknowledges at paragraphs 43 to 44 of his report that:

> *"43. …. [T]he Electoral Amendment Act has changed the electoral system for the National Assembly, adding a second ballot. The quota calculated in terms of the amended Item 6(a) of Schedule 1A of the Act uses the sum of all votes cast in the proportional representation ballot, and those cast in favour of parties in the regional ballots.*
>
> *44. The quota is thus higher, but parties have the votes from the two ballots in order to reach the higher quota. In terms of the amended Act, the quota is also affected by the number of independent candidates elected in the regional elections[33], as this number is subtracted from 400 in the quota calculation in terms of Item 6(a) of Schedule 1A."[34]*

23.2.3 The table at paragraph 47 of Mr Atkins' report indicates the quota calculations for the compensatory tier under the new electoral system, based on the 2019 national election results and assuming that independent candidates win 2% of the votes in the regional tier (which translates to 2 seats in the National Assembly) or 8% of the votes in the regional tier (11 seats). As is reflected in the last column of the table, the quota for parties to win a seat in the compensatory tier on these

[32] First Atkins report, para 38, p 61.
[33] To be precise, this should be in the national election, on the regional tier ballots.
[34] First Atkins report, paras 43-44, pp 61-62.

assumptions would be 86,532 votes (if 398 seats remained for allocation to parties in the compensatory tier) or 85,846 (if 389 seats remained).

23.2.4 In his analysis, Mr Atkins proceeds (at paragraphs 48 to 50 of his report) to halve the actual quota in the compensatory tier, in order to gain what he describes as "*an approximate equivalent of the two ballot quota described above, for comparing with the single ballot quota applying to independent candidates*". But this calculation is problematic as it fails to take account of the very two-ballot system introduced under the amended Electoral Act, which entitles every voter to cast two votes.

23.2.5 The artificial nature of Mr Atkins' halving of the actual quota in the compensatory tier is evidenced by his claim that parties require the support of about "***44,000 voters***" to obtain a seat in the National Assembly.[35] This distorts the true calculation required – i.e., of the number of supporting votes a party must obtain on both ballots; and (ii) assumes, without any basis, that voters will vote for the same party on both ballots.[36]

23.3 Third, the ICA's claim that the 200/200 split results in *"a large number of wasted and excess votes for independent candidates which will be allocated to parties, thereby skewing the outcome"* [37] is plainly incorrect, as the Commission explained and demonstrated through mathematical modelling.[38] The ICA

[35] See paras 48 and 51 of the first Atkins report, p 64.

[36] The problematic elision is also demonstrated at paragraph 53 of Mr Atkins' report and the accompanying table, at p 64. Mr Atkins purports to compare the quota in the regional tier (column headed "quota", which reflects the number of votes required per region) to a "party quota", which reflects the assumed number supporting voters (not votes) across both tiers.

[37] ICA founding affidavit para 9.5 and 51, pp 16 and 34.

[38] ICA application, Commission affidavit paras 42-44, pp 160-162.

appears to have abandoned this complaint as it does not advance it in its submissions.[39]

24 In sum, therefore, the principal misconception underpinning the ICA application is that revising the 200/200 split between regional and compensatory seats in the National Assembly to a 350/50 split will not affect the proportionality of the outcome of the election. A 350/50 allocation of seats presents the risk of overhang. Under the current legislative framework, there is no mechanism for addressing this problem (and none is proposed by the ICA in its interim reading-in order). Overhang would accordingly jeopardise the Commission's ability to declare the election results while ensuring inter-party proportionality in the National Assembly. Should the Commission declare results in these circumstances, the integrity of the election results would almost certainly be challenged.

THE OSA APPLICATION

THE SIGNATURES REQUIREMENT

25 To be entitled to contest an election, s 31B(3) requires an independent candidate to submit supporting signatures from registered voters in the region (province) in which the candidate intends to compete totalling 15% of the quota for that region in the previous election.[40]

26 Based on the 2019 election quotas, this equates to between approximately 10,000 and 14,000 signatures to contest in the national election (depending on the region) and

[39] This appears confirmed by the comment at para 35.1 of the ICA's submissions.

[40] If the candidate is contesting in more than one region in the national elections, the candidate must submit supporting signatures totaling 15% of the highest of those regional quotas.

between approximately 4,000 and 9,000 signatures to contest in the provincial election (depending on the province).[41]

27 This requirement applies to unrepresented independent candidates – that is, to independent candidates that have not been elected to either the National Assembly or a provincial legislature as an independent candidate in the preceding election.[42] The same requirement applies to any political party that is unrepresented in the National Assembly or provincial legislature (i.e., a political party that does not hold a seat in the legislature).[43]

28 The Commission explains that the purpose of this requirement is two-fold:[44]

28.1 First, it ensures that candidates have a serious intention of contesting elections and do not participate frivolously, and have some prospect of doing so successfully; and

28.2 Second, it enables the Commission to run free and fair elections more efficiently. Fairness to voters is a critical consideration in this regard. Too many candidates on a ballot can compromise voters' ability to vote according to their preferences, as it increases the risk of confusion between candidates and causes spoilt ballots. Limiting the number of candidates to a manageable number is also necessary to ensure that voting and vote counting can be done, and the election results declared, within the prescribed period.

[41] OSA founding affidavit, table at para 132, p 43.

[42] See the exemption in section 31B(3)(a), quoted in the footnote above.

[43] Section 27(2)(cB) of the Electoral Act, as amended.

[44] As indeed the applicant acknowledges, although it conflates this requirement with the registration requirement described below. See founding affidavit at paras 133-134 and 142-143.

29 In describing these purposes, the Commission noted that *"support for the participation of a political party or candidate in an election does not necessarily indicate an intention to vote for that party or candidate*".[45] OSA has described this as "confusing", and suggests that this is "a self-defeating argument".[46] This is not so. The point is simply that it cannot be taken for granted that a registered voter's expression of support for a party or candidate to contest an election will necessarily translate into that voter voting for that candidate or party. But requiring unrepresented candidates and parties to canvass and prove voter support for their participation in the election is, nevertheless, the best available measure – both of the candidates' and parties' seriousness to contest the election, including their organisational capacity to do so, and that they have some prospect of being elected. Since the secrecy of voters' choices in an election must be respected and protected,[47] the law cannot require proof of an actual commitment to vote for a particular candidate or party.

30 The Commission has also explained that the introduction of the new signatures requirement must be understood in the context of a clear trend, over the past 20 years, of increasing participation – and moreover, increasing *unsuccessful* participation – in national and provincial elections. In the most recent national election (in 2019), 48 parties participated (compared to 16 in the 1999 national election). Of the 48 parties, only 14 gained representation, while 34 (70,8%) did not gain representation. In comparison, in the 1999 election, only 3 parties (18,8%) did not gain representation.[48]

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[45] OSA application, Commission affidavit, footnote 8 to paragraph 12, p 516.

[46] OSA submissions para 95.

[47] Section 19(3)(a) of the Constitution provides:

> *"(3) Every adult citizen has the right –*
>
> *(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret".* (Emphasis added.)

[48] OSA application, Commission affidavit paras 24-26, pp 522-523.

31 As at 8 August 2023, there were 332 parties registered to participate in an election of the National Assembly and Provincial Legislatures, and the door remains open for others to register before the next election. Foretelling how many of these registered parties intend to participate in the next election is impossible. However, it is reasonable to expect that the trend of increased political party participation, as well as increased participation of unsuccessful parties will continue.[49]

32 OSA complains that there is no forecast or prediction of how many independent candidates are likely to contest the 2024 NPE.[50] Unlike parties, independent candidates do not need to register before an election is proclaimed.[51] This, coupled with the fact that this is the very first time independent candidates can contest the election, means that it impossible reliably to predict how many independent candidates intend to contest the elections. This will only be known when the candidate nominations process closes.[52]

33 But it stands to reason that by allowing independent candidates to contest the elections, the risk of an election with an unmanageable number of contestants is substantially heightened. It bears emphasis that every South African citizen is entitled to stand as an independent candidate, provided they meet the legislative requirements to contest.[53]

34 In this context there is a well-founded concern that, absent a new signatures requirement, the fairness and manageability of the elections will be compromised by too many contesting parties and independent candidates.

[49] OSA application, Commission affidavit para 28, p 524.

[50] OSA submissions para 70.

[51] They only need to meet the requirements to contest the elections as contemplated in section 31B by the date set in the election timetable.

[52] OSA application, Commission affidavit para 28, p 524.

[53] These are specified in s 31B of the Electoral Act, as amended.

35 The Commission has detailed the practical implications, and crucially, the impact on voters' exercise of their right to vote, if there are too many contestants.[54] Most pertinently, a longer and more complex ballot would –

35.1 increase the number of spoilt ballots;

35.2 make it more difficult for voters to find the party or candidate on the ballot paper they support (particularly should the ballot paper have two columns or multiple pages) and lead to voter confusion – both of which compromise voters' right to vote according to their preferences;[55]

35.3 slow the voting process, as voters will take longer to identify a party or candidate of their choice on a ballot with more than one column or over multiple pages; and

35.4 increase the time required to count ballots, as counting officers and counters would have to check longer ballot papers (including for spoilt ballots which requires examining every page of the ballot).

36 Moreover, additional problems arise with a two-page ballot, which would be required if there are more than 96 contestants.[56] The pages of the ballot may become separated – e.g., in the process of being inserted in the ballot box by a voter, or when other voters add theirs to the ballot box, or when ballots are removed for counting purposes. Should this occur multiple times, it will be impossible to effect a proper reconciliation of the votes.[57] This could implicate the credibility of the elections. A secondary but not

[54] OSA application, Commission affidavit paras 29-31, pp 524-526.

[55] As the Commission explained, this problem is exacerbated for voters (including illiterate voters) who rely on visual cues like logos, abbreviated names of parties and pictures of candidates, which may be very similar and not readily distinguishable when printed small on a ballot. This may be compounded by less than ideal lighting conditions in voting stations of a temporary nature.

[56] A single page ballot can be adapted to have two columns of 48 candidates each.

[57] Since ballot papers are not numbered (to protect the secrecy of votes), it would be impossible to

unimportant matter is the cost implications for more complex or multi-page ballot papers. These are detailed by the Commission.[58]

37 In the light of the above, the Commission expresses the view that:

37.1 OSA's proposed requirement of 1000 supporting signatures will not suffice to achieve the legislative purposes of preventing frivolous participation and limiting the number of contestants to a manageable number; and

37.2 requiring proof of a higher level of support for the candidacy of unrepresented parties and independent candidates is a rational and justifiable requirement.[59]

38 OSA purports to summarise the IEC's position when it states that *"Although the IEC supports the signature requirement, and points to various practical considerations, it does not argue that it will be impossible to conduct elections without the signature requirement being imposed on independent candidates."*[60] This is misleading.

38.1 The IEC does not argue for impossibility without the signature requirement because it does not presently know (and cannot know) how many independent candidates intend to contest the 2024 NPE. But the IEC makes clear that, as this number increases, so too does the risk that voters' exercise of their right to vote will be compromised.

38.2 The IEC also makes clear that particular practical problems arise which can threaten the integrity of the election, if the number of contesting candidates and parties is substantially higher and requires a second page to be added to the

effect a reconciliation and establish the choice of voters, if pages of ballots are separated;

[58] OSA application, Commission affidavit para 31, p 526.

[59] OSA application, Commission affidavit para 33, p 527.

[60] OSA submissions para 94.

ballot.

39 OSA submits that no explanation has been offered for imposing the same requirements on (unrepresented) independent candidates and political parties;[61] and also that there is no explanation for why new entrants in the form of independent candidates must meet the signature requirement that applies to some, but not all, political parties.[62]

40 Both of these submissions are incorrect.

41 On the first, the Commission has explained that applying the same signature requirement to independent candidate and political parties *(i)* accords with international best practice;[63] and *(ii)* is also informed by the fact that in every election since 1999, there has been a party that gained only one seat (equivalent to what an independent candidate can achieve). Since the requirement to win a seat in the regional tier is the same for parties and independent candidates, it seems appropriate that the same proof of support requirement applies to unrepresented parties and independent candidates.[64]

42 The Commission has also explained that the new signatures requirement applies only to independent candidates and political parties who are unrepresented in the relevant legislature, because political parties who are represented have already demonstrated that they are serious contenders with sufficient voter support to justify their candidature.[65] The Commission has also explained that this distinction is not an uncommon feature of electoral systems.[66] While it so happens that all independent candidates will have to meet the signature requirement in this election, being the first to

[61] OSA submissions para 73.

[62] OSA submissions para 78.

[63] OSA application, Commission affidavit para 35, pp 528-530.

[64] OSA application, Commission affidavit para 36, p 531.

[65] OSA application, Commission affidavit para 32, p 527.

[66] OSA application, Commission affidavit para 35.5, p 530.

allow for the participation of independent candidates, in drawing this distinction, the Electoral Act treats independent candidates and political parties equally.

43 Finally, as regards the threshold of 15% of the quota for the region in the previous election, OSA contends that the Commission's data "*demonstrates the disproportionate impact that the signature requirements place on independent candidates*".[67] The Commission does not agree.

43.1 It is not correct (as OSA's submissions suggest)[68] that an independent candidate or party must obtain voter support in every district in the region in which it seeks to contest. The Commission explained that support for a candidate's participation may, in some instances, not be widespread in a region, and that it is open to parties and candidates to concentrate on areas with stronger support to compensate for the lack of general support or organisational infrastructure elsewhere in a region. Nevertheless, when broken down into the number of signatures required per voting district in the region, the number of supporting signatures (of less than 10, with the exception of Northern Cape) is an achievable requirement that will not obstruct serious contenders from participating in an election.[69]

43.2 When the number of signatures required is considered as a proportion of the number of registered voters in the region – of less that 1% in the national election (with the exception of the Northern Cape) and less than 0,5% in provincial elections – it is again clear that this is a manageable requirement for

[67] OSA submissions para 89.

[68] OSA submissions para 89.

[69] OSA application, Commission affidavit para 43.1 and 43.2, p 535.

any independent candidate or party serious about contesting the election and winning a seat in the legislature.[70]

RECALCULATION OF SEATS ON FORFEITURE AND VACANCIES

44 The Commission has described the circumstances in which forfeiture and vacancies arise, and how the system for the recalculation of seats that follows.[71]

45 OSA contends that the method for the recalculation of seats is constitutionally offensive as it unfairly favours larger parties and entails the 'discarding' of votes cast for independent candidates.

46 The Commission accepts that there is a numerical bias in favour of parties with more overall votes (i.e., larger parties) under the amended quota that applies in the recalculation of seats. But it has emphasised and demonstrated that –

46.1 this is not an inevitable outcome that will always hold good; and

46.2 smaller parties and eligible independent candidates can gain seats under the recalculation method, particularly where there is a more even spread of votes between contestants; and

46.3 even when a large party dominates, it is not mathematically impossible for a smaller party to gain a seat on recalculation. [72]

47 The Commission explains that the rationale for the Electoral Act's recalculation method is to ensure that the election of candidates who are not eligible to hold a seat, or have

[70] OSA application, Commission affidavit para 43.3, p 536.

[71] OSA application, Commission affidavit paras 47-49, pp 537-540.

[72] OSA application, Commission affidavit paras 57-58, p 544 read with the analysis in annexure PSM1, p 550.

chosen to vacate a seat, does not continue to influence the outcome of the re-allocation of that seat.[73] OSA accepts this principle.[74] OSA fails to acknowledge, however, that its preferred model would not give effect to this principle. It entails taking account of the votes cast for all candidates (eligible and ineligible), while applying the largest remainder method.

48 Second, the Commission explains that, unlike the largest remainder method that OSA proposes, the recalculation method in the Electoral Act takes into account the overall votes cast for eligible parties and independent candidates in determining who is allocated the forfeited or vacated seat. This has the benefit of optimising inter-party proportionality.[75] This too is not disputed by OSA.[76]

49 Third, OSA's expert, Mr Atkins identifies another difficulty with reliance on the largest remainder method that OSA proposes: a forfeited or vacant seat could be awarded to a party or independent candidate with a low absolute number of votes.[77] Mr Atkins observes that "*this is a valid concern, and one that should be balanced carefully with the problems of unfairness and disproportionality".* The Commission agrees that this is a concern. It does not agree that problems of unfairness or disproportionality arise from the current recalculation method.[78]

[73] OSA application, Commission affidavit para 52, p 541.

[74] OSA submissions para 134.

[75] OSA application, Commission affidavit paras 56, 59 and 64, pp 543-544 & 546.

[76] OSA submissions para 138. OSA contends, however, that inter-party proportionality is not required, but rather 'proportional representation'. OSA fails to recognise that proportional representation is inherently a multiparty-based measure. Proportional representation in unavoidably distorted with the participation of independent candidates in an electoral system, since independent candidates can only hold one seat, no matter how many votes they win. The result is that, in a mixed electoral system which includes both political parties and independent candidates, 'proportional representation' can only mean inter-party proportional representation.

[77] See pp 5 and 31 of the second Atkins report.

[78] OSA application, Commission affidavit para 62, p 545.

CONCLUSION

50 The Commission abides the decision of this Court in both applications, but has endeavoured to explain the current provisions and the implications of the applicants' proposals for consideration.

51 The Commission is especially concerned that these challenges to the amended Electoral Act be finally determined by mid-September 2023, to avoid materially prejudicing its preparations for the 2024 NPE.

AZHAR BHAM SC

JANICE BLEAZARD

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Chambers,
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23 August 2023

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent
and	
RIVONIA CIRCLE NPC	Amicus Curiae

CASE NO: CCT 158/23

And in the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
and	
RIVONIA CIRCLE NPC	Amicus Curiae

FILING SHEET

TAKE NOTICE THAT the following documents have been filed by the *amicus curiae*, Rivonia Circle NPC:

1. the *amicus curiae*'s heads of argument;

2. the *amicus curiae*'s practice note, and list of authorities; and

3. the *amicus curiae*'s bundle of authorities.

Dated at **JOHANNESBURG** on **25 AUGUST 2023**.

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INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
and	
RIVONIA CIRCLE NPC	Amicus Curiae

WRITTEN SUBMISSIONS OF *AMICUS CURIAE* – RIVONIA CIRCLE

INTRODUCTION

1. Rivonia Circle has been admitted as an *amicus curiae* in these proceedings which challenge the constitutionality of various provisions of the Electoral Amendment Act 1 of 2023 ("**Amendment Act**"). It focuses its submissions on the constitutionality of onerous signature requirements introduced by the Amendment Act that restrict access to the ballot for independent candidates and unrepresented political parties ("**new entrants**") – but not for incumbent political parties already represented in the national assembly or provincial legislatures.

2. The onerous signature requirements introduced by the Amendment Act cannot be viewed in isolation. They must be considered in the context of our electoral system and the constitutional right to free and fair elections. As held by the United States Supreme Court in ***Storer v. Brown,*** sometimes *"a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights."*[1]

3. There is already a significant ballot access restriction contained in section 27(2)(e) of the Electoral Act 73 of 1998 ("**Electoral Act**") – the requirement that political parties pay a deposit in order to be placed on the ballot papers. This applies to represented political parties as well as unrepresented political parties. The deposit requirement also applies to independent candidates in terms of section 31B(3)(b) of the Electoral Act. In addition to this, new entrants – unlike incumbent political parties already represented in parliament – do not receive state funding.[2]

4. The onerous signature requirements introduced by sections 3 and 6 of the Amendment Act require new entrants to direct significant human and financial

[1] *Storer v. Brown,* 415 U.S. 724, 737 (1974).

[2] Public Funding of Represented Political Parties Act 103 of 1997, section 5.

resources towards collecting an excessive number of signatures: 15% of the quota, in the previous election, for a seat in the relevant legislature.[3]

5. Considered together with the deposit requirement and the lack of state funding, the new signature requirements unconstitutionally tip the scale towards excluding or deterring new entrants from participating in elections – creating an unreasonable and unjustifiable barrier to exercising the right to stand for office.

6. Even if the new signature requirements do not exclude new entrants, they at least undermine the ability of new entrants to compete against incumbent political parties on anything close to an equal footing. New entrants will have fewer resources for campaigning because they are required to obtain an excessively large number of signatures just to access the ballot. Incumbent political parties do not face the same obstacle – all of their resources may be directed towards campaigning for election. This means that the electioneering playing field is not level as a result of the electoral laws in place.

7. This case is thus concerned with an electoral law that places a restriction on new entrants contesting elections, which has the effect of: (i) excluding or deterring new entrants from participating in elections; or (ii) *at least* undermining the ability of new entrants to compete against represented political parties.

8. In having these effects, the onerous signature requirements violate a number of constitutional rights and values: the right to free and fair elections; the right to secret suffrage; the right to stand for office; and the founding constitutional value of multi-party democracy.

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[3] Moreover, a candidate or party will need to obtain even more signatures than this to ensure that they will be placed on the ballot, as not all the signatures obtained will ultimately be verified. Depending on the stringency of the verification process – which is not set out in the Electoral Act – a party or candidate may need a considerable buffer to ensure that they will be able to contest the elections.

9. Rivonia Circle seeks to draw particular attention to three aspects that are not covered by the submissions of other parties, or not fully covered: (i) the importance of **pre-election equality and fairness** through the lens of international and comparative law and construing the right to stand for office in harmony with cognate election rights; (ii) the **risk to secret suffrage** of onerous signature requirements; (iii) the **appropriate level of scrutiny** called for in this case, where Parliament (made up of incumbent political parties) bears a duty to justify regulatory figures and calculations, act positively to protect multi-party democracy, and avoid retrogressive measures.

FIRST SUBMISSION: ONEROUS SIGNATURE REQUIREMENTS CONSTITUTE AN IMPERMISSIBLE BARRIER TO ENTRY AND UNDERMINE COMPETITION

Section 19(2): The right to free and fair elections

10. Given our country's history, section 19(2) of the Constitution enshrines the right to free and fair elections.[4]

11. This Court has pronounced on the nature of the right to free and fair elections. In ***Kham***,[5] this Court distilled the elements that are of fundamental importance to the conduct of free and fair elections. Importantly, in distilling these elements, this Court recognised that the Constitution protects "*the right to participate in elections as a candidate and to seek public office*".[6]

12. What does "free and fair" in the context of elections mean? This Court explained that the standard highlights "*both the freedom to participate in the electoral process*" and the ability of the political parties and candidates, both aligned and non-aligned, "*to*

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[4] It provides: "*Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution*."

[5] *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) ("*Kham*").

[6] *Kham* at para 34, emphasis added.

compete with one another on relatively equal terms".[7] It acknowledged that larger political parties have advantages – both organisationally and financially – that smaller parties and independent candidates lack, but that what is required by free and fair elections is a "*level playing field in which all participants can compete without any undue hindrance or obstacle occasioned by the manner in which the preparations for the election have been undertaken or the way in which the election has been conducted*."[8]

13. It said that: "*The Court must give full weight to the constitutional commitment to free and fair elections and the safeguard it provides of the right and ability of all who so wish to offer themselves for election to public office*."[9]

14. Our courts have looked at international standards on free and fair elections in determining the nature and scope of the right in section 19(2). These international standards are summed up in the report by Justices Moseneke and Khampepe in their capacities as members of the Judicial Observer Mission to the 2002 Presidential Elections of Zimbabwe ("**Khampepe Report**").[10] The Khampepe Report indicates that:

14.1 "Free" relates to the "*freedom or options or process or absence of impediments, voters, individually or collectively enjoy in relation to the electoral process*".[11] Implicit in this freedom, we submit, is the opportunity to participate in an electoral process free of negative consequences for one's safety, privacy or dignity.

14.2 "Fair", on the other hand, relates to "*whether the environment and systems within*

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[7] *Kham* at para 86, emphasis added.

[8] *Kham* at para 87, emphasis added.

[9] *Kham* at para 91.

[10] The Report is online available at https://www.veritaszim.net/sites/veritas_d/files/Khampepe%20Report%20on%202002%20Presidential%20Election%20in%20Zimbabwe.pdf

[11] Khampepe Report at p 21.

which elections are prepared for, and conducted and concluded are equitable".[12] This, we submit, involves both the impartial and reasonable application of electoral rules.[13]

15. The Khampepe Report referred to specific standards developed by social scientists to assess whether the 2002 Presidential Elections in Zimbabwe could be considered "free and fair". These standards combine the two principal dimensions of election assessment (i.e., "free" and "fair") with three observational phases, namely *before* polling day, *on* polling day and *after* polling day. These three observational phases are necessary because *"election day itself is only part of the electoral process"*.[14]

15.1 "Free" before polling day requires *inter alia* (i) freedom from fear in connection with the election and the electoral campaign; and (ii) an absence of impediments to standing for election by both political parties and independent candidates.[15]

15.2 "Fair", on the other hand, includes an election Act and an electoral system that grants no special privileges to any political party or social group and equal opportunities for political parties and independent candidates to stand for election.[16]

16. The above demonstrates that *"[w]hat happens before and after polling day is at least as important as what happens on polling day itself"*[17] and the observance of freedoms and fairness in a pre-election period is a prerequisite for the acceptability of elections that follow. It is against these standards that the impact of the signature requirements

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[12] Khampepe Report at p 21.

[13] See Jørgen Elklit and Palle Svensson "The rise of election monitoring: What makes elections free and fair?" *Journal of Democracy* Vol. 8, No. 3 (July 1997) 32 at p 35.

[14] Elklit and Svensson ibid at p 36.

[15] Khampepe Report, p 22.

[16] Khampepe Report, p 22. See also Elklit and Svensson supra at p 37.

[17] Elklit and Svensson supra at pp 36 and 38.

imposed by the Amendment Act on *inter alia* the right to vote and the opportunity for political competition ought to be assessed.

17. The new onerous signature requirements violate the right to free and fair elections in multiple ways:

17.1 First, in so far as the onerous signature requirements introduced by the Amendment Act (together with the other obstacles put in the path of new entrants by our electoral laws) tip the scale towards excluding or deterring new entrants from participating in elections, they self-evidently infringe the right to free and fair elections.

17.2 Second, the new onerous signature requirements create an uneven playing field – protecting the interests of incumbent political parties and prejudicing new entrants. They deprive new entrants of a better chance of competing in elections because the human and financial resources that could be used for campaigning are instead directed at obtaining an excessively high number of signatures so as to obtain access to the ballot.

17.3 The right to free and fair elections is infringed because independent candidates and unrepresented political parties do not have an equal opportunity to contest elections. The amendments treat independent candidates and unrepresented political parties less favourably than represented political parties – placing an obstacle in the path of new entrants, with which represented political parties do not have to contend.

Section 19(3)(b): The right to stand for office

18. Section 19(3)(b) gives citizens the right to run for and, if elected, hold political office.

19. This Court has emphasised that individual constitutional provisions must be interpreted purposively and in light of the Constitution as a whole.[18] It further emphasised in ***August***[19] and ***Ramakatsa***[20] that the political rights in section 19 of the Constitution fall to be interpreted generously in light of this country's past in which the majority were denied political rights and excluded from political participation.[21]

20. This interpretational approach was adopted by this Court in construing the right to stand for office in section 19(3)(b) in ***New Nation Movement***. This Court interpreted the right in section 19(3)(b) in **harmony** with the right to make political choices and the right to freedom of association (together with the related rights of freedom of conscience and dignity), as encompassing the right to contest elections <u>without</u> associating with any political party (i.e. as an independent candidate).[22] In that case, this Court found that the restrictions placed on individuals' ability to contest elections by requiring individuals to contest elections through association with a political party unreasonably and unjustifiably limited the right in section 19(3)(b), properly interpreted.

21. Rivonia Circle submits that this Court ought to adopt a generous interpretation of the right to stand for office – in harmony with the right to free and fair elections, the right to vote and the founding value of multi-party democracy. This means that: (i) no persons or groups[23] may be unreasonably and unjustifiably excluded from contesting

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[18] *Matatiele Municipality and Others v President of the RSA and Others (No 2)* 2007 (6) SA 477 (CC) at para 36. In *Matatiele (No 2)*, this Court said:

> "*Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole*."

[19] *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 17.

[20] *Ramakatsa v Magashule* [2012] ZACC 31; 2012 JDR 2203 (CC); 2013 (2) BCLR 202 (CC) at para 64.

[21] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) ("*New Nation Movement*") at para 106 and 108.

[22] *New Nation Movement* ibid at para 63.

[23] The right is conferred on citizens.

elections; and (ii) a fair electoral framework must be provided within which the right may be exercised so as to ensure **equality of opportunity** among candidates and parties.[24]

22. The right to stand for office and contest elections is closely linked to the right to vote. This Court recognised this relationship in ***My Vote Counts II***.[25] It said: "*The right to stand for public office is tied up to the right to 'vote in elections for any legislative body' that is constitutionally established*."[26] Similarly, in ***New Nation Movement***, this Court recognised that the right to stand for public office and the right to vote are interconnected; explaining that "*the exercise of the franchise is not an end in itself. It is about voting people into public office*."[27]

23. A generous interpretation of the right to stand for office is therefore necessary for the full realisation of the right to vote. Restrictions on access to the ballot impact the voter's interest in freely choosing her representatives – limiting the field of candidates and parties from which the voter may choose.

24. When candidates or parties are excluded or deterred from participating in elections because of unreasonable restrictions on access to the ballot, this implicates the right to vote. The Inter-American Court of Human Rights, in ***Yatama v Nicaragua,***[28] dealt with a case in which members of an indigenous group, the YATAMA, were excluded from contesting an election because they did not form part of a registered political party. The Court explained that their exclusion—

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[24] See Johns, A. The case for political candidacy as fundamental human right (2016) *Human Rights Law Review*, 16(1), 29-54.

[25] *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC).

[26] Ibid at para 29.

[27] *New Nation Movement* above at para 108, emphasis added.

[28] *Yatama v Nicaragua* IACtHR Series C 127 (2005).

> *"meant that the candidates proposed by YATAMA were not included among the options available to the voters, which represented a direct limitation to the exercise of the vote and affected negatively the broadest and freest expression of the will of the electorate, which implies grave consequences for democracy."*[29]

25. This is not to suggest that every voter must have their preferred candidate on the ballot. What is required is a broad and diverse field of candidates and parties representing different interests and views within society. As explained by the European Court of Human Rights in ***Russian Conservative Party of Entrepreneurs v Russia***[30]—

> *"[T]he Court finds that the right to vote cannot be construed as laying down a general guarantee that every voter should be able to find on the ballot paper the candidate or the party he had intended to vote for. It reiterates, nevertheless, that the free expression of the opinion of the people is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population."*[31] (Emphasis added).

26. The benefit of a plurality of political parties and candidates participating in elections goes beyond increasing the choices available to voters. It has expressive value – increasing open debate on important issues. This is aptly demonstrated in the case of ***Figueroa v Canada (Attorney General)***.[32] In that case, the Canadian Supreme Court considered the right to stand for office in the Canadian Charter of Rights.

26.1 A challenge was brought by a small political party (the Communist Party of Canada) against an electoral law that required parties to nominate candidates in 50 electoral districts in order to register as a political party and to list their party affiliation on the ballot papers. The law favoured larger political parties.

26.2 Iacobucci J, writing for the majority, held that section 3 of the Charter, which enshrines the right to vote and to stand for office, must be construed in light of its

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[29] Ibid at para 226.

[30] *Application Nos 55066100 and 55638/00, Merits and Just Satisfaction, 11 January 2007.*

[31] Ibid at para 79.

[32] [2003] 1 SCR 912.

purpose. Section 3 should thus be construed with reference to the right of each citizen to play a meaningful role in the electoral process. She said:

> *"[P]articipation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections ... it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses."*[33] (Emphasis added).

27. The need for plurality of political parties and candidates in South Africa is underscored by the founding value of multi-party democracy, to which we turn below.

28. The right to stand for office is, moreover, interconnected with the right to free and fair elections. In ***New National Party***, this Court recognised the critical relationship between the right to vote and the right to free and fair elections. It said: "*The right to vote is, of course, indispensable to and empty without, the right to free and fair elections; the latter gives content and meaning to the former*."[34]

29. The same can and must be said for the right to stand for public office: the right to free and fair elections gives content to the right to stand for office. As explained above, the right to stand for public office in a free and fair election requires that candidates and parties have an equal opportunity to contest elections.

30. The Minister of Home Affairs places great reliance on this Court's judgment in *New National Party* in contending that ballot access requirements are a constitutional requirement of the right to stand for elections and thus not a limitation of the right (similar to the requirement that voters be registered in order to exercise their right to vote).[35] However, this ignores that the Constitution *itself* requires that only persons on

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[33] Ibid at para 29.

[34] *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) ("*New National Party*") at para 12.

[35] Minister of Home Affairs' submissions at para 40-44.

a national common voters roll may vote – an electoral system based on a national voters roll is a founding constitutional value[36] and the Constitution in numerous places requires that elections must be based on a national common voters roll.[37] Signature requirements for ballot access, on the other hand, are plainly not a constitutional imperative. Although Parliament may regulate access to the ballot, it may not do so in a way that unreasonably and unjustifiably limits the right to contest elections. Properly interpreted, in harmony with other political rights, the right to contest elections requires that any restrictions on ballot access neither constitute an unreasonable barrier to entry nor lead to an uneven playing field.

31. This interpretation is, moreover, consistent with international law and norms. Section 39(1)(b) of the Constitution makes it obligatory for a court interpreting a right in the Bill of Rights to consider international law. This includes decisions of international courts, tribunals and bodies on international and regional conventions.[38]

32. The right to contest elections is enshrined in international law.

33. Article 25(b) of the United Nations International Covenant on Civil and Political Rights confers on every citizen the right to *"vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors"*.[39]

34. Expounding on this, the United Nations Human Rights Committee, in General Comment No. 25,[40] said: *"The right of persons to stand for election should not be*

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[36] Section 1(d) of the Constitution.

[37] Sections 46(1), 105(1) and 157(5) of the Constitution.

[38] *New Nation Movement* above at para 29.

[39] Article 25(b) of the United Nations International Covenant on Civil and Political Rights (ICCPR). The ICCPR was adopted by the General Assembly of the United Nations on 19 December 1966 and signed by South Africa on 3 October 1994 and ratified on 10 December 1998.

[40] *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7*

limited unreasonably…. <u>If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy</u>."[41]

35. This Court must assess the signature requirements introduced by the Amendment Act in light of the context of South Africa's electoral system – our history, the critical importance of the right to vote in a multi-party democracy, and the importance of ensuring equality between parties and voters as a foundational value – and in conjunction with other restrictions on ballot access, as stated above.

36. Yet it may be of assistance for the Court to have regard to the legal position in democracies comparative to South Africa which demonstrate that the number of signatures required under the Electoral Act is excessive.[42] Section 39(1)(c) of the Constitution permits a court when interpreting a right in the Bill of Rights to also consider comparative foreign law.[43]

36.1 In Australia, independent candidates need to obtain the signatures of not less than 100 electors entitled to vote at the election for which the candidate is nominated.[44]

36.2 Canada requires the signatures of at least 100 persons who are electors entitled to vote in the electoral district and 50 signatures in the remote districts.[45]

36.3 In Kenya, which has a comparable population to South Africa, a person is eligible for election as a member of parliament if the person is nominated by a political

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[41] Ibid at para 17, our emphasis.

[42] The ACE Project provides a database on the electoral systems of different countries. This may be accessed at https://aceproject.org/regions

[43] See *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at para 31 on the approach to the use of foreign law when interpreting a right in the Bill of Rights.

[44] Section 166 of the Commonwealth Electoral Act 1918 available at https://www.legislation.gov.au/Details/C2023C00067.

[45] Section 66(1)(e) of the Canada Elections Act (S.C. 2000, c. 9) available at https://canlii.ca/t/7vwm.

party, or is an independent candidate who is supported by at least 1,000 registered voters in the constituency in the case of election to the National Assembly.[46]

36.4 In India, a candidate put forward by a recognised political party must obtain the signature of one elector in a candidate's constituency, while an independent candidate or a candidate not from a recognised political party must obtain the signatures of 10 electors in the constituency.[47]

36.5 The United Kingdom requires the signatures of only 10 electors from a candidate's constituency.[48]

36.6 In Turkey, which has a greater population to South Africa, 450 voters' signatures must be collected in support of a candidate within the territory of the constituency for which he or she has been nominated.[49]

36.7 Finland requires a minimum of 100 eligible voters in the same electoral district to nominate a candidate for parliamentary elections.[50]

36.8 In Germany, independent candidates and parties that have not been continuously represented by at least five representatives in the German Bundestag or in a Landtag (state parliament) since the last election must collect 200 signatures of registered voters in the constituency.[51] The signature requirement does not apply

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[46] Section 99 of the Constitution of Kenya, 2010 available at http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010

[47] Section 33 of the Representation of the People Act of 1951 available at https://aceproject.org/ero-en/regions/asia/IN/india-representation-of-the-people-act-1951/view.

[48] Representation of the People Act 1983 (RPA 1983), Rule 7 Schedule 1.

[49] Article 157 of Turkey's Electoral Code, as cited in *Tahirov v. Azerbaijan, Application no. 31953/11, 11 June 2015.*

[50] Section 119 of Finland's Election Act (2004) available at https://www.finlex.fi/en/laki/kaannokset/1998/en19980714_20040218.pdf

[51] Section 20(2) and (3) of Germany's Federal Elections Act (1993) available at https://www.bundeswahlleiterin.de/en/dam/jcr/4ff317c1-041f-4ba7-bbbf-1e5dc45097b3/bundeswahlgesetz_engl.pdf

to constituency nominations by parties or independent candidates representing national minorities.[52]

37. The Independent Electoral Commission considers Denmark alone to be a useful comparator.[53] It says so on the basis that Demark has a similar electoral system to South Africa, including the participation of independent candidates. No other reason is given for why Denmark was the only country considered, or why it is to be preferred as a comparator to South Africa than those countries discussed above; many of which have electoral systems based on proportional representation (Germany, Finland and Turkey) and / or allow for the participation of independent candidates, while placing far less onerous signature requirements on new entrants.

38. Moreover, there is no functional equivalent between South Africa and Denmark so as to make it a useful comparator. Denmark has a different socio-economic and historical political landscape which is not apposite in the South African example. New entrants in South Africa suffer greater resource constraints, which impedes their ability to obtain large numbers of signatures to access the ballot **and** also advance an effective campaign for election.

39. Majority governments are also a rarity in Danish politics – since 1909, no single party has held a majority of seats in parliament.[54] The number of registered voters in Denmark is approximately 4,269,048 the population of approximately 5,920,767 as at 13 February 2023. It furthermore has an average voter turn-out of 78.98%.[55] South Africa, on the other hand, has approximately 26,014,875 registered voters as at

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[52] Ibid.

[53] IEC explanatory affidavit at para 38.

[54] https://freedomhouse.org/country/denmark/freedom-world/2022.

[55] See report of the International Foundation for Electoral Systems https://www.electionguide.org/countries/id/59/.

25 August 2023[56] of a population of approximately over 61,000,000.[57] As Denmark has a higher level of political participation by citizenry and a more fragmented political system, more onerous signature requirements may be more appropriate in its context. One thus cannot be sure of Denmark's relevance or cogency as an example, and there is no explanation on the papers for its privileging over others.

40. The Minister of Home Affairs points also to the example of the United States of America, where onerous signature requirements are a firm feature of elections.[58] The difficulty is that this is not an example, beyond Denmark, that features in the evidence. It is proffered in the heads by the Minister. The U.S. is anyways a poor comparator for South Africa, as it does not have an enshrined right to stand for office. The U.S. Constitution does not contain a right to candidacy, and the U.S. Supreme Court has held that there is no fundamental right to contest elections.[59] It is for this reason that its courts have taken such a conservative approach to ballot access restrictions.

41. The International Electoral Standards: Guidelines for Reviewing the Legal Framework for Elections published by the International Institute for Democracy and Electoral Assistance notes that the legal framework informing an election *"should provide for uniformity in the nomination process so that the same process applies to all political parties at all levels"*.[60]

42. The right to contest elections must be interpreted harmoniously with the right to free and fair elections, the right to vote and the value of multi-party democracy. An electoral system that requires only unrepresented political parties and independent

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[56] See the IEC's voter statistics at https://www.elections.org.za/pw/StatsData/Voter-Registration-Statistics.

[57] https://countrymeters.info/en/South_Africa

[58] Minister of Home Affair's submissions at para 67ff.

[59] *Bullock v Carter* 405 U.S. 134 (1972) at 142 143*; Clements v Fashing* 457 U.S. 957 (1982) at 965.

[60] International Institute for Democracy and Electoral Assistance *International Electoral Standards: Guidelines for Reviewing the Legal Framework for Elections* (200) at p 50. Available at https://www.idea.int/sites/default/files/publications/international-electoral-standards-guidelines-for-reviewing-the-legal-framework-of-elections.pdf

candidates to obtain an excessive number of signatures in order to gain access to the ballot is inconsistent with the right to stand for office enshrined in section 19(3)(b). As explained above, the onerous signature requirement is both an unreasonable barrier to entry and leads to an uneven playing field for candidates and parties.

43. The state respondents attempt to justify the onerous signature requirements on the basis that a candidate who is not able to obtain the number of signatures required will unlikely be able to ultimately successfully contest the election and obtain a seat. They contend that the threshold of 15% is a reasonable limitation of the right to stand for office because it is "*not more than one fifth of the total number of votes required for a seat in the election*".[61]

44. This ignores, firstly, that such onerous signature requirements must be considered together with the other ballot access restrictions, and that together these restrictions impede the ability of new entrants to effectively campaign for elections and to ultimately obtain a seat.

45. Secondly, it loses sight of the fact that there is a wide berth between frivolous participation and unsuccessful participation. In other words, the fact that a candidate or party is not ultimately successful in obtaining a seat does not mean that they contested elections frivolously.

46. The Canadian Supreme Court in ***Figueroa v Canada (Attorney General)*** explains:

> *"It is my conclusion that the ability of a political party to make a valuable contribution to the electoral process is not dependent upon its capacity to offer the electorate a genuine "government option". Rather, political parties enhance the meaningfulness of individual participation in the electoral process for reasons that transcend their capacity (or lack thereof) to participate in the governance of the country subsequent to an election. … [P]olitical parties act as a vehicle for the participation of individual citizens in the political life of the country. Political parties ensure that the ideas and opinions of their members and supporters are effectively represented in the open debate occasioned by the electoral*

[61] Fourth and fifth respondents submissions para 62.

> *process and presented to the electorate as a viable option. If those ideas and opinions are not subsequently adopted by the government of the day, it is not because they have not been considered, but, rather, because they have received insufficient public support."*[62]

Section 1(d) of the Constitution: Multi-party democracy

47. Multi-party democracy is enshrined in section 1(d) of the Constitution as a founding constitutional value. The foundational value is, moreover, purposive: section (1)(d) says that South Africa is a sovereign, democratic state founded on the values of universal adult suffrage, a national common voters roll, regular elections and "*a multi-party system of democratic government to ensure accountability, responsiveness and openness*" (emphasis added).

48. This Court has explained, in ***UDM***,[63] that the value of multi-party democracy "*excludes a system of government in which a limited number of parties are entitled to compete for office*".[64] In other words, it enshrines the ideal of an open and **competitive** democratic system.

49. This Court said:

> "*A multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid*."[65]

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[62] Ibid at para 39 to 40.

[63] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 ("*UDM II*").

[64] Ibid at para 24.

[65] Ibid at para 26.

50. This Court explained in ***New Nation Movement*** that what multi-party democracy makes obligatory is "*allowing different political groups to organise and participate in elections, including fielding candidates*."[66]

51. Multi-party democracy requires that the electoral system must: (i) allow different political groups to contest elections; and (ii), in so far as is possible, ensure a level playing field for competition between different political groups.

52. Onerous signature requirements for ballot access do not promote multi-party democracy. They actively undermine it by reducing the ability of new entrants to contest elections and enter the political space.

53. The value of multi-party democracy, read with the right to contest elections and the right to free and fair elections, requires that access to the ballot not be restricted through the imposition of onerous signature requirements.

SECOND SUBMISSION: REQUIRING VOTERS TO INDICATE FOR WHOM THEY INTEND TO VOTE VIOLATES SECRET SUFFRAGE

Section 19(3)(a): the right to secret suffrage

54. The principle of secret suffrage is widely considered a basic component of democratic contests. The right to a "secret vote" has been historically recognised and guaranteed in a number of international instruments such as Article 21 of the Universal Declaration of Human Rights;[67] Article 25 of the International Covenant on Civil and

[66] *New Nation Movement* above at para 72.

[67] Universal Declaration of Human Rights of 1948.

Political Rights;[68] Article 3 of Protocol No. 1 to the European Convention on Human Rights; and the Inter-American Democratic Charter.[69]

55. In South Africa, the right to secret suffrage is conferred by section 19(3) of the Constitution which provides as follows:

> *"Every adult citizen has the right— (a) to vote in elections for any legislative body established in* terms *of the Constitution, and to do so in secret…"*

56. The purpose of secret suffrage is to guarantee the free expression of will by voters and to enhance the freeness and fairness of elections. [70] It affords protection against –

> *"[a] great class of evils, including violence and intimidation, improper influence, dictation by employers or organizations, the fear of ridicule and dislike, or of social or commercial injury – all coercive influence of every sort depending on a knowledge of the voter's political action".*[71]

57. Secrecy of the ballot is merely one aspect of voter freedom.[72] In order to fulfil the purpose of and promote and preserve the right guaranteed in section 19(3), Rivonia Circle submits that secrecy must apply to the <u>entire election procedure</u> and not merely at the ballot stage. This is consistent with the position of the Venice Commission that secrecy must apply to the entire procedure in order to shield voters from the pressures they might face if others learned how they had voted.[73]

58. The onerous signature requirements introduced by the Amendment Act require independent candidates and unrepresented political parties to collect large numbers of signatures as well as the personal information of voters and submit this information

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[68] International Covenant on Civil and Political Rights, adopted by U.N. General Assembly Resolution 2200 A (XXI) of December 16, 1966.

[69] Adopted on 11 September 2001 by a special session of the General Assembly of the Organization of American States.

[70] *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC) ("*UDM v Speaker*") at para 73.

[71] J Wigmore *The Australian ballot system as embodied in the legislation of various countries* (2nd edition) cited in Eric Van Hagen "Notes and comments, The Not-So-Secret Ballot: How Washington Fails to Provide a Secret Vote for Impaired Voters as Required by the Washington State Constitution" 80 *Wash. L. Rev.* 787 (2005) at 787. See also the comments by the Supreme Court of the United States of American in *Burson v Freeman* (90-1056), 504 U.S. 191 (1992) about the secret ballot as the "*hard-won right to vote one's conscience without fear of retaliation*".

[72] Explanatory Report adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002) at p 24.

[73] Ibid.

to the independent electoral body in order to (i) signify the support of an independent candidate or unrepresented political party; and (ii) provide an indication of an intention to vote for that candidate or party. This exposes the voter to the "great evils" referred to above.

59. The potential for such risk is not merely speculative – it manifested in the parliamentary elections in Azerbaijan in November 2010. At the time, the Azerbaijan Electoral Code required that each nomination as a candidate for parliamentary elections be supported by a minimum of 450 voters. The Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights Election Observation Mission (ODIHR) received *"credible reports of intimidation of and pressure on voters to sign or withdraw their signatures from signature sheets"* as well as *"allegations of direct intimidation of candidates, their relatives and their representatives."* Such intimidation and pressure were found to have negatively restricted political campaigning in a fair and free atmosphere.[74]

60. As the Khampepe Report further made clear, the risk of intimidation and threats to voters in the pre-election environment was also apparent in Zimbabwe, with campaigns of violence and intimidation against supporters of the Movement for Democratic Change.

61. The more contested elections become, this exacerbates the risk that follows the high signature requirement which forces voters to raise their hands publicly before the votes are cast, including the fear of intimidation and harassment that may have a chilling effect on the supporters of such prospective parties and candidates.

[74] *Tahirov v Azerbaijan*, No. 31953/11, ECtHR (First Section), 11 June 2015 at p 12.

62. Similarly, should constituents be aware that their vote is not being cast in secret, it may discourage those voters from choosing unrepresented political parties and independent candidates and compel them to instead associate with represented parties to mitigate the risk of harassment and intimidation. This, we submit, would also undermine the fundamental right of freedom of association guaranteed by section 18 of the Constitution. It furthermore has the potential to undermine the freedom of choice – another characteristic of free elections – by increasing the potential for bribery and vote-buying.[75]

63. In the South African context, there are patently insufficient mechanisms to preserve the secrecy of identity of the political supporters who submit signatures in support of an unrepresented party or independent candidate.

63.1 Section 29 of the Electoral Act provides that a list of candidates and accompanying documents submitted in terms of section 27 will be available for inspection. Similar rights of inspection are established in the new section 31D of the Electoral Act.

63.2 Further, while the Electoral Act prescribes measures to ensure secrecy during the voting stage,[76] there are no restrictions imposed by the Amendment Act around the publication of lists of signatures obtained for the purposes of fulfilling the new signature requirements.

64. Accordingly, multiples of thousands of voters are required to reveal that they support and intend to vote for an independent candidate or unrepresented political party prior

[75] Khampepe Report, p 22.

[76] See sections 38, 39, 70 and 90 of the Act.

to the election thereby heightening the risk of influence, family and social pressure, intimidation and harassment.

65. This, we submit, inhibits voters' ability to exercise their vote freely and effectively *"without undue influence, intimidation or fear of disapproval by others"*[77] and is inconsistent with a fair election as identified in the Khampepe Report insofar as it detracts from the *"freedom from fear in connection with the election and the electoral campaign"*.[78] This plainly undermines the spirit and purpose of secret suffrage.

66. Viewed in this context, the limitation of the right to keep one's vote a secret is neither reasonable nor justifiable. Moreover, given the link between secret suffrage and free and fair elections, requiring thousands of voters to reveal who they intend to vote for prior to the election will likely seriously undermine the freeness and fairness of an election.

67. As OSA points out in its written submissions,[79] *"prior to the amendments introduced in section 27, political parties were only required to demonstrate that they had the support of 1000 voters"*. Even then, no consideration was apparently given to secure the secrecy of those voters who were forced publicly to raise their hands. Indicating one's support for a political party to enable it to register as a political party may be seen as more removed from elections and the exercise of the right to vote than indicating one's intention to vote for a particular party or independent candidate for the purposes of enabling them to access the ballot, as is now required under the new amendments to the Electoral Act. Requiring voters to provide signatures for the purposes of ballot access is necessarily closely linked to elections and the right to

[77] *UDM v Speaker* above at para 73.

[78] Khampepe Report, p 22.

[79] OSA written submissions, para 25.

vote in secret – being required to be provided close in time to the election. Moreover, to the extent that the signature requirements, now imposed on new entrants, will range between 10,000 and 14,000 (for national elections), there is a need for Parliament to assiduously justify the significant new imposition on new entrants given the concomitant violations of secret suffrage that the increase entails.

THIRD SUBMISSION: THE LEVEL OF SCRUTINY REQUIRED

68. With the adoption of the Amendment Act, political parties represented in the parliamentary process gain an advantage through the onerous administrative requirements imposed on new entrants to contest elections. The constitutionality of the new onerous signature requirements is being tested in a context where new entrants must clear a significant burden to contest the ballot. The question arises: what is the appropriate level of scrutiny, and the burden of justification?

The Legislature's constitutional duties

69. Section 1(a) of the Constitution states that one of its founding values is *"human dignity, the achievement of equality and the advancement of fundamental human rights and freedoms"*.[80] Section 7(2) of the Constitution requires the state to *"respect, protect, promote and fulfil the rights in the Bill of Rights."* This obligation *"goes <u>beyond a mere negative obligation</u> not to act in a manner that would infringe or restrict a right. Rather, it entails <u>positive duties on the State to take deliberate, reasonable measures</u> to give effect to all of the fundamental rights contained in the Bill of Rights."*[81]

[80] Emphasis added.

[81] *Glenister v The President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ("*Glenister*") para 102 (minority), read with paras 177, 178, and 189 (majority). See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) ("*Metrorail*") paras 66 to 72.

70. It follows that Parliament is (i) obligated to take reasonable and effective steps to respect, protect, promote and fulfil constitutional rights;[82] and (ii) is prohibited from interfering with or violating any constitutional right unless that interference can be justified in terms of section 36(1) of the Constitution – the limitations clause.[83]

71. It is accordingly through the lens of section 7(2) that the new signature requirements must be assessed.

The new signature requirement violates the positive and negative requirements of section 7(2)

72. The prescription of the new onerous signature requirements is a retrogressive measure. Registered political parties intending to contest an election were not previously required to submit the names, identity numbers and signatures of voters who support the party. The new signature requirements imposed by the Amendment Act therefore retrogressively erode the right to stand for office (and cognate rights) as discussed earlier in these submissions. They do so by depriving or threatening to deprive voters and new political parties of existing rights to access the ballot enjoyed by incumbent parties. Citizens are entitled to free elections – which includes respect for their right to vote, to contest elections, and to do so free from "*undue influence, intimidation or fear of disapproval by others".*[84] Given the new restrictions, they are less free than before.

73. This is constitutionally impermissible not only as a retrogressive measure. It is also a failure to respect, protect, fulfil and promote the rights in question, including a failure of an explicit positive duty to encourage multi-party democracy. This Court has held

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[82] *Glenister* para 189 and *Metrorail* para 88.

[83] *Mlungwana v S* 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) para 42.

[84] *UDM v Speaker* above at para 73.

that the founding values of section 1 of the Constitution "*inform the interpretation of the Constitution and other law, and set* ***positive standards*** *with which all law must comply in order to be valid*."[85]

74. Accordingly, whether as a retrogressive measure, or a failure of a positive duty under section 7, the law will be unconstitutional, unless it can be justified under section 36 of the Constitution (the limitation would have to be in terms of a law of general application and be reasonable and justifiable).[86]

Insufficient justification – the duty to explain the figures chosen

75. While the Legislature is entitled to pass laws regulating elections, it must provide fulsome justification for any violation of rights and may not resort to arbitrary or non-disclosed bases for how it arrived at an imposition – in this case, the figure of 15%. As this Court has held previously, when a regulatory figure is adopted that impacts on rights, then the figure or calculation must be properly justified. In *New Clicks*,[87] Ngcobo J (as then was) said this in relation to the dispensing fee prescribed by the Minister of Health for pharmacies:[88]

> "*What is singularly lacking in the record is an explanation of how the dispensing fees were arrived at. There is no explanation as to why the Pricing Committee chose the figures that it chose. While the Pricing Committee indicated that the fee covers both the professional remuneration and operating costs, it does not explain what was allocated to each of these component parts of the fee. As the SCA observed, "except for a general statement that all factors were taken into account, there is no evidence or document that shows what those factors were, what weight they bore, whether any calculations were made and, more particularly, whether any regard was given to the viability of the dispensing profession." It was this lack of explanation for quantum of the dispensing fees that led the SCA to conclude that there was no rational explanation for the quantum of fees and that therefore the fees were not appropriate.*
>
> *[536] As pointed out previously, the Pricing Committee and the Minister were obliged to address the viability of the fees for pharmacies in a meaningful way, and demonstrate*

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[85] *UDM II* above at para 19 emphasis added.

[86] *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 34.

[87] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) ("*New Clicks*").

[88] Ibid at paras 535 to 536.

> *that they have done this. It was incumbent upon them to put forward facts from which it would appear that they had paid due regard to the viability of pharmacies so that a court considering a dispute relating to the viability of the fees could examine those facts and satisfy itself that they have properly discharged their statutory duty. In particular, they had to explain how they arrived at the figures that they adopted. In the absence of such explanation it is difficult to assess whether they had due regard to the viability of pharmacies. The mere statement by the applicants that they have done so is insufficient.*"[89]

76. What was expected of the Pricing Committee in *New Clicks* was an explanation of how the dispensing fees were arrived at, i.e., why the Pricing Committee chose the figures that it chose and how the members of the Pricing Committee satisfied themselves that these figures were appropriate.[90]

77. In these proceedings it is contended that the signature requirements imposed by the Amendment Act serve a legitimate purpose in that they (i) minimise the prospect of frivolous entries into the election race; (ii) avoid an unwieldly ballot; and (iii) ensure that political parties and independent candidates compete on a level playing field.[91] But even if the requirement is rational, given that it has the effect of infringing on rights, reasonableness (the section 36 enquiry) becomes relevant.[92]

78. Insufficient information has been put before this Court to test the objective reasonableness of the signature threshold imposed, such as how Parliament was able to resolve that *this* figure was appropriate – particularly where a deposit was previously considered sufficient to deter frivolous contenders and prevent an

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[89] See also paras 541 to 543, where the following was concluded by Ngcobo J: "*There is much to be said for the conclusion reached by the SCA that the record "establishes that the fees are not appropriate and that the [applicants], within whose peculiar knowledge the calculation [of the fees are], were unable to give any rational explanation for the quantum of the fees."[339] Ordinarily failure to provide an explanation would lead to the inference that there is no rational explanation for the fees determined and that the fees are therefore arbitrary. This is more so here, where the fees have been challenged on the ground that they are not appropriate*." See also the judgments by Justice Sachs at para 664 and by Justice Van der Westhuizen at para 853.

[90] *New Clicks* at paras 403 and 535. An appropriate justification was also required of UNISA in support of its decision to abandon Afrikaans as a language of teaching and learning in *Chairperson of the Council of UNISA v AfriForum NPC* (CCT 135/20) [2021] ZACC 32; 2022 (2) SA 1 (CC); 2022 (3) BCLR 291 (CC) at paras 56-58. The Court held that it was incumbent upon UNISA to provide appropriate justification for its decision that had an adverse effect on the rights of Afrikaans students to receive tuition in their language of choice. There must be some evidence of how UNISA, as an organ of state, went about applying its mind.

[91] Fourth and fifth respondents' answering affidavit in the OSA application at para 75.

[92] *New National Party* above at paras 23-24.

unwieldly ballot[93] and the imposition of a signature requirement can lead to a reduction in electoral competition, candidate selection, administrative efficiencies of an election process, and a decrease in voter participation due to an absence of potentially preferred candidates,[94] and fear of intimidation.

79. The Fourth and Fifth respondents say that the 15% threshold was opted for because Parliament was advised that it was more likely to pass constitutional muster than a 20% requirement.[95] But this just shows that a sliding scale was employed – it does not show why the line should be drawn at 15% or that Parliament had gathered evidence that a 15% threshold would *not* have an impact on political rights. And it shows that a threshold impacts upon rights, as it obviously does – why else would Parliament be concerned about the impact passing constitutional muster?

80. In the same vein, the Minister of Home Affairs says that the 15% threshold is proportional because "*There is no evidence at all explaining why or how this [15% threshold] creates an insuperable or unreasonable bar to independent candidates*".[96]

81. In both cases, this ignores that it is the state respondents who bear the onus to establish that the limitation of rights is reasonable and justifiable.[97] In particular, the state respondents bear the onus of establishing the facts on which they rely for

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[93] The Venice Commission's Code of Good Practice in Electoral Matters incorporates certain guidelines adopted by the Venice Commission at its 51st Plenary Session in July 2002. It recognises that a deposit requirement is more effective than collecting signatures – see Michael Krennerich for the Venice Commission "Report on electoral law and electoral administration in Europe" (October 2020) p 21 at para 127.

[94] Santiago M. Perez-Vincent "A few signatures matter: Barriers to entry in Italian local politics" *European Journal of Political Economy* 78 (2023) 102333.

[95] Fourth and Fifth respondents submissions at para 64.

[96] Minister of Home Affairs submissions at para 65.2.

[97] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre As Amicus Curiae)* 2001 (4) SA 491 (CC) ("*Moise*") at para 31; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at paras 33-7; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC) at para 20.

justification.[98] The duty is acutely upon the state respondents especially where the political rights previously enjoyed without the same burden, are now limited by the introduction of the new requirements.

82. We have already explained that the introduction of the signature requirements limits the right to free and fair elections; the right to secret suffrage, the right to stand for office; and the founding constitutional value of multi-party democracy. It is for the state respondents to show what the effect of the 15% threshold will be on these rights. There is no indication that the state respondents interrogated the impact of the 15% threshold on these rights and whether such impact would be defensible.

83. This Court is required to scrutinise these limitations through the lens of proportionality in terms of section 36 of the Constitution and will require persuasive grounds for justification.

84. As the Court explained in *S v Bhulwana*:[99] "*In sum therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be*".[100]

85. Given the multitude of rights that are implicated, and the centrality of the rights and multi-party democracy to our constitutional order, the justificatory burden on the law-maker is accordingly a heavy one, particularly where Parliament is composed of

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[98] *Minister of Home Affairs v NICRO* 2005 3 SA 280 (CC) para 36. See also *Moise* at para 18 *("… to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court") and Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 84 *("where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law – usually the organ of state responsible for its administration – must put material regarding such considerations before the court").*

[99] 1996(1) SA 388 (CC).

[100] Para 18.

represented political parties that stand to gain from burdens imposed on new entrants. The respondents have failed to discharge this burden.

CONCLUSION

86. With the submissions outlined above, we respectfully submit that the Rivonia Circle has drawn this Court's attention to the broader impact of the new signature requirements which impact not only independent candidates but also unrepresented political parties. It would be amiss for this Court to be required to determine the issue related to signature requirements raised in the OSA application without an understanding of this broader impact.

87. Rivonia Circle does not seek costs against the Minister of Home Affairs, the Speaker of the National Assembly and the National Council of Provinces despite their refusal to consent to Rivonia Circle's admission. We submit that if Rivonia Circle's submissions are not upheld, it should similarly not be held liable for costs.

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CATHERINE KRUYER

Counsel for the Rivonia Circle NPC

Chambers, Durban and Sandton

25 August 2023

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 144/23

In the matter between:

INDEPENDENT CANDIDATE ASSOCIATION SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ALL POLITICAL PARTIES REGISTERED FOR ELECTIONS FOR THE NATIONAL ASSEMBLY	Sixth Respondent
and	
RIVONIA CIRCLE NPC	Amicus Curiae

CASE NO: CCT 158/23

And in the matter between:

ONE MOVEMENT SOUTH AFRICA NPC	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
and	
RIVONIA CIRCLE NPC	Amicus Curiae

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PRACTICE NOTE OF *AMICUS CURIAE* – RIVONIA CIRCLE

I. NATURE OF THE PROCEEDINGS

1. A constitutional challenge to various provisions of the Electoral Amendment Act 1 of 2023 ("**Amendment Act**"), including section 3 of the Amendment Act – on which Rivonia Circle NPC ("**Rivonia Circle**"), as *amicus curiae*, wishes to place emphasis – which imposes onerous signature requirements on independent candidates and unrepresented political parties to gain access to the ballot, where such candidates must obtain signatures amounting to 15% of the quota in the previous election for a seat in the relevant legislature.

2. Before this Court is —

2.1 the applications of the Independent Candidate Association ("**ICA**") and One Movement South Africa ("**OSA**") pertaining to the declaration of constitutional invalidity in respect of the impugned provisions of the Amendment Act; and

2.2 Rivonia Circle's application to be admitted as *amicus curiae*, which has already been determined by virtue of the directions issued by the Chief Justice on 23 August 2023, and Rivonia Circle's written submissions.

II. THE ISSUES TO BE ARGUED

3. As *amicus curiae*, Rivonia Circle seeks to emphasise:

3.1 the importance of pre-election equality and fairness;

3.2 the risk to secret suffrage posed by the onerous signature requirements; and

3.3 the appropriate level of scrutiny required in this matter, where Parliament bears a duty to provide justification for the regulatory figures and calculations informing the new signature requirements; to act positively to protect multi-party democracy; and to avoid retrogressive measures.

III. NECESSARY PORTIONS OF THE RECORD

4. Subject to any documents excluded by the applicants in their practice notes, all documents filed by the applicants and *amicus curiae* in the record before this Court must be read.

5. Subject to any documents excluded by the respondents in their practice notes, all documents filed by the respondents in the record before this Court must be read.

IV. ESTIMATE OF THE DURATION OF ORAL ARGUMENT

6. 10 minutes, as per the latest practice directive of this Court for *amicus curiae* – but subject to any additional time that the Court may allow.

V. SUMMARY OF THE ARGUMENT

7. The impugned provisions of the Amendment Act introduce onerous signature requirements, which unreasonably and unjustifiably restrict access to the ballot for independent candidates and unrepresented political parties, yet do not

similarly apply to political parties that are already represented in the national and provincial legislatures.

8. The signature requirements create an impermissible barrier to entry and serve as a deterrent to new entrants from participation in elections, thus eliminating competition and undermining the constitutional value of multi-party democracy and the rights to stand for office; to free and fair elections; and to secret suffrage.

9. The new signature requirements entail the diversion of significant human and monetary resources by independent candidates and unrepresented political parties in the pre-election stage, which blights the pre-election environment for such candidates by diminishing resources that may rather be used for electioneering and creates an uneven playing field and unequal opportunities for independent candidates and unrepresented political parties to contest elections.

10. Additionally, requiring voters to indicate for whom they intend to vote violates the right to secret suffrage, given that prospective voters must declare their political allegiance by indicating which party they support, as well as infringing on their right to privacy by providing personal information including their names, identity numbers and signatures. Once collected, this information must be submitted to the independent electoral body. Naturally, the disclosure of such sensitive information exposes voters to risks, including intimidation, pressure and coercion.

11. Despite the significant barrier to entry into the elections which must be cleared by new entrants, there is little justification for such barriers, where Parliament has not provided any explanation or justification for the figures set out in the

requirements under the Amendment Act despite possessing the duty to do so, thus creating an element of arbitrariness in its passing of electoral laws.

12. Parliament is similarly obliged to take reasonable, effective steps to uphold constitutional rights, as well as bearing a duty to not infringe constitutional rights, unless such infringement can be justified in terms of section 36(1) of the Constitution. However, as stated above, the new requirements under the Amendment Act retrogressively erode the rights to free and fair elections, secret suffrage, and to stand for office. In addition to constituting a retrogressive measure, this is a contradiction of the constitutional duties borne by Parliament.

VI. LIST OF AUTHORITIES (those to which reference will likely be made in oral argument are marked with an asterisk)

Cases

1. *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC)
2. *Bullock v Carter* 405 U.S. 134 (1972)
3. *Burson v Freeman* (90-1056), 504 U.S. 191 (1992)
4. *Clements v Fashing* 457 U.S. 957 (1982)
5. *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912
6. * *Glenister v The President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) *
7. *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC)
8. *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC)
9. *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC)
10. *Matatiele Municipality and Others v President of the RSA and Others (No 2)* 2007

(6) SA 477 (CC)

11. * *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC) *
12. *Minister of Home Affairs v NICRO* 2005 3 SA 280 (CC)
13. *Mlungwana v S* 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC)
14. *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre As Amicus Curiae)* 2001 (4) SA 491 (CC)
15. *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC)
16. * *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) *
17. *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC)
18. *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC)
19. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC)
20. *Ramakatsa v Magashule* [2012] ZACC 31; 2012 JDR 2203 (CC); 2013 (2) BCLR 202 (CC)
21. *Russian Conservative Party of Entrepreneurs v Russia*, Application Nos 55066100 and 55638/00, Merits and Just Satisfaction, 11 January 2007
22. *S v Bhulwana* 1996(1) SA 388 (CC)
23. *Storer v. Brown*, 415 U.S. 724, 737 (1974)
24. *Tahirov v Azerbaijan*, No. 31953/11, ECtHR (First Section), 11 June 2015
25. *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC)
26. *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for*

Democracy in South Africa and Another as Amici Curiae) (No 2) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179

27. *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC)

28. *Yatama v Nicaragua IACtHR Series C* 127 (2005)

Foreign law

29. Section 66(1)(e) of the Canada Elections Act (S.C. 2000, c. 9)

30. Section 166 of the Commonwealth Electoral Act 1918

31. Section 99 of the Constitution of Kenya, 2010

32. Section 33 of the Representation of the People Act of 1951

33. Section 119 of Finland's Election Act (2004)

34. Section 20(2) and (3) of Germany's Federal Elections Act (1993)

International law

35. Article 3 of Protocol No. 1 to the European Convention on Human Rights

36. Article 21 of the Universal Declaration of Human Rights of 1948

37. Articles 25 and 25(b)of the International Covenant on Civil and Political Rights

38. * General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7 *

39. Inter-American Democratic Charter

40. International Institute for Democracy and Electoral Assistance International Electoral Standards: Guidelines for Reviewing the Legal Framework for Elections (200)

41. Explanatory Report adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002)

South African law

42. Sections 27, 27(2)(e), 29, 31B(3)(b), 31D, 38, 39, 70 and 90 of the Electoral Act 73 of 1998

43. Section 3 of the Electoral Amendment Act 1 of 2023

44. Section 5 of the Public Funding of Represented Political Parties Act 103 of 1997

45. The Constitution of the Rublic of South Africa, 1996

Reports

46. * The Khampepe Report on the 2002 Presidential Elections of Zimbabwe

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48. Johns, A. *The case for political candidacy as fundamental human right* (2016) Human Rights Law Review, 16(1), 29-54.

49. Jørgen Elklit and Palle Svensson "*The rise of election monitoring: What makes elections free and fair?*" Journal of Democracy Vol. 8, No. 3 (July 1997) 32 at p 35

50. J Wigmore *The Australian ballot system as embodied in the legislation of various countries* (2nd edition) cited in Eric Van Hagen "Notes and comments, The Not-So-Secret Ballot: How Washington Fails to Provide a Secret Vote for Impaired Voters as Required by the Washington State Constitution" 80 *Wash. L. Rev.* 787 (2005) at 787

51. Santiago M. Perez-Vincent "*A few signatures matter: Barriers to entry in Italian local politics*" European Journal of Political Economy 78 (2023) 102333

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