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
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
and	
RIVONIA CIRCLE NPC	Amicus Curiae

Neutral citation:	*One Movement South Africa NPC v President of the Republic of South Africa and Others* [2023] ZACC 42
Coram:	Zondo CJ, Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ, Theron J and Van Zyl AJ
Judgments:	Zondo CJ (uninamous in respect of direct access, minority in respect of the signature challenge and majority in respect of the recalculation challenge): [1] to [212]

Kollapen J (majority in respect of the signature challenge): [213] to [355]
Theron J (partial dissent): [356] to [385]

Heard on: 30 August 2023

Decided on: 4 December 2023

Summary: Section 31B(3) of the Electoral Act 73 of 1998 as amended by the Electoral Amendment Act 1 of 2023 — unconstitutional — declaration of invalidity suspended for 24 months — interim reading-in

Unjustifiable limitation — sections 18(1), 19(1) and 19(3) of the Constitution — regulation versus limitation

Items 7, 12 and 23 of Schedule 1A of the Electoral Act 73 of 1998 as amended by the Electoral Amendment Act 1 of 2023 — constitutional — challenge dismissed

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ORDER

On application for direct access the following order is made:

1. The applicant is granted direct access to this Court.
2. The recalculation relief sought in prayers 4, 6.2 and 6.3 of the applicant's notice of motion is refused.
3. Section 31B(3)(a)(i) and (ii) of the Electoral Act 73 of 1998 (Electoral Act) as inserted by the Electoral Amendment Act 1 of 2023 is declared invalid and inconsistent with the Constitution, to the extent that it unjustifiably limits the rights to freedom of association, freedom to make political choices and to stand for public office.
4. The declaration of invalidity referred to in paragraph 3 is suspended for 24 months from the date of this order to afford Parliament an opportunity to remedy the constitutional defects giving rise to the constitutional invalidity.

5. From the date of the order of this Court and during the period of suspension, section 31B(3)(a)(i) and (ii) of the Electoral Act will read as follows, the underlined words being read into the section with the words in strike-out text being severed:

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

(*a*) A completed prescribed form confirming that the independent candidate has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear—

(i) in the case of an election of the National Assembly in respect of regional seats, on the national segment of the voters' roll and who support his or her candidature, totalling 1 000 signatures for each region in which the candidate intends to contest an election;

~~(*aa*) totalling 15 percent of the quota for that region in the preceding election, if intending to contest only one region; or~~

~~(*bb*) totalling 15 percent of the highest of the regional quotas in the preceding election, if intending to contest more than one region, provided that where 15 percent of the highest of the quotas is not achieved, that the independent candidate may only contest the region or regions as determined by the next highest quota;~~

(ii) in the case of an election of a provincial legislature, on the segment of the voters' roll for the province and who support his or her candidature, totalling 1 000 signatures ~~least 15 percent of the quota of that province in the~~

~~preceding election, which the independent candidate intends to contest~~,

provided that an independent candidate who was elected to either the National Assembly or a provincial legislature as an independent candidate in the preceding election shall be exempt from this requirement."

6. In the event that Parliament does not remedy the constitutional deficiency in section 31B(3)(a)(i) and (ii) within the period provided for in paragraph 4 of this order, or any extended period granted by this Court, then section 31B(3)(a)(i) and (ii) will be deemed to read as set out in paragraph 5 above.

7. The second, fourth and fifth respondents, jointly and severally, are to pay fifty percent (50%) of the applicants' costs, which costs shall include the costs of two Counsel. The applicant is not entitled to recover any costs associated with the report of Mr Atkins.

JUDGMENT

ZONDO CJ (Mathopo J, Schippers AJ and Van Zyl AJ concurring in respect of the whole judgment. Maya DCJ, Mhlantla J and Kollapen J concurring in respect of only direct access and the recalculation point):

Introduction

[1] One Movement South Africa NPC (OSA or applicant) is a registered not-for-profit company. It has as some of its members individuals who intend to contest the national and provincial elections that will be held in this country some time in 2024 as independent candidates.

[2] Clause 2 of OSA's constitution provides that OSA's vision is "a society in which all men and women, regardless of background and race, live together side by side peacefully and [will] be able to prosper together". OSA's constitution further provides in part that OSA envisions "a South Africa that is:

> 2.1.1. a crime free society
> 2.1.2. a racially cohesive and integrated society
> 2.1.3. an educated society with high quality jobs
> . . .
> 2.1.8. a society where political leaders are accountable."

[3] OSA has cited the President of the Republic of South Africa as the first respondent, the Minister of Home Affairs (Minister) who is the Minister responsible for the administration of the Electoral Act[1] as the second respondent, the Independent Electoral Commission (IEC or Commission), which is the body constitutionally mandated to manage elections in this country, as the third respondent, the Speaker of the National Assembly (Speaker) as the fourth respondent and the Chairperson of the National Council of Provinces (NCOP) as the fifth respondent. Rivonia Circle NPC was admitted as an amicus curiae. We are indebted to the amicus for its submissions and its assistance in this matter. The President abides the decision of this Court. The Minister, the Speaker of the National Assembly and the Chairperson of the NCOP oppose the application. The IEC abides the decision but delivered an explanatory affidavit.

Should direct access be granted?

[4] OSA has brought an application for direct access to this Court as a matter of urgency for an order declaring certain provisions of the Electoral Amendment Act[2] (EAA) inconsistent with the Constitution and, therefore, invalid. This Court grants direct access when it is in the interests of justice to do so. Direct access means that a

[1] 73 of 1998.

[2] 1 of 2023.

matter is brought to this Court without first having been taken to another Court. Where this Court grants direct access, it decides the matter as a court of first and final instance. That is not something that this Court does lightly because we appreciate the importance of having the benefit of the views of other courts on issues before they are decided by this Court. There will have to be exceptional circumstances before it can be said that it is in the interests of justice for this Court to grant direct access in a matter.

[5] The justification advanced by OSA for its application for direct access and for this matter to be dealt with on an urgent basis or to be given a certain amount of priority is this. Parliament passed the EAA to correct the constitutional defect identified in the Electoral Act by this Court's judgment in *New Nation Movement*.[3] OSA contends that, although the EAA will enable independent candidates to stand for election in next year's elections and in future elections, it infringes their right to stand for election to public office, their right to dignity and their right to disassociate.

[6] OSA, therefore, seeks to ensure that by the time of the elections next year the constitutional defects which it contends are to be found in the EAA have been corrected. Accordingly, OSA contends that it is of critical importance that this Court decides the constitutional validity of the relevant provisions of the EAA while there is enough time for Parliament to correct any constitutional defect of the EAA that this Court may identify if it upholds OSA's contentions.

[7] The date for next year's elections has not yet been fixed. However, it is accepted by all parties in this matter that constitutionally the date for the elections is required to be somewhere between early May and sometime in August 2024. OSA argues that, if it had to first take this matter to the High Court and, thereafter, come to this Court for confirmation of any declaration of invalidity that the High Court might make, that would cause such a delay that there would be a serious risk that, by the time the matter was brought to this Court, there would not be enough time for Parliament to correct any

[3] *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 BCLR 950 (CC).

constitutional defect that this Court could identify if it upheld OSA's contention. Indeed, the IEC might also not have enough time to make all the arrangements that may need to be made in order to ensure that the elections are free and fair.

[8] None of the respondents opposed OSA's application for direct access and for this matter to be accorded a certain amount of priority. I am of the view that OSA has reasonable prospects of success. I agree that, if OSA was required to first take this matter to the High Court before bringing it to this Court, by the time this Court handed down its judgment, there would not be enough time for Parliament to correct whatever constitutional defect this Court might identify in the EAA if it upheld OSA's contentions. Assuming that OSA's complaint about the EAA is well founded, that would cause OSA and independent candidates serious prejudice in next year's elections. It is, therefore, in the interests of justice for this Court to grant OSA direct access. Accordingly, leave is hereby granted to OSA to bring this matter directly to this Court.

Background

[9] Since the advent of our constitutional democracy in the April 1994 elections for national and provincial legislative bodies in this country have been conducted on the basis that no individual could stand for election to any such bodies. Voters voted only for political parties. In turn political parties provided lists of persons that they nominated for membership of those legislative bodies if they won seats in those bodies. In 2020 this Court handed down its judgment in *New Nation Movement* and declared the Electoral Act inconsistent with the Constitution and, therefore, invalid to the extent that it did not allow an individual adult citizen to stand for election to the legislative bodies at national and provincial levels without having to be a member of a political party. This Court suspended that declaration of invalidity for 24 months to afford Parliament the opportunity to correct the constitutional defect within that period.

[10] In *New Nation Movement* this Court, through Madlanga J, said that there were two issues before it. The first was whether – by making access to political office possible only through membership of a political party – the Electoral Act unjustifiably

limited the right to freedom of association guaranteed in section 18 of the Constitution. The second issue involved a determination of the content of the right enshrined in section 19(3)(b) of the Constitution and whether the Electoral Act unjustifiably limited that right.[4]

[11] Madlanga J later stated that, on its own, the freedom of association challenge begged the question. He said that that challenge could not be dealt with as a standalone challenge. He went on to say that this did not mean that freedom of association was irrelevant to determining the content of the right provided for in section 19(3)(b) of the Constitution.[5]

[12] Section 19 of the Constitution deals with entrenched political rights. It reads:

> "Political rights
>
> 19. (1) Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[4] *New Nation Movement* above n 3 para 10.

[5] *New Nation Movement* above n 3 para 4.

Early in his judgment in *New Nation Movement*, Madlanga J said:

> "[17] I want to lay emphasis on subsection (1). It affords every citizen the freedom to make political choices. The fact that what are itemised in the subsection as being the choices a citizen is free to make all relate to political parties does not mean those choices concern political parties only. If that were the case, instead of saying these rights or freedoms "include", the subsection would simply have said the rights "are". The present formulation means the rights are more than what is itemised. As the first applicant submits, paragraphs (a) to (c) of section 19(1) 'are mere examples of "political choices"; they do not cover the field of what [section 19(1)] protects'. A conscious choice not to form or join a political party is as much a political choice as is the choice to form or join a political party; and it must equally be deserving of protection.
>
> [18] Once an adult citizen is forced to exercise the section 19(3)(b) right through a political party, that divests her or him of the very choice guaranteed by section 19(1) not to form or join a political party. That cannot be. We must strive for a reading that does not truncate the full effect of any of the rights afforded by section 19. The respondents' reading of section 19(3)(b) results in a diminution of the political choices afforded by section 19(1). Effectively that gives rise to a conflict between the two subsections."

[13] In *New Nation Movement* this Court referred to *UDM II*.[6] There, the question was whether members of the National Assembly could vote in accordance with their conscience when voting in a motion of no confidence in President Jacob Zuma. Madlanga J then referred to this passage in *UDM II*:

> "As is the case with general elections where a secret ballot is deemed necessary to enhance the freeness and fairness of the elections, so it is with the election of the President by the National Assembly. This allows Members to exercise their vote freely and effectively, in

[6] *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at paras 73-4.

> accordance with the conscience of each, without undue influence, intimidation or fear of disapproval by others.
>
> The frustration or disappointment of the losing presidential hopeful and his or her supporters could conceivably have a wide range of prejudicial consequences for Members who are known to have contributed to the loss. To allow Members of the National Assembly to vote with their conscience and choose who they truly believe to be the best presidential material for our country, without any fear of reprisals, a secret ballot has been identified as the best voting mechanism."[7]

[14] This Court went on to say in *New Nation Movement* that, if all members of the National Assembly were free to vote as they saw fit regardless of how politically sensitive an issue might be and without any risk of reprisals from their political parties, litigation on this issue would not have been necessary. It went on to say that it was exactly because the opposite prevailed that the litigation was instituted. It said that this would not have been an issue at all for someone not subject to encumbrances of party politics; someone not owing his or her membership of the National Assembly to a political party.

[15] The concern was that the majority of members of the National Assembly did not necessarily vote in accordance with their true beliefs or convictions on certain matters that are very important to the country and its people. This was because they were instructed by their party leadership on how to vote on certain issues. This was also the reason why the United Democratic Movement (UDM) approached this Court in what has become known as the secret ballot case.[8] In that case the UDM wanted the Speaker to ensure that a secret ballot – as opposed to a show of hands – was conducted in the National Assembly. This Court held that the Speaker had a discretion to direct that the ballot in a vote of no confidence in a President be held in secret. The UDM made this request for the ballot to be held in secret because it believed that there were many members of the National Assembly who were members of the majority party who had

[7] Id.

[8] *UDM II* above n 6.

genuinely lost confidence in President Zuma at the time and who would have liked to vote in support of the motion of no confidence in President Zuma but would not be able to do so if the ballot was not secret. This would have been because the leadership of their party either had already given an instruction, or, it was believed that they would soon give an instruction, that all African National Congress (ANC) members of the National Assembly should not support the motion of no confidence in President Zuma.

[16] When any member of Parliament makes a decision or allows himself or herself to be party to a decision that he or she knows deep down in his or her heart is not in the interests of the people of South Africa, he or she betrays the people of South Africa. In *UDM II* this Court said through Mogoeng CJ:

> "[37] In anticipation of a President and this constitutionally envisaged team's possible remissness in the execution of their constitutional mandate, provision was made to minimise or address that possibility. Those who represent the people in Parliament have thus been given the constitutional responsibility of ensuring that members of the executive honour their obligations to the people. Parliament, that elects the President and of which the Deputy President, Ministers and their deputies are members, not only passes legislation but also bears the added and crucial responsibility of 'scrutinising and overseeing executive action.'"[9]

[17] As already stated above, this Court concluded in *New Nation Movement* that the EAA was inconsistent with the Constitution and, therefore, invalid to the extent that it did not allow an adult citizen to stand for public office except through membership of a political party. The legislation that Parliament has passed in response to that judgment may well allow independent candidates who will serve in the National Assembly to tilt the scale to get the majority of members in the National Assembly to put the interests of the people first in whatever they do. That would include when they vote in future motions of no confidence.

[9] *UDM II* above n 6 at para 37.

[18] Subsequent to the handing down of the *New Nation Movement* judgment, the Minister commissioned a panel of experts, the Ministerial Advisory Committee (Committee), to provide technical proposals to give effect to the judgment. This Committee consisted of eight members who subsequently submitted a report to the Minister. The Minister attached a copy of that Committee's report to his affidavit. The members of the Committee were divided on the advice to give to the Minister. Four members proposed a combination of a single member constituency and proportional representation system. This was the majority option. Three members of the Committee proposed a modification of the existing system so as to permit independent candidates to contest the elections. This was the minority option. One member of the Committee chose not to state a preferred option.

[19] In their report the Committee had this to say in part about the two options:

> "Option 1 (Minority report): The slightly modified multi-member constituency (MMC), which stakeholders referred to as the minimalist option.
>
> This option entails modifying the existing multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation. Those in favour of this option believe that it does not interfere with the constitutionally required general proportionality and is the best option for ensuring inclusiveness, gender representation, simplicity and fairness for independents.
>
> Option 2 (Majority report): The mixed-member model incorporating single-member constituencies.
>
> This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system resembling the current local government electoral system, albeit with some improvements. It involves electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency. Thus, voters would vote for a single MP to represent

> them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing for closed party lists (their second vote). Those in favour of this option believe that it does not interfere with the constitutionally required general proportionality and is the best option for ensuring inclusiveness, gender representation, simplicity and fairness for independents."

[20] The Minister accepted the minority option. It would seem from his affidavit that he chose the minority option out of pragmatism, given what could be done before the 2024 elections. He left the door open as to what option could be decided upon after the 2024 elections for long term.

[21] In February 2023 Parliament passed the Electoral Amendment Bill (Bill). The President assented to the Bill in April 2023 which then became the EAA. It is now necessary to deal with the relevant features and sections of the EAA. The EAA permits independent candidates to stand for public office and, if elected, to hold public office. There are only two respects in which OSA is unhappy about the EAA. The first complaint relates to section 31B(3) of the EAA. This section relates to a signature requirement about which more is said below. The other one relates to how the recalculation of seat allocations is done when an independent candidate is elected, but their surplus votes are either discarded or when an independent candidate vacated his or her seat. I propose to deal with the signature requirement first and thereafter with the recalculation challenge.

The signature requirement

[22] For the first time in the history of our constitutional democracy since 1994 adult citizens will be able to stand for election to public office in the form of the National Assembly or provincial legislatures. This is because the EAA makes this possible. As already indicated above, this follows upon the judgment of this Court in *New Nation Movement.*

[23] Section 4 of the EAA introduces Part 3A into Chapter 3 of the Electoral Act. Part 3A deals with independent candidates. The reference to independent candidates is a reference to candidates who contest elections independently of a political party. Section 31A governs the nomination of independent candidates. Section 31B governs the requirements and qualifications for independent candidates to contest elections.

[24] Section 31B(1) and 3(a)(i) and (ii) reads:

> "31B. (1) A person may contest an election as an independent candidate only if that person is nominated on a prescribed form and that form is submitted to the Commission by not later than a date stated in the timetable for the election and complies with the requirements of subsection (3).
>
> . . .
>
> (3) The following must be attached to a nomination when it is submitted:
>
> (*a*) A completed prescribed form confirming that the independent candidate has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear—
>
> (i) in the case of an election of the National Assembly in respect of regional seats, on the national segment of the voters' roll and who support his or her candidature—
>
> (*aa*) *totalling 15 percent of the quota for that region in the preceding election, if intending to contest only one region; or*
>
> (*bb*) *totalling 15 percent of the highest of the regional quotas in the preceding election, if*

> *intending to contest more than one region*, provided that where 15 percent of the highest of the quotas is not achieved, that the independent candidate may only contest the region or regions as determined by the next highest quota; or
>
> (ii) in the case of an election of a provincial legislature, on the segment of the voters' roll for the province and who support his or her candidature, totalling at least 15 percent of the quota of that province in the preceding election, which the independent candidate intends to contest,
>
> provided that an independent candidate who was elected to either the National Assembly or a provincial legislature as an independent candidate in the preceding election shall be exempt from this requirement;" (Emphasis added.)

The reference to a quota is a reference to the number of votes a political party or independent candidate must get in an election in a particular region or province in order to get one seat.

[25] OSA states that its complaint about section 31B(3) is the requirement that an independent candidate must secure signatures of registered voters amounting to 15% of the quota in the previous election in the relevant region. The deponent to OSA's founding affidavit, Mr Mogoale, pointed out that OSA's complaint with regard to the requirement of signatures was that the EAA placed "an impermissible and arbitrary barrier to entry for independent candidates to register for elections by placing an unreasonably high signature requirement upon them". What this means is that OSA

relied upon the contention that the signature requirement was unreasonably high to submit that the signature *requirement was impermissible and arbitrary*. In its founding affidavit OSA said that it would "*demonstrate that the 15% signature requirement is arbitrary and poses a barrier to entry for independent candidates*" (emphasis added).

[26] OSA puts its chief complaint about the requirement of signatures thus:

> "[O]ne of the factors informing this choice is the ability to attain the required number of signatures in order to register with the IEC. The *chief complaint of OSA* is that the Amendment Act requires both political parties and independent candidates to acquire the same number of signatures in order to register." (Emphasis added.)

This statement says that the applicant's chief complaint about the requirement of signatures was that it applied to both independent candidates and political parties. As one reads this statement, one expects to see some substantiation of this chief complaint but there is none.

[27] OSA continued and said in its founding affidavit:

> "While on the face of it, it is a formally equal requirement, this results in a substantively unequal outcome, creates an unfair barrier to entry for independent candidates and goes against the purpose of *New Nation II*."

After the above excerpt, OSA quoted paragraphs 52 and 53 of this Court's judgment in *New Nation Movement.*[10] However, there is nothing in those two paragraphs which

[10] *New Nation Movement* above n 3 at paras 52-3 provides that:

> "[52] Being coerced to form or join a political party is an issue that may fundamentally touch one's inner core; a matter that goes to one's conscience. And freedom of conscience is protected by section 15(1) of the Constitution. It is so that individual members of a legislature remain 'free to follow the dictates of personal conscience'. But they do so at their own peril because 'if [they] wish to be re-elected they need to bear in mind party discipline'. A classic Hobson's choice for somebody who does not want to be shackled by party politics and constraints.

supports OSA's statement at the end of the above excerpt that the requirement that an independent candidate and a political party that is not yet represented in the National Assembly or provincial legislature must obtain signatures that are equal to 15% of the quota goes against the purpose of the *New Nation Movement* judgment. I shall refer to such a political party in this judgment simply as a new political party.

[28] OSA states that, in real numbers, for the upcoming 2024 national and provincial elections independent candidates will be required to attain the following number of signatures (equating to 15% of the relevant quotas) to contest an election:

	National Legislature	**Provincial Legislature**
Eastern Cape	11 657	4 672
Free State	11 340	4 286
Gauteng	13 890	8 757
KwaZulu-Natal	13 045	6 664
Limpopo	11 329	4 357
Mpumalanga	11 925	5 886
North West	11 652	4 213
Northern Cape	10 271	4 920
Western Cape	13 201	7 176

Ms Revell, the second applicant, is such a person. We cannot make light of her choice. In the interpretative exercise, her personal situation is merely illustrative.

[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."

[29] OSA then deals with the purpose of the signature requirement as it understood it. OSA states that the stated purpose of imposing a signature requirement on independent candidates "is that such a requirement will ensure that candidates have a serious intention of contesting elections and limit the number of frivolous candidates on the ballot". OSA states that this supposedly ensured that the IEC "[was] able to run elections effectively". It also states that "the signature requirement supposedly prevented voting from becoming too complicated for voters and prevented vote counting from being overly complicated and taking a much lengthier period".

[30] OSA also states that, prior to the EAA, political parties were required to submit 1 000 signatures to register themselves as national parties with the IEC. OSA goes on to state that "the only reasonable inference to draw is that 1 000 signatures satisfied the same purpose so that political parties are serious about entering the election race". OSA points out that, instead of maintaining this 1 000 signature requirement, the EAA changed this requirement to direct that political parties also attain the 15% entry requirement. In other words, says OSA, instead of requiring independent candidates to also obtain 1 000 signatures in the same way that political parties were obliged to obtain that number of signatures under the Electoral Act, now both political parties and independent candidates are required to secure 15% of a quota of the relevant region in respect of a previous election.

Minister Motsoaledi

[31] According to the Minister, the purpose of the signature requirement is "to ensure prospective independent candidates or prospective political parties seeking to contest the national elections in fact have some plausible chance of gaining sufficient public support to be elected". The Minister goes on to say in the same paragraph:

> "With respect, this eligibility requirement is eminently rational, sensible and constitutionally permissible. If an independent candidate (or political party) seeking to contest the elections is unable to gather enough support to equate to 15% of the votes likely to be required to

> obtain a seat, they would be extremely unlikely to obtain enough votes to meet the quota for a seat in the election."

[32] If the quota of the previous election was 44 000, an independent candidate would need to obtain 15% of 44 000 which is 6 600. If, therefore, an independent candidate cannot obtain 6 600 signatures of registered voters to contest elections, how can he or she hope to get 44 000 votes during the actual election? It would be highly unlikely. 15% is under one sixth of the votes he or she would require to win a seat.

[33] The Minister says that the purpose of the 15% signature requirement is also to act as a sifting mechanism to ensure the integrity of the general elections. He says that this requirement seeks to discourage independent candidates and political parties who have no plausible hope of obtaining a seat from contesting the elections. The requirement also seeks to ensure that the ballots are kept to a manageable length and that voters are not overwhelmed by unnecessarily long and unwieldly ballots.

[34] The Minister contends that OSA's attack on section 31B(3) of the EAA is misplaced because, if it were to be upheld, the result would be to lower the threshold for independent candidates (unrepresented in the legislatures) to contest an election while making it more difficult for political parties (unrepresented in the legislatures) to contest elections. He points out that this would be so because, while OSA challenges the constitutional validity of section 31B(3), it did not direct any challenge to section 27(2)(cB) of the EAA which makes the signature requirement applicable to political parties that are not yet represented in the legislative bodies. He submits that there is no basis for this differentiation and Parliament had correctly made the signature requirement applicable to both independent candidates and new political parties.

[35] The Minister disputes OSA's contention that section 31B(3) limits the right to stand for public office in section 19(3)(b) of the Constitution and other political rights. He contends that the Constitution recognises that it is necessary to regulate the exercise of the right to stand for public office. He points out that, without reasonable regulation

of such right, it would be impossible to give substantive content to the right. He states that the Constitution anticipates this by requiring that elections be held in terms of an electoral system prescribed by Parliament. He submits that the requirements that must be met by a contestant to register for and to contest an election are a constitutional imperative and not a limitation of the right to stand for public office. He also states that there is a limited number of seats which may be the subject of electoral contestation. The Minister states that, unless the exercise of that right is regulated properly, too many candidates would contest elections irrespective of their prospects of success with the result that the ballot paper could be too long and unwieldly. He submits that, if that were to happen, namely if anybody and everybody could stand for elections irrespective of their prospects of success, it would result in an election that is not free and fair. OSA did not file any further affidavits to dispute this.

[36] In concluding on the OSA challenge to the signature requirement, the Minister refers to the fact that in the past this Court "similarly evaluated the constitutionality of voter registration requirements (including the need to have a bar-coded ID book)". He points out that this Court concluded that these requirements did not limit rights.

Parliament

[37] Mr Mosa Steve Chabane is the Chairperson of the Portfolio Committee on Home Affairs in the National Assembly. He deposed to an answering affidavit on behalf of the Presiding Officers of both the National Assembly and the NCOP. Mr Chabane points out that the purpose of the signature requirement is to minimise the prospect of frivolous entries into the election race. He also states that "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". He says that it avoids a situation of an unwieldly ballot, full of candidates who have no hope of being elected. He says that this would be confusing to voters and ultimately could undermine the freeness and fairness of the election.

[38] Some of the points made by Mr Chabane are the following:

(a) a balance was struck between ensuring that persons contesting the elections are serious about the election and have some prospects of being elected and not placing barriers which unnecessarily and unjustifiably dissuade participation in contesting elections.

(b) The threshold of 15% is imminently reasonable when regard is had to the fact that, if an independent candidate or political party is not able to meet the 15% threshold, this means that they are not able to demonstrate the support of less than one fifth of the total number of votes required for a seat in the election.

[39] Mr Chabane also points out that OSA's contention that, if the requirement of 15% signatures were to be changed to a requirement of 1 000 signatures, that would equally achieve the same objective as the objective of 15% is mistaken. He explains that the requirement of 1 000 signatures applies to political parties when they register with the IEC and not when they seek to contest elections. He states that the signature requirement relating to section 31B(3) and the signature requirement that relates to the registration of political parties with the IEC serve different purposes.

[40] Mr Chabane points out that the signature requirement relating to the registration of political parties conveys the seriousness of the political party to operate as a serious and well-organised party. He said that this requirement is not directly concerned with the ballot or the manageability of elections as a whole. Mr Chabane points out that there were 331 registered national political parties and a ballot that tried to accommodate all these political parties would be unworkable.

IEC

[41] Mr S Mamabolo, the Chief Executive Officer of the IEC, states that section 31B(3) requires an independent candidate to submit supporting signatures from registered voters in the region or province in which the candidate intends to compete

totalling 15% of the quota for a region or province in the previous election (or, if the candidate is contesting in more than one region in the national elections, totalling 15% of the highest of those regional quotas). It then says that, based on the 2019 election quotas, 15% thereof equates to between approximately 10 000 and 14 000 signatures to contest in the national elections (depending on the region) and between 4 000 and 9 000 signatures to contest in provincial elections (depending on the province).

[42] Mr Mamabolo points out that the requirement of proof of support to contest the election must be distinguished from the requirement of supporting signatures for the registration of political parties. The requirements for registration of a political party are set out in section 15 of the Electoral Commission Act[11] and the Regulations for the Registration of Political Parties, 2004[12] (2004 Regulations).

[43] Mr Mamabolo responded to OSA's statement in its founding affidavit that political parties were previously required to submit 1 000 signatures of registered voters to contest elections. OSA said in effect that there was no reason why independent candidates and new political parties were not required to also submit 1 000 signatures instead of 15% of the quota based on the previous elections. Mr Mamabolo explains that the requirement of 1 000 signatures of registered voters is still a requirement for political parties, not to contest elections but to register with the IEC. Mr Mamabolo explains that, upon registration with the IEC, a political party obtains a registration certificate and its registration particulars, including its name, abbreviated name and symbol are published in the *Government Gazette* which are then afforded legal recognition and protection.

[44] The effect of the registration of a political party with the IEC is to be gathered from regulation 8 of the 2004 Regulations. Regulation 8 reads:

[11] 51 of 1996.

[12] Regulations for the Registration of Political Parties, 2004, GN R217 *GG* 26058, 7 January 2004.

"A party registered under these Regulations shall—

(a) be entitled to be represented on a party liaison committee as contemplated in the Regulations on Party Liaison Committees;

(b) have free access to any voters' roll compiled and maintained by the Commission; and

(c) be entitled to protection by the Commission of its name, abbreviation of its name and distinguishing mark or symbol."[13]

[45] Mr Mamabolo goes on to point out that the fact that a political party has been registered with the IEC does not entitle the party to contest an election. This is important to note because it means that the requirement of 1 000 signatures with which political parties must comply is not a requirement for contesting elections. It is a requirement for the registration of a political party with the IEC. Once a political party has been registered with the IEC and then wants to contest elections, there are requirements for contesting elections with which the political party must comply. These are provided for in section 27(1), (2), (3) and (4) of the Electoral Act. These are that:

(a) it must submit a list of its candidates and a declaration of its candidates' qualification to stand for election and acceptance of the nomination;

(b) a declaration of commitment by a duly authorised representative and each of its candidates, to comply with the Electoral Code of Conduct;

(c) it must pay the prescribed deposit for participation in the election; and

(d) political parties that are not yet represented in either a provincial legislature or in Parliament are required, additionally, to submit the signatures of registered voters

[13] Regulation 8 of 2004 Regulations.

> equating to 15% of the relevant quota in the previous election.

[46] Mr Mamabolo also points out that to register, every political party whether they are already represented in one or other legislative body or not is required, among others, to submit 1 000 supporting signatures of registered voters. He points out that, contrary to OSA's assertion that this is a repealed requirement, this requirement is currently applicable. Mr Mamabolo also points out that OSA's statement that this requirement was prescribed in terms of section 27 of the Electoral Act is not correct. He states that this requirement is prescribed in terms of section 15(3)(a) of the Electoral Commission Act and regulation 3 of the 2004 Regulations.

[47] Mr Mamabolo also states that, in order to contest an election, political parties which are not represented in one or other of the legislative bodies must prove their capacity to participate successfully in the election by submitting signatures amounting to 15% of the quota of the relevant region from the previous election and this requirement also applies to independent candidates. In respect of political parties, the requirement is provided for in section 27(2)(cB) whereas in respect of independent candidates it is provided for in section 31B(3).

[48] Mr Mamabolo also states that the signature requirement for the registration of a political party serves a different purpose to the signature requirement for contestation. He says that OSA mistakenly conflates the two. He goes on to say:

> "The signatures requirement on registration aims to ensure that the associations seeking to be recognised and legally protected as political parties convey their intention, and demonstrate the capacity, to operate as a serious and well-organised party. While it serves a different purpose to the requirement of a signature for contestation of an election, both signature requirements are clearly complementary. Both signature requirements ultimately prevent frivolous participation in elections."

[49] Mr Mamabolo also states that the trend indicates that the signature requirement for the registration of a party – even when increased to 1 000 signatures – did not serve as an indicator of voter support to justify a candidate as a serious contender in an election. He says that in the most recent election nearly three-quarters of participants (political parties) were unsuccessful and forfeited their deposits. He points out that the 1 000 signature requirement also did not protect against the risk of an election with an unmanageable number of contestants. He says that this risk has been substantially heightened with the inclusion of independent candidates as participants. This simply has to be true. Whereas in the past it could, for example, be 24 or 48 political parties which did not get even a single seat, with independent candidates it could even be thousands of candidates who will contest the election if all they need is a number of signatures which is not related in any way to the number of votes they must get in the election in order to get one seat. One thousand signatures is such a number.

[50] Mr Mamabolo also points out that a secondary but not unimportant factor is the cost of multi-page ballot papers. He says that the cost of the long ballot papers used in the 2019 election came to about R35 million. He states that with the sharp rises in the cost of paper since 2019, the inflation adjusted 2024 cost – which includes the introduced third ballot – was projected and budgeted at R66 million. He says that that takes into account the single-column ballot paper similar to the 2019 ballot, permitting 48 contestants. One only has to imagine what would happen if there were thousands of independent candidates in the ballot who will contest elections because the threshold is too low and bears no relationship to the number of votes they will have to get in the elections to get one seat.

[51] Mr Mamabolo also makes the point that, if an independent candidate or political party cannot secure 15% of the quota of a previous election, it means that the independent candidate or political party is unable to show voter support of less than one-fifth of the support he, she or it will need to win just one seat in the elections. He then says that it is difficult to think how a person or political party that cannot get less

than one-fifth of the votes required in order to obtain one seat before the elections can manage to get five times that number of support in the elections.

[52] Mr Mamabolo points out that there is no international standard for parties and individual candidates to prove their support before participating in an election. He says that there is a wide disparity in the signature requirements adopted by different countries, based on their own circumstances, needs and electoral systems many of which are not based on proportional representation. He says that the Commission considers that Denmark provides a useful comparator as it has an electoral system akin to South Africa's, including the participation of independent candidates. Denmark requires one signature for every 175 votes cast in the previous election. He points out that in the 2022 elections in Denmark, the formula resulted in a requirement of 20 194 signatures, based on 3 535 952 votes cast in the previous election.

[53] Mr Mamabolo states that, by comparison, in the 2019 provincial election in KwaZulu-Natal a broadly similar number of 3 652 577 votes were cast. He then says that, if the Danish formula of one signature for every 175 votes were used, the requirement would be 20 872 signatures. That, of course, is much more than is required in South Africa for the election in 2024. Mr Mamabolo goes on to say that in Gauteng, where a total of 4 537 402 votes were cast in the provincial election in 2019, the requirement would be 25 928 signatures. That is, if we used the Danish formula of one signature for every 175 votes.

[54] Mr Mamabolo states that South Africa's signature requirement differs from the Danish model in that instead of taking into account all the votes cast, it sets the signature requirement as a percentage of the level of support required to win a seat. That is a percentage of a quota. Mr Mamabolo states that this approach results in a more inclusive outcome with a much lower threshold of support required for participation.

[55] Mr Mamabolo points out that the number of signatures required under section 31B(3) falls in the range of 10 000 to 14 000 for the National Assembly and

provincial legislatures depending on the region. He says that this means that an independent candidate or a political party not yet represented in any of the legislative bodies is only required to show that "it has the support of 15% – less than one-fifth – of the number of votes that were required for a seat in the previous election". Mr Mamabolo says 15% is less than one-fifth – it is actually less than one-sixth – of the number of votes that were required for a seat in the previous election.

[56] Mr Mamabolo sets out the election outcomes from the 2004 election to the last election in 2019. This helps to show how the numbers of political parties that were allowed to contest elections but did not win any seats has been going up:

(a) In the 2004 election for the National Assembly 21 political parties participated in the election but only 12 gained representation while 9 did not gain representation. This means that just under 50% of the political parties that had been allowed to contest the elections failed to get enough votes for even one seat in the National Assembly.

(b) In the 2009 election for the National Assembly 26 political parties participated in the election and 13 parties gained representation and 13 did not. This means that in 2009, 50% of the political parties which were allowed to contest the elections could not get enough votes to get simply one seat.

(c) In the 2014 election for the National Assembly 29 parties took part in the elections but only 13% gained representations and 16 failed to gain even one seat. This meant that 55% of the parties which took part in the elections did not get even one seat.

(d) In the 2019 election for the National Assembly, out of 48 parties that participated in the elections, only 14 gained representation and 34 did not gain representation. This meant that 70.8% of the political parties allowed to contest elections failed to get even one seat.

(e) In the 2019 National Assembly and provincial legislature elections, a combined 78 parties participated and 15 gained representation in one or both legislatures and 63 did not gain representation in either. This means that in the 2019 elections – the most recent – there was an astronomical rise in the number of political parties that were allowed to contest elections but that did not get even one seat. More than 80% of the political parties failed.

[57] Lastly, with regard to the Commission's evidence on the signature requirement of 15% of the quota of the previous election, Mr Mamabolo says:

> "39 The rationality and fairness of the requirement of 15% of the quota of the previous election can also meaningfully be assessed with reference to two data sets.
>
> 40 First, it can be evaluated by considering how many support signatures a candidate would have to obtain per voting district in each of the regions to meet (or exceed) the required total number of supporting signatures. These are set out in the following tables for the National Assembly elections (regional tier) and the provincial elections respectively. Column 1 reflects the number of supporting signatures required to contest for a seat in the legislature per region; columns 2 to 4 show the calculation of the signatures the candidate would need to obtain per voting district in that region to meet (or exceed) that figure.
>
> 40.1 For the National Assembly (regional tier) election;

	Signatures Required	Number of Voting Districts	Signatures per Voting District	Total Signatures
Eastern Cape	11 657	4 869	3	14 607
Free State	11 340	1 582	8	12 656
Gauteng	13 890	2 799	5	13 995
KwaZulu-Natal	13 045	4 972	3	14 916
Limpopo	11 329	3 223	4	12 892
Mpumalanga	11 925	1 813	7	12 691
North West	11 652	1 737	7	12 159
Northern Cape	10 271	732	15	10 980
Western Cape	13 201	1 572	9	14 148

40.2 For provincial legislatures:

	Signatures Required	Number of Voting Districts	Signatures per Voting District	Total Signatures
Eastern Cape	4 672	4 869	1	4 869
Free State	4 826	1 582	4	6 328
Gauteng	8 757	2 799	4	11 196
KwaZulu-Natal	6 664	4 972	2	9 944
Limpopo	4 357	3 223	2	6 446
Mpumalanga	5 886	1 813	4	7 252
North West	4 213	1 737	3	5 211
Northern Cape	4 920	732	7	5 124
Western Cape	7 176	1 572	5	7 860

41 The average number of registered voters per voting district currently stands at 1 120 prior to the registration weekends before the 2024 election. Higher averages will apply in the

metropolitan and urban voting districts, while they will be lower in rural areas.

42 Second, it can be evaluated by considering the number of signatures required as a proportion of the pool of registered voters from which support for participation can be obtained. This is reflected in the following tables.

42.1 For the National Assembly (regional tier) election:

	Signatures Required	Registered Voters	Signatures as a Portion of Registered Voters
Eastern Cape	11 657	3 226 252	0,36%
Free State	11 340	1 394 838	0,81%
Gauteng	13 890	6 146 680	0,23%
KwaZulu-Natal	13 045	5 434 281	0,24%
Limpopo	11 329	2 612 185	0,43%
Mpumalanga	11 925	1 900 122	0,63%
North West	11 652	1 676 687	0,69%
Northern Cape	10 271	613 577	1,67%
Western Cape	13 201	3 092 488	0,43%

42.2 For provincial legislatures:

	Signatures Required	Registered Voters	Signatures as a Portion of Registered Voters
Eastern Cape	4 672	3 226 252	0,14%
Free State	4 826	1 394 838	0,35%
Gauteng	8 757	6 146 680	0,14%
KwaZulu-Natal	6 664	5 434 281	0,12%
Limpopo	4 357	2 612 185	0,17%

Mpumalanga	5 886	1 900 122	0,31%
North West	4 213	1 676 687	0,25%
Northern Cape	4 920	613 577	1,8%
Western Cape	7 176	3 092 488	0,23%

43 The above figures indicate that it is reasonably possible for any serious contender to collect the required number of signatures to support their participation in an election.

43.1 When broken down into the number of signatures required per voting district in the region, it becomes an achievable requirement that will not obstruct serious contenders from participating in an election.

43.2 Support for participation may, in some instances, not be widespread in a region. Still, 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. Moreover, if an independent candidate or unrepresented party intends to contest in more than one region, it only needs to focus on the region with the highest number of signatures. If that threshold is not met, the independent candidate or unrepresented party may contest in the region or regions where the number of signatures collected meets the next highest quota threshold."

[58] Mr Mamabolo concludes by saying that, for the reasons given above, the signature requirement of 15% of the quota of the relevant region for the previous election is, in the Commission's submission, a rational and justifiable requirement and one that serves a legitimate government purpose.

Analysis

OSA's real complaint

[59] OSA is challenging the constitutional validity of the statutory requirement that an independent candidate should obtain and produce supporting votes totalling 15% of the quota of the relevant region from the previous election but a close examination of OSA's complaint reveals, in my view, that its real problem is not the 15%. It is the size of the regions and, therefore, the size of the quotas. There is not one quota that applies throughout.

[60] There are different regions or provinces with different quotas. 15% of the quotas of some regions is low, for example, KwaZulu-Natal, and 15% of the quotas in some provinces, for example, Gauteng, is high. Where the number of registered voters in a region or province is low, the quota will also be low and, therefore, the 15% will also be a low figure. Where a region or province is big and the number of registered voters in the region or province is high, the quota will also be high and that will mean that the 15% is also high. How high or low the number representing 15% of the quota will depend on the size of the region or of the quota.

[61] The reason why OSA's complaint cannot be with the 15% is that, if the 15% was a 15% of a quota that is low, for example, 20 000, the 15% would translate to just about 3 000 about which I do not think OSA would complain. Another example is that, if the quota was 100 in which case 15% thereof would be 15 supporting signatures of registered voters, OSA could not complain. OSA could not complain about a requirement that independent candidates and new political parties obtain 15 supporting signatures of registered voters. However, when the 15% of a quota translates to 9 000 or 13 000 votes, OSA complains that the 15% requirement is a problem. *However, their problem is the size of the quota which in turn is based on the size of the region or province*. If the 15% were to be calculated on the basis of much smaller regions or constituencies, OSA would have no problem with the 15% requirement. This proves that the source of OSA's true complaint is the size of the regions.

[62] Mr Mogoale made this statement in his founding affidavit:

> "The stated objective must however be understood in the context of the legislative framework. For all intents and purposes provinces are constituencies. Further, the signature requirements for independent candidates are based on the quotas from those very regions from the previous elections."

This is found in paragraph 144 of OSA's founding affidavit. In the first sentence of the next paragraph, namely, paragraph 145, Mr Mogoale then says:

> "I respectively submit – that the problem originates in and is caused by this fact."

The reference to "this fact" in this sentence is a reference to what he said in the previous paragraph, namely paragraph 144.

[63] After stating in effect in the first sentence of paragraph 145 read with paragraph 144 that "the problem originates in and is caused by" the fact that Parliament decided that the provinces would be constituencies and that the signature requirement for independent candidates (and new political parties) "are based on the quotas from those very regions from the previous election", Mr Mogoale then continued in paragraph 145 and said:

> "Parliament elected or chose to have provinces as large constituencies. It then made the signature requirement relative to the large vote thresholds of these provincial regions or constituencies. The inescapable inference is that the deliberate decision to use provinces as a unit of measurement for the number of signatures required is arbitrary."

[64] In the next paragraph, paragraph 146, Mr Mogoale states:

> "Not only does this approach lead to exorbitant numbers of signatures being required, but the principle is out of kilter with the rest of our electoral system. The previous 1 000 signature requirement had no link to the vote threshold nor was it linked to the number of voters per province. It represented an ordinary, feasible and reasonable measure."

[65] OSA says that Parliament's choice to have provinces as large constituencies and to make the signature requirement relative to the "large vote thresholds of those provincial regions or constituencies" leads to "exorbitant numbers of signatures being required".

[66] That OSA's real complaint is about the size of the constituencies that were adopted by Parliament, namely the provinces, is also supported by Mr Mogoale's statements in paragraph 220 to 222 of OSA's founding affidavit. In those paragraphs Mr Mogoale says:

> "220. While OSA does not ask this Court to step in the shoes of the legislature, it does bring to this Court's attention that an appropriate system should be highest remainder system, because parties will be rewarded based on their highest remaining votes keeps in step proportionality.
>
> 221. The allocation of the vacancy should ideally be dealt with by the normal cause of a by-election. This proposal was declined by Parliament during the Parliamentary process on the basis that it was not feasible because regions which are provinces, are too large to conduct by-elections.
>
> 222. *However, I must point out that this conundrum is a direct consequence of Parliament refusing to implement a constituency system that was recommended by the majority of the Ministerial Advisory Committee*." (Emphasis added.)

[67] The Minister's response to paragraph 222 of OSA's founding affidavit is in paragraph 121 of his answering affidavit. It is this:

> "Indeed, the *OSA reveals its true complaint at paragraph 222 of the founding affidavit* where it complains that the ultimate cause of these difficulties is Parliament's failure to adopt a constituency-based system. While the OSA's preference for such a system is noted, this is not a basis to invalidate the Electoral Act." (Emphasis added.)

[68] OSA is not asking this Court to set aside or invalidate Parliament's decision to use provinces as regions or constituencies. It is also not asking this Court to direct Parliament to consider or decide to use any other places as constituencies on the basis of which quotas will be calculated so that the 15% requirement will translate to lower numbers than the numbers that one gets when 15% is used in relation to provinces. In my view, OSA has acted wisely in not asking us to make those decisions.

[69] The consequence of the fact that OSA is not asking this Court to set aside or in any way invalidate Parliament's choice of provinces as constituencies or regions and Parliament's decision to base the 15% requirement on the quota of a region in the previous election is that, as long as the level of support of the independent candidates or new political parties needs to be tested, it can only be tested by way of a percentage of the quota of the relevant region in the previous election. In other words, if there were going to be one quota for all regions, one could fix a number as opposed to a percentage.

[70] If, for example, the quota for all regions or provinces were 30 000, one could fix, for argument's sake, 3 000 signatures which would be 10% of 30 000 as the number of signatures that an independent candidate or a new political party would have to obtain in order to contest elections on the basis that it would be an indication of adequate voter support. However, if the quotas for different regions or provinces differ according to the size of a region or province, whether or not an independent candidate or a new political party has credible support to contest elections can only be determined on the basis of a percentage of voter support in relation to the quota of a particular region or province. You cannot fix one number such as 1 000 for all regions when the regions have vastly different sizes. A one-size-fits-all approach cannot work.

[71] Fixing one number such as 1 000 signatures when the regions have vastly different sizes of voter populations simply cannot serve the purpose of the 15% requirement. This is so because 15% is 15% of the quota of each region but 1 000 may be enough to show adequate support for a region whose quota is 10 000 but, once a region has a quota of 44 000, a requirement of 1 000 signatures cannot conceivably be said to be an indication that such an independent candidate or new political party has credible prospects of gaining a seat in elections. Therefore, in my view requiring an independent candidate or new political party to obtain 1 000 signatures on the basis that 1 000 signatures would be an indication that he, she or it has credible prospects of gaining one seat in elections is irrational. It would not serve any government purpose.

[72] OSA has not anywhere in its founding affidavit said why 15% of the quotas based on the previous elections constitutes a barrier. One may have understood if the position was that, for example, there were two months left before the elections and OSA was saying there was too little time left to collect signatures from so many people. OSA does not anywhere say that there is little time left to collect so many signatures. When OSA launched its application – which was in May 2023 – there was still about at least a year before the 2024 elections. The question is: why would even six months before the elections not be enough to collect 4 000 signatures or 9 000 signatures or 13 000 signatures? An independent candidate will have campaign workers or supporters. If he or she has 10 campaign staff, there is no reason why each one of them cannot secure 2 000 signatures per month which would be 500 per week which would mean 20 000 signatures per month which would be 40 000 in two months.

[73] Another point is this: OSA does not seek the reduction of the size of the quotas or the quota of the regions or provinces on which the 15% is based. It seeks a change from the use of a percentage of a quota to a fixed number, namely, 1 000 in order for an independent candidate to be eligible to contest an election but it has not shown why Parliament's decision to use a percentage of a quota is bad or is irrational. There is, therefore, no justification to change from the use of a percentage of a quota to a fixed number. This was Parliament's judgment call and there is no basis to interfere with it.

OSA has not shown any basis on which it would be justified to effectively set aside Parliament's decision to use a percentage and not a number.

[74] Lastly, I wish to make this point. The 15% is 15% of the number of the registered voters that the independent candidate will need to achieve in the elections in order to secure one seat. If OSA says 15% of the quota of the region in the previous election is too high because it will be 9 000 or 14 000 votes and says the requirement should be 1 000 signatures, we must remember that the quota will remain the same. It will not be reduced if the requirement is altered to 1 000. If the requirement remained at 15% of the quota and an independent candidate secured 15% before contesting the election, then later – during the election campaign – that independent candidate would not need to go back and canvass the people whose signatures he or she already secured. In that event, the candidate would only need to win over the remaining 85% of the registered voters in the relevant region to reach the quota.

[75] In other words, an independent candidate who complied with the 15% requirement at the beginning would have an easier job thereafter than an independent candidate who obtained only 1 000 signatures at the beginning and has to obtain, maybe, 90% of the quota later. That is if 1 000 signatures constitute 10%. If 1 000 signatures constitute 2% of the quota, that would mean the independent candidate who secures only 1 000 signatures to contest the elections, has to work hard to secure 98% of the quota during the election campaign. The question that arises is: what logical basis can there be for thinking that the same candidate has credible prospects of getting in the election with 98% of the votes that he or she needs in order to get one seat? If there was a reward offered for a student who would get 100% in a particular subject in the final matric examination, nobody would ever think that a student who could not get 15/100 in the trial examinations in August or September would be able to suddenly get 100% in the final examination in November and get the promised reward. So, it seems to me that anyone who cannot get 15% of the quota over a year before the election is highly unlikely to be able to get 100% of the required votes in the election for one seat in a few months' time.

[76] I think that we can take judicial notice of South Africa's world famous race, namely, the Comrades Marathon which is run between Durban and Pietermaritzburg. The distance is about 90 km. It is a very popular race and there are always too many people who want to run the Comrades Marathon than numbers that the organisers can accommodate. 15% of the distance of 90 km is about 13,5 km. If you wanted to enter the Comrades Marathon and the organisers asked you to run a distance of 13,5 km in order to be eligible and you said that that was too much, would they allow you to enter the Comrades Marathon? I don't think so.

[77] The point would be that the distance you will have to run to finish the race is 90 km and, if you cannot run a distance of 13,5 km, you have no chance of successfully running 90 km on the day of the race. Here, too, if over a year before elections, an independent candidate cannot obtain the support of registered voters amounting to 15% of the votes he or she will need in the election in order to get one seat, they have no chance of getting 100% of the votes they will need. I go back to saying that the source of OSA's problem is not the 15% but the size of the regions and the size of the quotas. I now turn to deal with the complaint that OSA says in its founding affidavit is its chief complaint.

OSA's declared chief complaint

[78] As stated earlier, OSA says in its founding affidavit that its chief complaint is that the EAA requires both the independent candidates and the political parties which are not yet represented in the National Assembly and provincial legislatures to obtain the same number of signatures in order to be allowed to contest elections. OSA goes on to say that, although the fact that the signature requirement referred to in section 31B(3) applies to both the independent candidates and new political parties meant that it was a "formally equal requirement", "this results in a substantively unequal outcome, creates an unfair barrier to entry for independent candidates and goes against the purpose of *New Nation II*". The reference to *New Nation II* is a reference to this Court's judgment in *New Nation Movement*. The passages of this Court's judgment

in *New Nation Movement* which Mr Mogoale quotes in OSA's founding affidavit do not contain anything that supports the statement that the fact that the signature requirement applies to both independent candidates and political parties is contrary to the purpose of that judgment.

[79] OSA did not anywhere in its founding affidavit say why it was complaining about the fact that the signature requirement applied to both the independent candidates and political parties. All it said was that the fact that the signature requirement applied to both independent candidates and political parties "creates an unfair barrier to entry for independent candidates and goes against the purpose of *New Nation II*". There was no elaboration provided as to how that fact created a barrier and, if it created a barrier, why OSA contended that it was unfair. At the hearing I said to OSA's Counsel that I could not see any substantiation in OSA's founding affidavit of its bald assertions about its complaints and I asked her to indicate to us where we could find substantiation of the general assertions in the founding affidavit. She could not point to any.

[80] OSA drew a table which it said reflected the real numbers which would constitute 15% of the quota from the previous election in the different regions. In the different provinces the figures were somewhere between 10 271 to 13 890 signatures in respect of the National Assembly, depending on the size of the province, and 4 213 to 7 176 signatures in respect of the provinces depending on the size of the province. One would have thought that OSA's purpose in indicating what 15% would translate to, in real numbers, of people was to then elaborate by saying why independent candidates would not be able to achieve those numbers but OSA did not do this in its founding affidavit. So, OSA did not say that there would be any logistical or practical difficulties that an independent candidate could not reasonably overcome. The Court should not assume practical or logistical difficulties that independent candidates could possibly have which OSA has chosen not to articulate. It is difficult to think how anybody could contend that it would be difficult for any independent candidate worth his or her salt to obtain around 4 000 or 4 500 or so signatures to obtain a seat in a provincial legislature.

[81] OSA also contended that Parliament should have required independent candidates to obtain 1 000 signatures because in the past, as OSA understood the position, political parties had been required to obtain 1 000 signatures as one of the requirements for contesting elections. OSA contended that, if the requirement of 1 000 signatures served its purpose in respect of political parties, there is no reason why it would not serve its purpose in respect of independent candidates. OSA contended that Parliament should have made the requirement of 1 000 signatures applicable to independent candidates.

[82] I did not understand this contention by OSA to mean that independent candidates and political parties would have to be required to obtain different numbers of signatures. I understood OSA to suggest that both independent candidates and political parties should obtain the same number of signatures. However, the difficulty with this is the fact that OSA did not challenge the constitutional validity of section 27 of the amended Electoral Act which makes the signature requirement applicable to political parties not represented in the National Assembly or in any provincial legislature as yet. This means that, if OSA succeeded in its challenge, independent candidates would be required to obtain 1 000 signatures whereas new political parties would be required to obtain 15% of the quota of registered voters in a region. OSA has not sought to justify this differentiation.

[83] Reference has been made above to Mr Mamabolo's evidence that over the years there has been a sharp increase of political parties which participate in elections but do not get even one seat. This happened even during the period when 500 signatures were required for the registration of a political party. It is quite clear from this evidence, that the requirement of 500 signatures of registered voters that used to be required for the registration before the 1 000 signature requirement which is half of 1 000 signatures now required for the registration of political parties with the IEC – has not been effective in preventing political parties that have no credible prospects of obtaining even just one seat in the elections from being registered with the IEC. The requirement of 1 000 signatures is unlikely to make any difference.

[84] The Minister, Parliament and the Commission contend that requiring independent candidates and political parties to obtain only 1 000 signatures would not serve the purpose which the requirement of 15% of the quota of the previous election is meant to serve. They point out that OSA got its facts wrong with regard to the purpose of the requirement of 1 000 signatures. They state that the 1 000 signature requirement applicable to political parties relates to registration and not to contesting elections whereas the requirement of 15% signatures of the quota of the previous election relates to contesting elections.

[85] OSA did not deny that the requirement of 1 000 signatures applicable to political parties relates to registration and not to contesting elections. Indeed, the Minister, Parliament and the IEC actually point out that, contrary to OSA's suggestion in its founding affidavit that the 1 000 signature requirement used to apply but is no longer applicable now, this requirement is still one of the legal requirements for the registration of political parties with the IEC. They point out that the requirements with which new political parties are required to comply in order to contest elections are separate and do not include any requirement for 1 000 signatures.

[86] OSA did not file any affidavit that questioned or challenged or disputed the explanation given by Parliament, the Minister and the IEC that the requirement of 1 000 signatures is not a requirement for contesting elections. Even if one were to say that the requirement of 1 000 signatures is intended to gauge some support for a political party just like the requirement of 15% signatures of a quota from a previous election, there is a distinction between the two which would strongly militate against the use of the requirement of 1 000 signatures in the place of the 15% signatures requirement to test the seriousness of an independent candidate or of a political party to contest elections and to discourage frivolous candidates.

[87] It is legitimate to exclude from contesting elections anyone and any political party that has no credible prospects to win even one seat during the elections. There is

nothing unconstitutional about that. Therefore, it is quite legitimate for Parliament to legislate a requirement such as a certain percentage of supporting signatures of registered voters which reflects that such an individual or political party has a credible chance of obtaining in the election enough votes for a seat. In this regard it must be borne in mind that different people will have different views as to what percentage would represent a credible prospect for such an individual or political party to obtain a seat. Accordingly, some deference should be shown to the percentage determined by Parliament unless such percentage is irrational. In this regard the Court should be slow to impose its own view of what an appropriate percentage should be.

[88] OSA states:

> "OSA believes that the amendment Act unjustifiably arbitrarily and disproportionately sets an independent candidate's requirement at 15%. It further submits that the requirement does not fulfil any legitimate government purpose and that less restrictive means such as the original 1000 signature requirement would achieve the same objective."

Counsel for OSA conceded, in my view correctly, that the 15% signature requirement does serve a legitimate government purpose. That is to serve as an indication that the independent candidate is serious about contesting the election and to eliminate frivolous contestants. With regard to the first part of the above excerpt I wish to point out that OSA simply tells us that it believes that the EAA "unjustifiably, arbitrarily and disproportionately sets an independent candidate at 15%" but it does not provide the factual basis for its belief nor does it substantiate its statement.

[89] It is trite that in motion proceedings the affidavits serve as both pleadings and evidence. They define the issues between the parties and provide the evidence.[14] This Court has held that a party that challenges the constitutionality of a provision in a statute must do so when the legal proceedings are instituted and must lay a proper foundation

[14] *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at para 27 and *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) at para 22.

for such a challenge in the pleadings. It must place before the court all information relevant to the determination of the constitutionality of the impugned provisions. This is necessary to alert the other side to the case it is called upon to meet and to enable the latter to present factual evidence and legal argument to oppose that case so as to leave no doubt about the nature of the matter, the grounds on which it is brought and the relief sought.

[90] In its statement OSA also does not identify the things in relation to which the setting of the 15% signature requirement is disproportionate. For that reason it is difficult to follow this part of its case. More is required. Something does not become unjustifiable or arbitrary just because someone says it is unjustifiable or arbitrary. OSA has failed to substantiate these statements or beliefs or contentions.

[91] The case made out in the founding affidavit is this. OSA's "chief complaint" is that the EAA requires political parties and independent candidates to obtain the same number of signatures to register as contestants in the elections, namely 15% of the quota in the National Assembly or provincial legislature. OSA contends that on its face, this is a formal equal requirement, but results in a substantively unequal outcome and "creates an unfair barrier to entry for independent candidates". OSA then quotes the number of signatures required in each province in order to contest the elections for the National Assembly and provincial legislatures. OSA then points that, before the EAA came into force, political parties were required to submit 1 000 signatures to register as a party with the IEC. It then states that the only reasonable inference is that 1 000 signatures were sufficient to show that political parties were serious about contesting elections. OSA then contends that the EAA "unjustifiably, arbitrarily, and disproportionately sets an independent candidate's requirement at 15%", which does not fulfil any legitimate government purpose. It adds that the original 1 000 signature requirement would do so.

[92] However, OSA has not put up any facts or evidence in support of its contention that the 15% signature requirement results in an unequal outcome. Neither is there any

evidence of the respects in which this requirement creates an unfair barrier for independent candidates to contest the elections. The same is true for OSA's assertion that the signature requirement is arbitrary and disproportionate. There is not a shred of evidence that it is impossible to meet the signature requirement or that an independent candidate attempted to do so but failed. On the IEC's evidence before us in some province or provinces the 15% signature requirement would require a candidate to obtain 4 000 signatures. OSA has not said why a serious candidate would not be able to obtain 4 000 signatures. He or she might have three months to obtain 4 000 signatures. What one is then left with is nothing more than OSA's say-so as to why the signature requirement is a barrier.

[93] After making the statements discussed immediately above, OSA submits that three rights of independent candidates were "directly and detrimentally affected by the 15% signature requirement". It stated that these were:

(a) the right of every citizen in section 19 of the Constitution to make political choices which includes the right to form a political party and to participate as an independent candidate;

(b) the right provided for in section 19(3)(b) of the Constitution in favour of every adult citizen to stand for public office and, if elected, to hold office;

(c) the right to associate or, by extension, not to associate with the political party system by running as an independent candidate;

(d) an independent candidate's right to dignity.

[94] After specifying the above as the rights that are "directly and detrimentally affected by the 15% requirement", OSA then states:

> "Therefore, any requirements that are imposed on independent candidates to contest elections as prescribed in section 31B should be balanced in the context of these political rights and ought not to be treated as a gate-keeping mechanism nor as a barrier to entry."

OSA makes this statement about balancing the 15% signature requirement with the political rights referred to above but does not say why it contends that the EAA, as it stands, does not achieve the required balance. After making the statement that it makes about balancing the 15% signature requirement with the political rights referred to above, OSA then proceeds to say that the next question is "whether the limitation is unjustifiable in terms of section 36(1) of the Constitution". OSA then says: "This question comes down to whether there are less restrictive means to achieve the purpose which is ultimately a question about threshold".

[95] The first question that this Court is called upon to determine with regard to the signature requirement is whether section 31B(3) of the EAA limits or infringes the right to stand for public office, the right to vote and the right to free and fair elections entrenched in section 19 of the Constitution. If section 31B(3) limits one or more of these rights, the next question will be whether the limitation is reasonable and justifiable in a democratic society based on freedom, equality and human dignity as contemplated in section 36 of the Constitution.

OSA's statement that three of independent candidates' rights have been detrimentally affected

[96] In its founding affidavit OSA states that the right to make political choices which includes the right to form a political party and to participate as an independent candidate, the right of every adult citizen to stand for public office and, if elected, to hold office, the right to associate or the right not to associate with the political party system by running as an independent candidate and an independent candidate's right to dignity are "directly and detrimentally affected" by the 15% signature requirement. OSA did not substantiate this assertion at all. It did not provide any reasons why it says that the 15% signature requirement has detrimentally affected any of their rights.

[97] OSA is the applicant here. It must convince the Court that the 15% signature requirement has detrimentally affected these rights. It cannot do so by simply making an unsubstantiated statement that the 15% signature requirement has

detrimentally affected any of the rights it identified. OSA is the one that has come to this Court to seek relief. It must substantiate its case. In regard to this statement OSA has failed dismally to substantiate its case. I will return to this point later when I deal with the test for determining whether a regulatory provision of a statute limits an entrenched right as articulated by this Court in *Affordable Medicines*.[15]

[98] Although the Constitution contains the Bill of Rights, it does not provide any detailed provisions that may be necessary for the effective exercise of those rights or for the implementation of those rights. The Constitution leaves the task of providing such detailed provisions to Parliament. Parliament is, therefore, enjoined to make such detailed provisions. In *New National Party*, this Court inter alia said:

> "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".[16] (Emphasis added.)

In the same case this Court said:

> "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."[17]

The regulation and limitation of rights

[99] Statutory provisions that affect rights entrenched in the Bill of Rights fall into at least two categories. The one category would be a provision that constitutes a complete

[15] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[16] *New National Party v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 13.

[17] Id at para 14.

or total denial of such a right. Another category is one where the provision permits the exercise of the right or prohibits or precludes its exercise only conditionally or temporarily. An example of a statutory provision that constitutes a total denial or a complete prohibition is section 65(1) of the Labour Relations Act (LRA).[18]

[100] Section 65 falls within a chapter that deals with strikes. What section 65(1) does must be viewed against the background that section 23(2)(c) of the Constitution confers on every worker the right to strike. Section 65(1) reads:

> "Limitations to right to strike and recourse to lock-out
>
> (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if—
>
> (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
>
> (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
>
> (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
>
> (d) that person is engaged in—
>
> (i) an essential service; or
>
> (ii) a maintenance service."

[101] Even the heading to section 65 reflects that indeed section 65 is a limitation of the right to strike or recourse to lock-out. The heading reads: "Limitations on right to strike or recourse to lock-out".

[18] 66 of 1995.

[102] In other words, whereas section 23(2)(c) of the Constitution confers upon every worker the right to strike, section 65(1) precludes certain categories of workers from exercising such a right. Those workers include those employed in essential services and maintenance services. In *New National Party* this Court repeatedly referred to a denial of a right as an infringement of a right.[19] One then has those statutory provisions which govern or regulate the exercise of such rights. In the context of the LRA, an example would be section 64 thereof. These provisions permit workers to exercise the right to strike but, only if certain conditions or requirements are met or complied with.

[103] There is no heading to section 64. Section 64 reads:

> "(1) Every employee has the right to strike and every employer has recourse to lock-out if—
>
> (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and—
>
> (i) a certificate stating that the dispute remains unresolved has been issued; or
>
> (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that—
>
> (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless—
>
> (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
>
> (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or

[19] See *New National Party* above n 15 at paras 18, 20, 37, 46 and 47.

(c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(d) the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).

(2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection (1)(b) or (c). A refusal to bargain includes—

(a) a refusal—

(i) to recognise a trade union as a collective bargaining agent; or

(ii) to agree to establish a bargaining council;

(b) a withdrawal of recognition of a collective bargaining agent;

(c) a resignation of a party from a bargaining council;

(d) a dispute about—

(i) appropriate bargaining units;

(ii) appropriate bargaining levels; or

(iii) bargaining subjects."

It will be seen that provisions under section 64(1) and those under section 65(1) do not fall into the same category. I have no doubt that those of section 64 regulate the right to strike but those of section 65 limit the right to strike. However, even if those of section 65 may also be said to regulate the right to strike, they are not the same as the provisions in section 64, do not serve the same purpose and cannot be treated the same.

[104] In fact section 23(5) of the Constitution appears to recognise that a provision that regulates a right entrenched in the Bill of Rights may or may not limit such a right. That is why it provides that national legislation may be enacted to *regulate* collective

bargaining. That comes after a sentence that refers to "the right to engage in collective bargaining". Then section 23(5) provides: "To the extent that the legislation *may limit a right* in this chapter, the *limitation* must comply with section 36(1)". This suggests a recognition that a statutory provision that regulates a right may or may not limit such right. Where a statutory provision totally or completely prohibits or outlaws the exercise of a right or where it constitutes a complete denial of a right; it constitutes a limitation of the right and, therefore, the inquiry would focus on whether the limitation is reasonable and justifiable in terms of section 36(1).

[105] The jurisprudence of this Court does reflect that a statutory provision that merely regulates a right entrenched in the Bill of Rights does not limit such a right. Such a provision must do much more before it can be said to limit a right entrenched in the Bill of Rights. It must be remembered that the purpose of the LRA includes:

> "[T]o advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—
>
> (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution"[20]

[106] In *POPCRU*[21] this Court held, through Nkabinde J, that "[t]he LRA was enacted, among other things, to regulate the right to strike in conformity with the Constitution". *Islamic Unity Convention*[22] related to the right to freedom of expression as entrenched in section 16 of the Constitution. In that case this Court said about regulation:

> "There is accordingly no bar to the enactment of legislation that prohibits such expression. *Any regulation of expression that falls within*

[20] Section 1(a) of the LRA.

[21] *South African Police Service v Police and Prisons Civil Rights Union* [2011] ZACC 21; 2011 (6) SA 1 (CC); 2011 (9) BCLR 992 (CC).

[22] *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC).

> *the categories enumerated in section 16(2) would not be a limitation of the right in section 16.*" (Emphasis added.)

Soon thereafter, this Court said:

> "*Where the State extends the scope of regulation beyond expression envisaged* in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution." (Emphasis added.)

It seems to me that what this Court had in mind here is where a provision goes beyond mere regulation.

[107] In *Garvas*[23] one of the issues that this Court had to consider was whether section 11(2) of the Regulation of Gatherings Act[24] limited the right to freedom of assembly and, if it did, whether the limitation was justifiable. In the course of its consideration of that issue, this Court said through Mogoeng CJ:

> "[54] *The long title of the Act states that the purpose of the Act is '(t)o regulate the holding of public gatherings and demonstrations at certain places; and to provide for matters connected therewith'. The Act requires the appointment of persons responsible for giving and receiving notices to hold gatherings and to act at consultations or negotiations in relation to the holding of gatherings on behalf of the organisers, the police and the local authority involved.*
>
> [55] *The mere legislative regulation of gatherings to facilitate the enjoyment of the right to assemble peacefully and unarmed, demonstrate, picket and petition may not in itself be a limitation. Section 11(2), read with section 11(1), goes further than simply to regulate the exercise of the right in order to facilitate its full and appropriate enjoyment by those who organise and those who participate*." (Emphasis added.)

[23] *South African Transport and Allied Workers Union v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC).

[24] 205 of 1993.

This excerpt reflects that this Court held in *Garvas* that a regulation has to go beyond regulation before it can be said to constitute a limitation.

[108] Mogoeng CJ went on to say in the *Garvas* judgment:

> "[56] Section 11(1) holds organisers of a gathering liable for riot damage subject to section 11(2), which provides a limited defence to a claim of this kind. The effect of these specific provisions, in the context of the Act as a whole, is to render holders of a gathering organised with peaceful intent liable for riot damage on a wider basis than is provided for under the law of delict. This is all the more so, given the extremely wide definition of riot damage in the Act. This means that proof of liability will, as indicated earlier, be easier in a large number of cases.
>
> [57] Compliance with the requirements of section 11(2) *significantly increases the costs of organising protest action*. And *it may well be that poorly resourced organisations that wish to organise protest action about controversial causes that* are nonetheless vital to society could be inhibited from doing so. *Both these factors amount to a limitation of the right to gather and protest*." (Emphasis added.)

[109] So, in *Garvas* this Court held a statutory provision that regulated the exercise of the right to assemble to constitute a limitation of that right because it found the provision to go beyond regulating the exercise of the right. The statutory provision was held to go beyond mere regulation because of the civil liability that was placed on the leaders or convenors of a public gathering as well as increased costs of organising protests. Had it not been for that the statutory provision would have been found to constitute a limitation. In the present case OSA has not cited cost as a factor in objecting to the signature requirement. Furthermore, in the present case there is no criminal or civil liability associated with the signature requirement.

[110] In *Mlungwana*[25] this Court had to consider whether the criminalisation by section 12(1) of the Regulation of Gatherings Act of the failure of the convener of a gathering of 50 normal persons to give notice or adequate notice limited the right entrenched in section 17 of the Constitution peacefully and unarmed, to assemble, to present petitions and, if it did, whether such limitation was reasonable and justifiable under section 36(1) of the Constitution.

[111] In *Mlungwana* this Court, through Petse AJ, said:

> "A convener can be held liable for any riot damage caused by a gathering or demonstration. This liability is civil in nature. The convener is presumed to have acted unreasonably if riot damage occurs as a result of the gathering, but this presumption is rebuttable. If the convener can show – in essence – that the riot damage was not reasonably preventable and foreseen, then they can avoid liability."

This Court rejected a contention that section 12(1) was not a limitation but a mere regulation. It said:

> "[46] The respondents' argument is unsustainable. *Section 12(1)(a) goes beyond mere regulation. In Garvas, this Court considered whether section 11(1) and (2) of the Act – which provides for the civil liability of a convener for riot damage – constituted a limitation of section 17. This Court held that "mere regulation" would not necessarily* amount to a limitation of the section 17 right. *But the increased cost of organising protest action and the deterrent effect of the civil liability did amount to a limitation. Thus, this Court found that deterring the exercise of the right in section 17 limits that right. The reason is obvious. Deterrence, by its very nature, inhibits the exercise of the right in section 17. Deterrence means that the right in question cannot always be asserted, but will be discouraged from being exercised in certain instances.*

[25] *Mlungwana v State* [2018] ZACC 45; 2019 (1) SACR 429 (CC); 2019 (1) BCLR 88 (CC).

> [47] In this matter, the criminal sanction in section 12(1)(a) deters the exercise of the right in section 17. The respondents not only admit this, but invoke the self-same deterrent effect to explain section 12(1)(a)'s purpose and justify its provisions. The possibility of a criminal sanction prevents, discourages, and inhibits freedom of assembly, even if only temporarily. In this case, an assembly of 16 like-minded people cannot just be convened in a public space. The convener is obliged to give prior notice to avoid criminal liability. This constitutes a limitation of the right to assemble freely, peacefully, and unarmed. And this limitation not only applies to conveners, but also to all those wanting to participate in an assembly. If a convener is deterred from organising a gathering, then in the ordinary course (save for the rare spontaneous gathering) a gathering will not occur." (Emphasis added.)

[112] I pause here to highlight the fact that both in *Garvas* and *Mlungwana* this Court held that a statutory provision that regulates a right entrenched in the Bill of Rights will only constitute a limitation of that right if it goes beyond mere regulation. The two judgments may be interpreted to mean that a statutory provision that regulates a right in the Bill of Rights will only constitute a limitation if it adversely affects that right or if it deters somebody from exercising that right. In *Garvas* what led this Court to conclude that the statutory provision in issue in that case that sought to regulate the right to assemble constituted a limitation of the right of assembly was the increased costs associated with convening a gathering as well as the civil liability for riot damage.

[113] I now turn to discuss *Affordable Medicines*.[26] Because of the importance of this case, I propose to deal with it in some detail. This is so because it shows, among other things, even what regulatory provisions may deal with. In *Affordable Medicines* this Court had to consider whether certain statutory provisions unjustifiably infringed or limited the right entrenched in section 22 of the Constitution. Section 22 of the Constitution reads:

[26] *Affordable Medicines* above n 14.

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession *may be regulated by law*." (Empahasis added.)

[114] Government introduced a licencing scheme by way of legislation in terms of which medical practitioners needed a licence if they wanted to compound and dispense medicines. The scheme also regulated the premises from which medicines were to be dispensed by licenced medical practitioners and dentists.

[115] Section 22(c)(1)(a) of the Medicines and Related Substances Act, as amended[27] (Medicines Act) empowered the Director-General to issue licences to medical practitioners "on the prescribed conditions". Regulation 18(3) of the Regulations made under the Medicines Act,[28] set out information that needed to be contained in an application for a licence while regulation 18(5) set out factors to which the Director-General had to have regard when considering an application for a licence. The issuing of a licence was subject to, among other requirements, the successful completion of a supplementary course determined by the South African Pharmacy Council after consultation with the South African Nursing Council.

[116] The licencing scheme was directed at addressing bad dispensing and compounding practices and their consequences which arose from the fact that, prior to this licencing scheme, the compounding and dispensing of medicines by medical practitioners and other health practitioners, with the exception of pharmacists, were either not adequately regulated or not regulated at all. There were no standards, norms or guidelines to ensure that dispensers of medicines adhered to good dispensing and compounding practices. The old legislative framework did not prohibit practices such as pharmaceutical companies giving incentives to medical practitioners nor did they prohibit practitioners from selling on samples they had received for free from

[27] 101 of 1965.

[28] Regulation 18(3) of the General Regulations made in terms of the Medicines and Related Substances Act, 1965 (Act 101 of 1965) GNR 844 *GG* 26572, 16 July 2004.

pharmaceutical companies. This created a conflict of interest between the dispensing medical practitioner and their patients.

[117] The underlying objective behind the scheme was to increase access to medicines that were safe for consumption by the public. This was to be achieved by, among other things, ensuring that healthcare practitioners who dispensed and compounded medicines were adequately trained in good dispensing practice and maintaining high standards in the safe and proper storage, labelling, handling and keeping of medicines. To this end, the respondents in the *Affordable Medicines* case said that the sale of medicines, their suitability, the standard of dispensing, the suitability of premises where medicines were kept and the conditions under which they were kept had to be properly regulated.

[118] One of the constitutional challenges mounted by the applicants in the *Affordable Medicines* case was that, in so far as regulation 11 required that a licence be "coupled" to specific premises from which medicines would be compounded and dispensed by a medical practitioner or dentist, it (i.e. regulation 11) fell outside the purview of section 22 of the Constitution. Section 22 permitted only the practice of a profession to be regulated by law. They also contended that "coupling" violated other rights in the Bill of Rights.

[119] This Court recorded the conclusions of the High Court in *Affordable Medicines*. The High Court found that the licensing scheme was introduced by the government in order to achieve its objective of increasing access to medicines that were safe for consumption. The High Court found that this was a legitimate purpose to pursue. It held that the Minister did not exceed her powers when making regulation 11 which linked a licence to compound and dispense medicines to specific premises. The High Court concluded that the Minister had not breached the principle of legality. It also held that the licensing scheme did no more than regulate the practice of dispensing medicines within permissible constitutional limits. It held that the scheme did not infringe the right of medical practitioners to choose to dispense medicines as

part of their practice. It held that the scheme, therefore, did not infringe section 22 of the Constitution nor did it infringe any of the other constitutional rights that had been asserted by the applicants in that case.

[120] The conclusions of the High Court as recorded above including the conclusion that the licensing scheme *did no more than regulate the practice* of dispensing medicines within permissible constitutional limits were confirmed by this Court. This is how Ngcobo J, writing for a unanimous Court, put it:

> "For all these reasons, the contention that the Minister exceeded her powers in making regulations that link a license to dispense medicines to particular premises cannot be sustained. *The finding of the High Court in this regard must, therefore be upheld.* But, the applicants had another string to their bow. *They contended that, if the scheme of the Medicines Act authorises the linking of the issuing of a license to dispense medicines to specific premises, it falls outside the purview of regulation permitted by section 22 of the Constitution*."[29] (Emphasis added.)

[121] To the extent that the licensing scheme of the Medicines Act authorised the linking of the issuing of a licence to compound and dispense medicines to specific premises, did it fall outside the purview of regulation permitted by section 22 of the Constitution? The applicants in the *Affordable Medicines* case contended that it did. The respondents in that case contended that it did not. Section 22 of our Constitution is based on section 12(1) of Germany's Basic Law.[30] Section 12(1) of Germany's Basic Law reads:

> "(1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law."

[29] *Affordable Medicines* above n 14 at para 55.

[30] Section 12(1) of the Constitution of the Federal Republic of Germany, 1949.

Our section 22 of the Constitution reads as follows:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

Dealing with article 12(1) of Germany's Basic Law, the German Federal Constitutional Court held that article 12(1) contemplated a unitary right of freedom of occupational activity that embraces both the choice and practice of a profession.[31]

[122] With regard to the standard for determining whether the regulation of the practice of a profession falls within the purview of section 22 of the Constitution, this Court said:

> "[80] The standard for determining whether the regulation of the practice of a profession falls within the purview of section 22 can therefore be formulated as follows*: if the regulation of the practice of a profession is rationally related to a legitimate government purpose and does not infringe any of the rights in the Bill of Rights, it will fall within the purview of section 22. Where the regulation of a practice, viewed objectively, is likely to impact negatively on the choice of a profession, such regulation will limit the right freely to choose a profession guaranteed by section 22, and must therefore meet the test under section 36(1). Similarly, where the regulation of practice, though falling within the purview of section 22, limits any of the rights in the Bill of Rights, must meet the section 36(1) standard.*" (Emphasis added.)

[123] This passage says that the test for determining whether a statutory provision is a regulation within section 22 – in other words it is not a regulation that goes beyond a regulation and limits the right – is whether "the regulation, viewed objectively, is likely

[31] Id.

to impact negatively" on the right or the activity that is the subject of the right. If the answer is that, viewed objectively, the regulation is likely to impact negatively on the right or the activity that is the subject of the right, then that regulation limits or will limit the right. In such a case the regulation must meet the test under section 36(1) of the Constitution. However, where, it follows, the regulation is unlikely to impact negatively on the right or the activity which is the subject of the right, then the regulation does not limit or will not limit the right and section 36(1) has no application.

[124] If one were to apply the *Affordable Medicines* test for determining whether section 31B(3), in so far as section 31B(3) constitutes a regulation or constitutes a limitation, one would have to go to OSA's founding affidavit to see whether OSA did place any evidence before this Court that tends to show that the signature requirement was likely to impact negatively on an independent candidate's right to stand for public office or right to associate or disassociate or right to make political choices, the answer would be that OSA simply did not place any such evidence before the Court. Indeed, that should not be surprising because how can going out to communities to get registered voters who will support your candidature as an independent candidate conceivably impact negatively on your candidature or on your right to stand for public office as an independent candidate? It simply cannot. Therefore, it simply cannot possibly limit your right. It is, therefore, not a limitation.

[125] Ngcobo J said in paragraphs 92, 93 and 94 of the judgment:

> "[93] That said, however, the scope of permissible regulation that we adopt here is not entirely inconsistent with the German approach. It recognises that it is not always possible to draw a clear line of distinction between regulation that affects the practice of a profession, on the one hand, and one that affects choice on the other. *It requires that where, objectively viewed, the regulation of the practice of a profession impacts negatively on choice such regulation must be tested under section 36(1). Such regulation does not fall within the purview of section 22, and must, therefore, meet, amongst other requirements, the standard of reasonableness*, of which proportionality analysis is an

> important component. The same standard must be met where the regulation of the practice of a profession limits any of the rights in the Bill of Rights. However where, as here, *the regulation, objectively viewed, does not impact negatively on choice, it need only satisfy the rationality test. In the result, restrictions on the right to practise a profession are subject to a less stringent test than restrictions on the choice of a profession.*
>
> [94] Where, as here, the Constitution gives the power to regulate a right, *not every regulation of that right amounts to a limitation of the right in question.* But at the same *time Parliament may not unconstitutionally limit the right to practise a profession under the guise of regulating it.* Where the regulation of the right amounts to a limitation of that right, such a limitation will have to be tested under section 36(1). *In this case we are concerned with regulation that merely regulates in the sense of facilitating the proper exercise of the right to practise a profession. It does not limit the right to practise.* The applicants did not contend otherwise.
>
> [95] The question that falls to be determined, therefore, is whether the linking of a licence to dispense medicines to particular premises is rationally related to the government purpose of increasing access to medicines that are safe for consumption. It is to that question that I now turn." (Emphasis added.)

[126] As I have said above, this case concerns the right to vote, the right to stand for public office and the right to free and fair elections. There are at least three cases that have come before this Court in which this Court was called upon to determine whether certain statutory provisions limited or infringed the right to vote. These were the *New National Party*[32], *Democratic Party*[33] and *Richter*.[34] In *New National Party* this Court enunciated the test for determining whether a statutory provision or an Act of Parliament limits or infringes the right to vote. That test was endorsed and followed

[32] *New National Party* above n 15.

[33] *Democratic Party v Minister of Home Affairs* [1999] ZACC 4; 1999 (3) SA 254 (CC); 1999 (6) BCLR 607 (CC).

[34] *Richter v Minister of Home Affairs* [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC).

by this Court in *Democratic Party* and in *Richter*. Since the present case is also about the right to vote, the right to stand for public office and the right to free and fair elections, that test is the most appropriate that should be used. Indeed, I am of the opinion that it is the test that we should use in a case involving an alleged limitation or infringement of a right entrenched in section 19 of the Constitution.

[127] As I have already said, this case is about every adult citizen's rights to vote, every citizen's right to free and fair elections and the right to stand for public office and, if elected, to hold public office. All of these rights are entrenched in section 19 of the Constitution. These rights are very important in our constitutional democracy because they are the primary pillars of any democracy. This is because, without the right to vote, there can be no democracy. The right to vote means nothing if it is exercised in an election that is not free and fair. The right to vote is meaningless unless it is accompanied by the right to stand for public office. The right to vote, the right to stand for public office and the right to free and fair elections are inextricably intertwined.

[128] Concerning the importance of the right to vote, this Court said through Sachs J in *August:*[35]

> "The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement."[36]

[35] *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

[36] Id at para 17.

[129] In *August* prisoners sought an undertaking from the Electoral Commission that they would be allowed to register to vote and, ultimately, to vote in the 1999 national and provincial elections. The Commission, which was mandated to manage elections and to ensure that elections were free and fair, took the position that, if a court made an order favourable to the prisons, it would comply with it. It is clear from the facts of the case that the Commission had included prisoners in its plans to conduct elections but was prepared to do so if the Court ordered that prisoners be included or if the Court declared that prisoners were entitled to vote. This Court concluded that there was nothing that disqualified the prisoners from voting. The Court granted an order which sought to ensure that prisoners were allowed to vote.

[130] In *New National Party* statutory provisions required every adult citizen who was otherwise entitled to be registered as a voter and who was otherwise entitled to vote to be in possession of a bar-coded identity document or a temporary identity certificate (TIC) in order to be registered as a voter and in order to vote. Many citizens were not in possession of such identity documents and it was contended that the Department of Home Affairs lacked capacity to ensure that the citizens who were not in possession of bar-coded identity documents or TICs would be issued with such identity documents before the polling day.

[131] In *New National Party* the New National Party challenged the constitutional validity of section 1(xii) and section 6(2) read with section 38(6) of the Electoral Act. Those provisions were, to the extent relevant here, to the effect that South African citizens who were otherwise entitled to vote could:

(a) register as voters and have their names included in the common voters' roll only if they were in possession of and produced an identity document (bar-coded ID) issued after 1 July 1986 in accordance with the provisions of the Identification Act[37] (1986 Act), a TIC issued in terms of section 6(2) of the Electoral Act; and

[37] 72 of 1986.

(b) vote only if they were registered on the common voters' roll and in possession of and produced the bar-coded ID or a TIC.

[132] The New National Party's complaint against these statutory provisions was that they unjustifiably infringed the right entrenched in section 19(3)(a) of the Constitution and were, therefore, constitutionally invalid. Section 19(3)(a) reads:

> "Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body in terms of the Constitution, and to do so in secret."

The Court had this to say about these statutory provisions:

> "[10] The aspects of the Electoral Act in issue *regulate the way in which citizens must register and vote. The question which must be answered is whether these requirements constitute an infringement of the right to vote.* This can only be done in the context of an analysis of the nature, ambit and importance of the right in question, the effect and importance of other related rights, the importance of the need for an effective exercise of the right to vote and *the degree of regulation required to facilitate the effective exercise of the right*."[38] (Emphasis added.)

In *New National Party* Yacoob J writing for the majority said that there was no point in belabouring the importance of the right to vote and it was 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 empty and useless" (emphasis added).[39]

[38] *New National Party* above n 15 at para 10.

[39] Id at para 11.

[133] This Court 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. *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*."[40] (Emphasis added.)

The Court said that two of the implications referred to in the preceding excerpt are that each citizen entitled to vote must vote only once in any election and that anybody not entitled to vote must not be permitted to do so. This Court continued:

> "The extent to which these deviations occur will have an impact on the fairness of the election. This means that *the regulation* of the exercise of the right to vote is necessary so that these deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote."[41] (Emphasis added.)

[134] This Court pointed out:

> "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*. Section 1(d) contemplates the existence of a national common voters' roll. Section 46(1), 105(1) and 157(5) of the *Constitution all make significant provisions relevant to the regulation of the exercise of the right to vote*."[42] (Emphasis added.)

I pause here to highlight the fact that in three of the passages quoted above from *New National Party* this Court spoke about the impugned provisions in that case being

[40] Id at para 12.

[41] Id.

[42] Id at para 13.

provisions which were part of the provisions regulating the right to vote. This suggests very strongly that this Court accepted that these provisions regulated the right to vote.

[135] In *New National Party* the effect of the impugned statutory provisions was that a citizen who was otherwise entitled to register as a voter and have their names included in the common voters' roll was prevented from registering as voters and having their names included in the common voters' roll unless he or she was in possession of and could produce a bar-coded identity book or a TIC. Indeed, those provisions also meant that a South African citizen who was otherwise entitled to vote would be prevented from voting unless he or she was in possession of, and, could produce a bar-coded identity book or TIC.

[136] Although OSA did not put its case in this way, it seems to me that its case can be put on the basis that section 31B(3) prevents an adult citizen who otherwise is entitled to stand for public office and, if elected, to hold office from standing for such office unless he or she obtains 15% signatures of the quota of registered voters of the relevant region from the previous election. It, therefore, seems to me that the requirement that was challenged in *New National Party* had the same effect as the requirement that is challenged in these proceedings. In *New National Party* a voter was required to be in possession of a bar-coded identity book before he or she could be registered as a voter and before he or she could be allowed to vote. In the present case an independent candidate or a new political party is required to secure 15% signatures of the quota of the previous election in the relevant region before he or she can stand for public office. In other words, he or she would not be allowed to stand for public office if he or she did not secure the signatures of registered voters in the relevant region that make 15% of the quota of the relevant region from the previous election.

[137] In *New National Party* this Court said:

> "[15] 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.
>
> [16] *The process of registration and voting needs to be managed and regulated in order to ensure that the elections are free and fair*. The creation of a Commission to manage the elections is a further essential though, not sufficient ingredient in this process. *In order to understand the enormity of the problem, one has just to picture the spectre of millions of South Africans arriving at registration points or voting stations armed with all manner of evidence that they are entitled to register or to vote, only to have the registration or electoral officer sift through this evidence in order to determine whether or not each of such persons is entitled to register or to vote*. It is to avoid this difficulty that the Electoral Act makes detailed provisions concerning registration, voting and related matters including the way in which voters are to identify themselves in order to register on the common voters' roll and to vote."[43] (Emphasis added.)

[138] I pause here to say, with reference to the signature requirement in the present case: in order to understand the enormity of the problem that would arise if a requirement such as the signature requirement was not put in place, one has just to picture the spectre of thousands of independent candidates contesting the elections and voters having to go through numerous pages of the ballot to find their candidates. Indeed, one has to picture electoral offices having to count votes of thousands of candidates the majority of whom would not earn even a single seat. It is to avoid these difficulties that section 31B(3) contains the signature requirement.

[139] In *New National Party* this Court dealt squarely with the question of when a statutory provision or an Act of Parliament can be said to constitute an infringement of the right to vote. The reference to an infringement in the *New National Party* judgment is a reference to a limitation of a right. This Court said in effect that, although it is for Parliament to determine the means by which voters must identify themselves, that did

[43] Id at paras 15-6.

not mean that Parliament was at large in determining the way in which the electoral scheme was to be structured. It pointed out that there were important safeguards aimed at ensuring appropriate protection for citizens who desired to exercise this fundamental right. This Court said that the first safeguard was that there had to be a rational relationship between the scheme which Parliament adopted and the achievement of a legitimate governmental purpose. The Court emphasised:

> "Parliament cannot act capriciously or arbitrarily. The absence of such rational connection will result in the measure being unconstitutional."[44]

[140] This Court went on to deal with who bears the onus of proving a limitation or infringement of a right. It said:

> "An objector who challenges the electoral scheme on these grounds bears the onus of establishing the *absence* of a legitimate governmental purpose, or the absence of a rational relationship between the measure and that purpose."[45] (Emphasis added.)

[141] This Court went on to say:

> "[20] 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. *The contention in this appeal is that the impugned provisions of the Electoral Act constitute a denial of the right to vote to a substantial number of South African citizens*. Any scheme designed to facilitate the exercise of this right carries with it the possibility that some people will not comply with its provisions. But that does not make the scheme unconstitutional. *The decisive question which arises for consideration in this case is the following: when can it legitimately be said that a legislative measure designed to*

[44] Id at para 19.

[45] Id.

> *enable people to vote in fact results in a denial of that right? What a party alleging that an Act of Parliament has infringed the right to vote is required to establish in order to succeed will emerge in the process of answering this question.*"[46] (Emphasis added.)

[142] This Court pointed out that the exercise to be carried out by a court entails an evaluation of the consequences of a statutory provision in the process of its implementation which occurs at some time in the future. It went on to say that it was necessary, at the outset of the enquiry, to determine the nature of the consequence that is impermissible. The consequence that would be impermissible in the *New National Party* case could best be determined by focussing on the question as to what Parliament had to achieve. This Court said that Parliament had to ensure that people who would otherwise be eligible to vote are able to do so if they want to vote and if they take reasonable steps in pursuit of the right to vote. This Court had this to say: "*More cannot be expected of Parliament. It follows that an impermissible consequence will ensue if those who wish to vote and who take reasonable steps in pursuit of the right, are unable to do so*".[47] (Emphasis added.)

[143] This Court went on to say:

> "It is necessary to determine the circumstances that are to be taken into account in deciding whether the *impugned* provisions infringe the right to vote. There are two possibilities. A court can make an evaluation in the light of the circumstances pertaining at the time the provisions were enacted, or those which exist at some later date when the constitutionality of the provisions are challenged."[48] (Emphasis added.)

This Court also stated:

[46] Id at para 20.

[47] Id at para 21.

[48] Id at para 22.

> "Nevertheless, the implementation of an Act which passes constitutional scrutiny at the time of its enactment, may well give rise to a constitutional complaint, if, as a result of circumstances which become apparent later, its implementation would infringe a constitutional right. In assessing the validity of such a complaint, it becomes necessary to determine whether the *proximate* cause of the infringement of the right is the statutory provision itself, or whether the infringement of the right has been precipitated by some other cause, such as the failure of a governmental agency to fulfil its responsibilities. If it is established that the proximate cause of the infringement, in the light of the circumstances, lies in the statutory provision under consideration, that provision infringes the right. This is not a departure from the objective approach to unconstitutionality. It is merely a recognition of the fact that a constitutional defect in a statutory provision is not always readily apparent at the time of its enactment, but may only emerge later when a concrete case presents itself for adjudication."[49] (Emphasis added)

[144] The test for determining whether a statutory provision or an Act of Parliament constitutes a limitation or infringement was articulated thus by this Court in *New National Party*:

> "Parliament must ensure that people who would otherwise be eligible to vote are able to do so if they want to vote and *if they take reasonable steps in pursuit of the right to vote*. More cannot be expected of Parliament. *It follows that an impermissible consequence will ensue if those who wish to vote and who take reasonable steps in pursuit of the right, are unable to do so*."[50] (Emphasis added.)

In *New National Party* this Court also said:

> "Parliament is obliged to provide for the machinery, mechanism or *process that is reasonably capable of achieving the goal of ensuring*

[49] Id.

[50] Id at para 21.

> *that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. I conclude, therefore, that the Act 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.* Any scheme which is not sufficiently flexible to be reasonably capable of achieving the goal of ensuring that people who want to vote will be able to do so if they act reasonably in pursuit of the right, has the potential of infringing the right. That potential becomes apparent only when a concrete case is brought before a court. The appellant bears the onus of establishing that the machinery or process provided for is not reasonably capable of achieving that purpose. As pointed out in the previous paragraph, it might well happen that the right may be infringed or threatened because a governmental agency does not perform efficiently in the implementation of the statute. This will not mean that the statute is invalid. The remedy for this lies elsewhere. The appellant must fail if it does not establish that the right is infringed by the impugned provisions in the manner described earlier. This Court held in *August v The Electoral Commission* that all prisoners would have been effectively disenfranchised without constitutional or statutory authority by the system of voting and registration which had been put into place by the Commission. This case is different, however, because the alleged disenfranchisement is said to arise from the terms of the statute and not from the acts or omissions of the agency charged with implementing the statute."[51] (Emphasis added.)

[145] In *New National Party* this Court made it clear that the "aspects of the Electoral Act in issue regulate the way in which citizens must register and vote".[52] This is a sufficient indication that the statutory provisions impugned in that case regulated the right to vote. The provisions that were impugned in *New National Party* precluded adult citizens who were otherwise entitled to vote from voting unless they obtained a

[51] Id at para 23.

[52] Id at para 10.

bar-coded identity document or TIC and produced it for registration and for voting. In the present case the impugned provision precludes an adult citizen who is otherwise entitled to stand for public office from standing for public office unless he or she has obtained signatures of registered voters in the relevant region that amount to 15% of the quota of that region from the previous election.

[146] So, if the provision that was impugned in *New National Party* was a regulatory provision regulating the right to vote and the provision impugned in the present case is a regulatory provision regulating the right of an independent candidate to stand for public office – each provision precluding the exercise of a right under section 19 unless something had been or has been done or achieved – there can be no basis for accepting that the impugned provision in *New National Party* was a regulatory provision but the impugned provision in the present case is not a regulatory provision. If the impugned provision in the present case is accepted as a regulatory provision, there can then be no doubt that this Court's decision in *New National Party* applies and that the judgment of this Court in *Affordable Medicines* also applies.

[147] In *New National Party* this Court said the issue it had to determine was "whether the measure itself constitute[d] such denial [of the vote] and [was] on that account an infringement of the right to vote". This Court then said:

> "To establish this, 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 unable to exercise it."[53]

The judgment of this Court in *Democratic Party* was handed down on the same day as this Court's judgment in *New National Party* but the latter was handed down first. This can be gathered from the dates of their hand down as they appear in the judgment as well as from the terms of the judgment in *Democratic Party*. Goldstone J wrote the

[53] Id at para 37.

judgment of the Court. Both in *New National Party* and in *Democratic Party* the issues were largely the same. The Democratic Party challenged the constitutional validity of the Electoral Act in so far as it only allowed to register to vote and ultimately to vote only those adult citizens of South Africa who were in possession of bar-coded identity documents or TIC.

[148] The Democratic Party contended that the Electoral Act infringed the right to vote in so far as it had this requirement. This Court rejected this contention for the same reasons that were advanced in *New National Party*. In other words, this Court also concluded in *Democratic Party* that the Electoral Act did not constitute a limitation or an infringement of the right to vote. It reached this conclusion for the same reasons that it had given in *New National Party*.

[149] In *Richter*, a unanimous judgment of this Court written by O'Regan J, who had dissented from the majority in *New National Party*, this Court followed the approach adopted in *New National Party* in determining whether a statutory provision limited the right to vote. Indeed, in *Richter* this Court endorsed the test that this Court enunciated in *New National Party*.

[150] In *Richter* what was challenged was the constitutionality of section 33(1)(e) of the Electoral Act. In terms of the Electoral Act the default position was that, if a citizen would be out of the country on polling day, he or she would not be able to vote. However, the Electoral Act made provision for exceptions to this general rule. Section 33(1)(e) of the Electoral Act made special provision for certain classes of South African citizens who would be abroad on polling day in 2009 to vote from outside of the country. The classes of people that section 33(1)(e) provided would be allowed to vote from outside the country on polling day were people who were temporarily absent from the Republic for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event.

[151] The classes of people who would be permitted under section 33(1)(e) to vote from outside of South Africa did not include persons in Mr Richter's class. Mr Richter was temporarily in the United Kingdom (UK) where he was working as a teacher. He did not fall into any of the classes that would be allowed under section 33(1)(e) to vote from outside the country. Mr Richter contended that the failure of the Electoral Act to include people in a similar position as him among those who would be allowed to vote from outside the country constituted an unjustifiable and unreasonable limitation of their right to vote.

[152] In *Richter*, talking about the importance of the right to vote, O'Regan J said:

> "[53] The right to vote is symbolic of our citizenship, as Sachs J declared. In entrenching the right of every citizen to vote, section 19 of our Constitution affirms that symbolic value. But the right to vote, and its exercise, has a constitutional importance in addition to this symbolic value. The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgettably did in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails."[54]

[54] *Richter* above n 34 at para 53.

[153] In *Richter* this Court pointed out that 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.[55] O'Regan J said:

> "[56] Just as the State bears a responsibility to take positive steps to enable elections to take place, the right to vote itself cannot be exercised by a citizen unless he or she takes the trouble to exercise it. *The very process of regulating the elections which requires the composition of a national voters' roll, the establishment of voting stations and voting times will impose burdens upon members of the public who wish to exercise their right to vote. First, they will have to register in good time. Then, on polling day, they may have to journey some distance to a voting station; they will have to be in possession of a bar-coded identity document; and they may have to stand in a long queue to vote. These burdens are largely unavoidable*."[56] (Emphasis added.)

[154] Paragraphs 57 and 58 of this Court's judgment in *Richter* are very important. They include the test enunciated in *New National Party* for determining whether a statutory provision limits or infringes the right to vote. In those paragraphs O'Regan J said:

> "[57] In assessing whether the restrictions or burdens placed on a voter who wishes to exercise his or her right to vote are inconsistent with the constitutional protection of the right to vote, *a court will accept that a voter may not complain if the burden imposed does not prevent the voter from voting, as long as the voter takes reasonable steps to do so.* As the majority in this court noted in *New National Party*:
>
> > 'Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. I

[55] Id.

[56] Id at para 56.

> conclude, therefore, that the Act 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.'
>
> [58] In approaching each of the provisions in question in this case, therefore, I would suggest that to determine whether any provision constitutes an infringement of section 19 of the Constitution, *we must establish whether the consequence of any of the challenged provisions is such that, were a voter to take reasonable steps to seek to exercise his or her right to vote, any of the provisions would prevent the voter from doing so. In determining what would constitute reasonable steps for the voter to take, we should bear in mind both the fact that the process of voting inevitably imposes burdens upon a citizen as well as the important democratic value of fostering participation in elections that I discussed above. Should it be found that the provision would prevent a voter from voting despite the voter's taking reasonable steps to do so, the provision will constitute an infringement of section 19.* The next question that will arise is whether the infringement is justifiable in terms of section 36 of the Constitution."[57] (Emphasis added.)

[155] It is to be noted that in the above excerpt the test for determining whether a provision or an Act constitutes a limitation or infringement of the right to vote which was enunciated in *New National Party* was formulated slightly differently. In this excerpt the test is formulated as whether the consequence of any provision is such that, were a voter to take reasonable steps to seek to exercise his or her right to vote, any of the provisions would prevent the voter from doing so. If it would, the provision or Act would constitute a limitation or an infringement. The next stage would then be to do a section 36 analysis. Obviously, if the answer is in the negative, that would mean that the statutory provision or Act of Parliament does not constitute an infringement or limitation of the right to vote or right to stand for public office.

[57] Id at paras 57-8.

[156] This test requires the person who asserts that the statutory provision or Act infringes or limits the right to vote or the right to stand for public office to identify what reasonable steps a voter or independent candidate would have taken which would still not have been enough for the voter or independent candidate to exercise his or her section 19 right. The test should be formulated thus: would the provision or Act or measure in question prevent an independent candidate from standing for public office even if he or she took all the reasonable steps to exercise that right?

[157] This Court observed – obviously bearing in mind the test enunciated in *New National Party* – that, apart from travelling from the UK, Korea and Canada back to South Africa, there were no steps that Mr Richter, Mr Tipper or Mrs Moloko – the other applicants in the *Richter* matter – could take in order to be able to vote in the 2009 elections other than to travel thousands of kilometres to South Africa to vote.

[158] O'Regan J also said:

> "Apart from travelling back to South Africa from the United Kingdom, South Korea and Canada in order to be present in South Africa on polling day, 2009, there are no steps that Mr Richter, Mr Tipper or Mr and Mrs Moloko can take to vote in the 2009 elections. Can it be said that in requiring them to return home to South Africa to vote, the election regulations are imposing an obligation of reasonable compliance upon them? I do not think so. It is acceptable to ask voters to travel some distances from their homes to a polling station. One cannot quibble, either, at the fact that delays in casting votes at a polling station may require voters to queue for considerable periods of time to vote. *It cannot be said, however, that requiring a voter to travel thousands of kilometres across the globe to be in their voting district on voting day is exacting reasonable compliance from a voter.* This is all the more so, given that section 33(1)(b) expressly does not require those working abroad on government service to return home to vote, but

> provides voting facilities for them at embassies, high commissions and consulates."[58] (Emphasis added.)

[159] This Court then concluded that section 33(1)(e) constituted a limitation of the right to vote "by restricting the classes of voters who are absent from the Republic on polling day from participating in the election".[59] In my view another way of putting this is that section 33(1)(e) limited the right to vote of those voters who would be outside of South Africa by not including them in the special arrangements it made for other classes of voters who would be outside the country on polling day. This Court then engaged in a section 36 analysis and concluded that the limitation was not reasonable and justifiable in a democratic society based on freedom, equality and dignity.

[160] The test for determining whether a statutory provision or an Act infringes the right to vote or the right to stand for public office involves asking the question whether people who otherwise qualify to vote or to stand for public office or who are eligible to vote and want to vote will be able to do so if they take reasonable steps in pursuit of the right to vote. This means that the person challenging the constitutionality of a statutory provision must show that people who are otherwise eligible to vote or to stand for public office and want to vote or to stand for public office will not be able to vote or stand for public office despite taking reasonable steps in pursuit of the right. OSA falls dismally short here. It has not addressed in its founding papers what steps independent candidates would reasonably be expected to take in order to be able to exercise their right to stand for public office. In *New National Party* this Court found that the Act did not infringe or limit the right to vote.

[161] At this stage I wish to summarise the test for determining whether or not a statutory provision or an Act of Parliament infringes or limits a right entrenched in section 19 of the Constitution. This may involve some repetition of what I have already said but I consider it appropriate to do so for emphasis and clarity. I emphasise that the

[58] Id at para 68.

[59] Id at para 70.

test for determining whether a statutory provision or an Act constitutes an infringement or limitation of a right entrenched in section 19 of the Constitution – which includes the right to vote, the right to a free and fair election and the right to stand for public office – is whether the provision or Act *would prevent a voter from voting or* an independent candidate standing for public office *despite the voter or independent candidate taking reasonable steps to do so*. This test has two legs. The first leg is whether the statutory provision or Act would prevent the voter from voting or would prevent an independent candidate from standing for public office, as the case may be. If the answer to this question is in the negative, that would be the end of the inquiry and the conclusion would be that the statutory provision or Act does not constitute a limitation or infringement of the rights in section 19 of the Constitution.

[162] If, however, the answer is in the affirmative – in other words, if the answer was that that provision or Act would prevent a voter from voting or an independent candidate from standing for public office, then the inquiry goes into the second leg. The question to be asked in the second leg of the inquiry is whether the prevention would occur despite the voter or independent candidate taking reasonable steps to vote or to stand for public office. If the answer to the question in the second leg is in the negative, that would be the end of the enquiry and the conclusion would be that there is no infringement or limitation of any rights contained in section 19 of the Constitution. However, if the answer to the question in the second leg is in the affirmative, then that would mean that the statutory provision or Act constitutes a limitation or infringement of the section 19 rights.

[163] The above test entails that it is not enough for a person who contends that a statutory provision or Act constitutes a limitation or infringement of a section 19 right to simply state that the statutory provision or Act would prevent a voter from voting or would prevent an independent candidate from standing for public office because that is only one leg of the test. Such a person must go further and say that the prevention would occur despite the voter or independent candidate taking reasonable steps to vote or to stand for public office. If that person does not go further, he or she has failed to

address the second leg of the inquiry and would fail to show that the statutory provision or Act constitutes an infringement or a limitation of the right to vote or right to stand for public office.

[164] In *OUTA*[60] Parliament had the constitutional competence to make laws concerning "road traffic regulation". Parliament passed the Administrative Adjudication of Road Traffic Offences Act (AARTO).[61] The main question in *OUTA* was whether the AARTO Act fell within the functional area described as "road traffic regulation" or "traffic and parking" or "municipal roads" in Schedules 4 and 5 of the Constitution. This Court referred to the meaning given to the verb "regulate" in the South African Concise Oxford Dictionary where the verb "to regulate" is given the meaning "1. To control or maintain the rate or speed (of a machine or process); 2. Control or supervise by means of rules and regulations".[62] In *OUTA* this Court inter alia said about the meaning of regulation:

> "It seems to me that, in relation to the functional area 'road traffic regulations', the Constitution confers upon the national and provincial spheres of government the concurrent competence of making laws that *control* traffic on the roads."[63] (Emphasis added.)

[165] This statement reflects that this Court accepted that the concept of regulation entails the control of something.[64] In *Beerman*[65] the Court said:

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[60] *Organisation Undoing Tax Abuse v Minister of Transport* [2023] ZACC 24; 2023 JDR 2533 (CC); 2023 (10) BCLR 1189 (CC) (*OUTA*).

[61] 46 of 1998.

[62] *OUTA* above n 60 at para 108.

[63] Id at para 114.

[64] Id.

[65] *Rex v Beerman* 1947 (2) SA 1028 (C).

> "The meaning of 'to regulate' is to control or govern and 'regulated' means governed by rule; properly controlled or directed; adjusted to some standard."[66]

In *De Freitas*[67] a Full Court said:

> "The two main purposes of the Act are to regulate the right of advocates and attorneys to appear in courts and to extend the existing right of attorneys to appear in courts. To regulate means to 'control' or 'govern.'"[68]

[166] There is a very helpful discussion of the meaning of the verb "regulate" by De Villiers J in *The Magic Company*[69] in which he also refers to some cases of the Appellate Division (now Supreme Court of Appeal) and the Privy Council. He referred to *Perumal*[70] at para 528A where, relying on *Feinstein*,[71] Didcott J said that '"it is surely inherent in the idea of regulation that something or other may perforce be forbidden'. 'It follows that the crucial question about such legislation is not whether it contains a prohibition affecting the activity liable to be regulated, but whether any ban embodied in it has such a character and extent that the activity itself has been substantially prohibited. That question is obviously one of degree in each individual case'".

[167] Referring to Didcott J, De Villiers J said:

> '"Referring to the case of *R v Williams* 1914 AD 460, the learned judge continued to say that some assistance is to be gained, when one attempts to answer it in a given

[66] Id at 1030.

[67] *Society of Advocates of Natal v De Freitas* 1997 (4) SA 1134 (N).

[68] Id at 1122.

[69] *The Magic Company (Pty) Ltd v Moleketi, the Member of the Executive Council of the Gauteng Province Responsible for Finance and Economic Affairs* 1999 JDR 0521 (T).

[70] *S v Perumal* 1977 1 SA 526 (N).

[71] *Feinstein v Baleta* 1930 AD 319 at 323 and 329.

situation from the judgment of Wessels AJA in that case. The judgment continues as follows:

> "A provincial Ordinance was then in issue. It had forbidden betting on horse races by any means but the totalisator, with the result that ordinary betting through bookmakers and with others was abolished. The Provincial Council had however lacked the power to do more than regulate betting on horse races. The relevant part of the Ordinance was consequently declared ultra vires. Wessels AJA had this to say, at pp468, 469-470:
>
> > 'By giving a subordinate legislature the right to make regulations the superior legislature does not as a rule intend the subordinate legislature to sweep away completely or substantially the matter it is required to regulate. To regulate is not to prohibit either entirely or substantially. . . . You cannot, under the guise of regulating, in fact prohibit the usual and prevalent method of betting. You cannot so frame your regulations that you virtually regulate the subject matter out of existence. *No doubt a power to regulate implies a power to restrict, and therefore even to prevent, but only in a small degree, and not so substantially that very little of the former rights remains.* No hard and fast rule can be laid down, and all that we can say is that, if a regulation takes away a substantial and important portion of existing rights, it becomes in fact a prohibition. . . . I therefore ask myself whether the Provincial Council merely regulates betting, or whether it prohibits it, by substituting a bet on a totalisator for the well-known methods of betting with bookmakers and between the members of the public, and I can come to no other conclusion than that it does away with such substantial and important kinds of betting that it must be said rather to prohibit than to regulate betting.'
>
> That is the background against which bylaw must be considered. It undoubtedly incorporates a prohibition. What must be examined is the prohibition's precise effect."

Earlier in the judgment, at 527F-H the learned judge pointed out that the sources of the principle set out in *R v Williams* were judgments by the Privy Council in two cases:

> "The one was *Municipal Corporation of the City of Toronto v Virgo* 1896 AC 88, in which Lord Davey said (at p93):
>
> > 'There is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.'
>
> In the other, *Attorney-General for Ontario v Attorney-General for the Dominion* 1896 AC 348, the point was made thus by Lord Watson, at p363:
>
> > 'A power to regulate naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation.'
>
> Both these statements were endorsed and adopted in *R v Williams*, supra at pp465, 469."

In *Fouche v McDonald* 1963 4 SA 968 (C) at 971A-B Diemont J (as he then was) said:

> "[O]ne must bear in mind that many regulations must of necessity contain a limited prohibition."

In *S v Schoenfeld* 1963 4 SA 77 (T) at 79B-E Colman AJ (as he then was) stated:

> "Counsel for the appellant, having brought these provisions to our notice, referred to the case of *R v Williams* 1914 AD 460, which is frequently cited in support of the proposition that 'a power to regulate is not a power to prohibit'. He therefore suggested that by-law 14, which prohibits certain conduct, was ultra vires the regulatory powers conferred by the enabling legislation.
>
> But to summarise the principle referred to in *R v Williams* supra, and the authorities cited therein in the words 'a power to regulate is not a power to prohibit' can be misleading. The principle is that when a subordinate law-making body is empowered to regulate a certain type of activity it is not thereby authorised to prohibit that type of activity altogether; it is not true to say that under a power to regulate, nothing

> may be prohibited. It is clear from such cases as *Brown v Pretoria Municipality* 1926 TPD 59, that in the proper exercise of power versus regulation a local authority may prohibit certain conduct incidental to or connected with the activity which is being regulated.""'

[168] In *Virgo*,[72] the Privy Council heard an appeal from a decision of the Supreme Court of Canada. The question before the Privy Council was whether a section of a by-law was completely and validly made by the corporation of the city of Toronto. However, the Privy Council said that it took the view that the real question was whether under a power to pass by-laws "for regulating and governing" hawkers, etc. the Council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city.

[169] The Privy Council had this to say about what regulation means or does not mean:

> "No doubt the regulation and governance of a trade may involve the *imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.* An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words." (Emphasis added.)

This statement was approved by Lord Watson in *Attorney-General for Ontario.*[73]

[72] *Municipal Corporation v Virgo* [1896] A.C. 88 (1).

[73] *Attorney-General for Ontario v Attorney-General for the Dominion* 1896 A.C. 348 at para 363.

[170] It is quite clear from the authorities discussed above that the power to regulate includes the power to control, to govern, to set norms and standards, to prohibit at least partially and not totally or substantially, to prescribe conditions and qualifications and to impose some restrictions. In this case section 31B(3) – which contains the signature requirement – provides that an independent candidate must obtain and produce supporting signatures of registered voters equal to 15% of the quota of the relevant region in the previous election in order to contest an election. That is a provision that falls within a regulation and not a limitation of the right to stand for public office.

[171] In *New National Party* this Court held that a statutory provision which facilitates the exercise of a right to vote did not constitute a limitation. Section 31B(3) is not a limitation of any right. The second judgment's conclusion to the contrary errs. The signature requirement does not adversely affect anybody. Section 31B(3) does not in any way adversely affect an independent candidate. It does not require an independent candidate to do anything unconnected with his or her personal goals or ambitions. It requires him or her to do that which he or she was bound to do sooner or later, namely, it requires him or her to go out and canvass and obtain the support of only 15% of the registered voters he or she was going to canvass anyway. It requires an independent candidate and a new political party to start campaigning for votes earlier. This has no adverse consequences for the independent candidate or his or her right to stand for public office. In fact the signature requirement entails that he or she must advance his or her ambition of obtaining a seat in the National Assembly or in a provincial legislature. The signature requirement of 15% can therefore not be said to be a limitation of this right to stand for public office. The requirement is ultimately beneficial to the candidate's candidature. Any suggestion that it limits his or her right is to misconstrue the requirement.

Second judgment

[172] I have read the judgment (second judgment) by my Colleague, Kollapen J. It strongly disagrees with my conclusion that my use of the test adopted by this Court in *New National Party*, *Democratic Party* and *Richter* for the determination of whether a

statutory provision limits the right to vote and with my conclusion that the signature requirement doesn't constitute a limitation. It takes the view that the test in *New National Party* does not apply in this case. In my view the second judgment errs.

[173] The *New National Party* case concerned the right to vote and the right to free and fair elections entrenched in section 19 of our Constitution. The present case is a case concerned with the right to vote, the right to stand for public office and the right to free and fair elections. The right to vote, the right to stand for public office and the right to free and fair elections are inextricably intertwined. Although, generally speaking it can be said that facilitating the exercise of the one may facilitate the exercise of the others, this does not mean that the exercise of each one of them may be facilitated in the same way. There may be facilitation that is peculiar to the right to vote which might not necessarily apply to the facilitation of the exercise of the right to stand for public office. The signature requirement is a form of facilitation of the right to stand for public office which would not apply to the right to vote. Indeed, section 31B(3) constitutes regulation of the right to stand for public office. The statutory provisions with which this Court had to deal in *New National Party* were also part of the regulation of the right to vote. That is why when one reads this Court's judgment in that matter, one finds many instances where it expressly refers to regulation and many instances where, although it does not say so in so many words, it is quite clear that it considered the provisions to regulate the right to vote. The test in *New National Party* was followed in *Democratic Party* and in *Richter*.

[174] Quite apart from the test in *New National Party*, if one accepts, as I do, that section 31B(3) constitutes regulation, one can also use the test used by this Court in *Affordable Medicines*. I have discussed the decision of this Court in *Affordable Medicines* at some length. Even on that test, too, the signature requirement does not constitute a limitation. OSA does not satisfy the *New National Party* test nor does it satisfy the *Affordable Medicines* test.

[175] Even applying the test that the second judgment applies, the result will be that the signature requirement does not constitute a limitation. Section 31B(3) does not constitute a denial of the right to stand for public office. The signature requirement has no adverse or prejudicial effects on the right of an independent candidate to stand for public office. Instead, it gets the candidate to go out and persuade registered voters to support his or her candidature – something that seeks to advance his or her political ambitions. Once he or she has secured the support of 15% of the quota of registered voters in a region, the candidate does not have to go back to those voters when the election campaign starts because those have already said that they support him or her. So, there is absolutely no basis for the proposition that section 31B(3) constitutes a limitation. How does something that advances an independent candidate's right to stand for public office suddenly become a limitation of that right? The 15% registered voters are voters that the independent candidate was going to have to approach anyway during his or her election campaign even if the signature requirement was not there.

[176] The second judgment has rejected Parliament's decision to use a percentage rather than a fixed number for the signatures of registered voters that must be secured by an independent candidate to stand for public office. There is absolutely no justification for the second judgment to effectively set aside that decision of Parliament when it was not one of the decisions that OSA sought to have set aside. This Court should defer to Parliament on such a matter. The second judgment had to take such an unwarranted step because it was faced with the problem of what relief it could grant to OSA after reaching the conclusion that section 31B(3) constitutes an unjustifiable and unreasonable limitation of the right to stand for public office. The second judgment itself provides no proper basis for effectively usurping Parliament's power to make such a decision that rightly is that of Parliament.

[177] The second judgment relies heavily on the decision of the majority in *Moloto*[74] in this Court to say that the test in *New National Party* does not apply. In the paragraph

[74] *South African Transport and Allied Workers Union (SATAWU) v Moloto* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC).

in which the majority in *Moloto* referred to in *New National Party*, it said that *New National Party* applies to cases where the statutory provision facilitates the right to vote. That is what I have said section 31B(3) in this case does. However, the majority in *Moloto* seems not to have appreciated the difference between statutory provisions that constitute a complete or total denial of a right such as those in section 65(1) of the LRA and those that permit the exercise of a right provided certain conditions are met or provisions that regulate rather than totally limit a right. I say this because a mere look at section 65 of the LRA would have revealed that the provisions in section 64 were not limitations of the right to strike but sought to regulate and that those of section 65 were the ones which were limitations. Both the majority in *Moloto* and the Labour Appeal Court in *CWIU*[75] on which the majority in *Moloto* relied fell into the same error. The second judgment also seems to fall into the same error.

[178] The second judgment decides that the signature requirement of 15% of the quota of the region from the previous election should be replaced by a requirement of 1 000 signatures. I have already said above that it is Parliament's decision whether to use a percentage or a fixed number and that there is no proper basis for this Court to second-guess Parliament on this issue. Furthermore, the purpose of the 15% requirement was to gauge the support of a candidate to see whether he or she has credible prospects of getting a seat in the elections if he or she were to contest the election. By determining that the threshold should be a fixed number i.e. 1 000 signatures as opposed to a percentage of a quota of a region the second judgment has decided to use a one-size-fits-all approach despite the fact that it is common cause that the different regions or provinces have vastly different sizes which is why the figures reflected both in OSA's affidavit as well as the IEC's affidavit relating to the numbers that would represent 15% of different quotas are so vastly different.

[179] One thousand (1 000) signatures may have been able to give an indication of the support for an independent candidate or new political party if the regions were of the

[75] *Chemical Workers' Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* [1998] ZALAC 27 (*CWIU*).

same size and the quotas were not above, for example, 20 000 registered voters but once the quotas reach 40 000 and above, that an independent candidate was able to get 1 000 supporting signatures will not be an indication of anything really. Furthermore, there is a great risk that, if this threshold of 1 000 signatures is used, the ballot paper will be unmanageable because of the great numbers of independent candidates that may contest the elections when they have no credible prospects of obtaining enough votes in the elections to get a seat. Indeed, this may pose a threat to the fairness and freeness of the election.

[180] The second judgment relies on legislation applicable in other countries to support its conclusion against the respondents. Those are pieces of legislation which Parliament, the IEC and the Minister have not been given an opportunity to deal with. This is unfair to them and it violates their right to a fair public hearing guaranteed by section 34 of the Constitution. If they had been afforded an opportunity to comment on such legislation, they may have disputed their relevance or applicability. In fact they may have produced a number of pieces of legislation from other countries which reflects a different picture.

[181] In the circumstances OSA has failed to show that the 15% signature requirement constitutes a limitation of any rights. That being the case, we do not reach the section 36 analysis. Accordingly, OSA's contention that section 31(B)(3) of the Electoral Act as amended by the EAA is inconsistent with the Constitution and invalid falls to be rejected.

OSA's second constitutional challenge

[182] The participation of independent candidates in the next election in South Africa will raise some issues that have never arisen in national and provincial elections in this country in the past 29 years since the advent of democracy. The difference between the previous national and provincial elections and next year's elections is that in the past 29 years our elections did not involve independent candidates whereas, following upon the EAA, next year's elections will involve independent candidates.

[183] When seats became vacant in the National Assembly or provincial legislature in the past 29 years as a result of the death or resignation of a member of the National Assembly or a provincial legislature, that did not give rise to a need for any recalculation of votes and reallocation of a seat or seats. This was because our electoral system did not involve independent candidates. All members of the National Assembly and of provincial legislatures were members of one or other political party represented in the National Assembly or provincial legislature. When a vacancy arose from the resignation or death of one of its members, the party concerned would simply nominate their party member next on the party's list for the National Assembly or provincial legislature.

[184] Now that in next year's elections and beyond independent candidates will contest elections and some will win and be allocated seats either in the National Assembly or provincial legislatures, the EAA had to provide answers to the following questions:

(a) what will happen when an independent candidate wins a seat in the National Assembly and a provincial legislature since he or she cannot occupy both seats?

(b) what will happen when an independent candidate who was allocated a seat in either the National Assembly or a provincial legislature resigns or dies and his or her seat becomes vacant?

(c) what will happen when an independent candidate for the National Assembly, and who competes in a single region, gets enough votes to win two or more seats?

(d) what will happen when an independent candidate for the National Assembly, and who competes in more than one region, wins a seat in more than one region?

(e) what will happen when an independent candidate for a provincial legislature gets enough votes to win two or more seats?

[185] Item 11(f) of the amended Schedule 1A deals with the position in regard to a seat in a provincial legislature and item 5(i) of the amended Schedule 1A deals with a regional seat in the National Assembly. Item 23 of Schedule 1A of the EAA deals with vacancies that occur when an independent candidate dies or resigns and a vacancy then arises.

[186] Item 11(f) of the amended Schedule 1A reads:

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

[187] Item 5(i) of the amended Schedule 1A reads as follows:

> "If no recalculation of provisional allocations is required in terms of item 7, the provisional allocation of such seats in terms of paragraphs (e), (f), (g) and (h) becomes the final allocation of such seats to the various parties and independent candidates, and if a recalculation is required, the provisional allocation of such seats, as adjusted in terms of item 7, becomes the final allocation of such seats to the various parties and independent candidates."

[188] Item 23 of the amended Schedule 1A reads:

> "(1) In the event of a vacancy in a region or provincial legislature with respect to a seat allocated to an independent candidate, the

chief electoral officer must in writing allocate the seat by recalculating the result as follows:

(a) disregarding the votes allocated to the independent candidate causing the vacancy;

(b) disregarding the votes and seats allocated to the independent candidates already in office; and

(c) recalculating the result for the region or provincial legislature in terms of the provisions in sub-item (3).

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

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

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

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

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

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

(f) In the event of a party being allocated an additional number of seats in terms of this item and if its list in question then does not contain the names of a sufficient number of candidates as set out in item 7(1) or item 12(1), the process provided for in item 24 must be repeated with the changes required by the context until all seats have been allocated."

[189] In considering OSA's second constitutional challenge it is important to bear in mind the provisions of sections 46(1)(d) and 105(1)(d) of the Constitution. Section 46(1)(d) relates to the National Assembly whereas section 105(1)(d) relates to provincial legislatures. Section 46(1)(d) reads:

"(1) 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—

. . .

(d) results, in general, in proportional representation."

Section 105(1)(d) reads:

> "(1) A provincial legislature consists of women and men elected as members in terms of an electoral system that—
>
> . . .
>
> (d) results, in general, in proportional representation."

This is a very important constitutional requirement because, when all is said and done, our Constitution requires that the outcome of our elections must result, in general, in proportional representation.

[190] OSA challenges the recalculation of seats when seats are forfeited in the National Assembly or a provincial legislature or when vacancies arise in a legislature.

[191] In his affidavit Mr Mamabolo gives an overview of the forfeiture of seats and vacancies. Mr Mamabolo points out that the forfeiture of seats arises during the initial allocation of seats following an election. He points out that there are three instances in which the forfeiture of seats occurs in the National Assembly. These are the following:

(a) If a party has submitted a national or regional list with fewer names of party candidates than the number of seats to be allocated to it, the number of seats for which it has no listed candidates is forfeited.

(b) If an independent candidate stands to be allocated more than one seat in a region, any excess seats won by the candidate are forfeited since an individual candidate can, by definition, only hold one seat.

(c) If an independent candidate contests the election in more than one region and wins a seat in more than one region, that candidate will be allocated a seat in the region where he or she received the highest proportion of votes and any excess seats are forfeited.

[192] Mr Mamabolo points out that, where a forfeiture occurs, the initial or provisional allocation of seats is recalculated in the affected region(s) in accordance with the

method prescribed in item 7(3) to (6) of Schedule 1A, which is applicable to the National Assembly and item 12(3) to (5) in respect of provincial legislatures.

[193] According to Mr Mamabolo the recalculation entails the following:

> "48.1 The party or independent candidate forfeiting seats is disregarded in the recalculation. Its provisional allocation of seats for the region (or province), minus the number of seats forfeited by it, becomes its final allocation of seats.
>
> 48.2 An amended quota of votes per seat is determined for the region (or province) by dividing the total number of votes cast minus the number of votes cast in favour of the party or candidate whose seat(s) has been forfeited, by the number of seats, plus one, reserved for the region (or in the province) minus the number of seats finally allocated to the said party or independent candidate. Simply put, the votes cast for the party or candidate that has forfeited a seat are not counted in determining the amended quota, and nor are the seats that have already been finally allocated to that party or candidate.
>
> 48.3 The result plus one, disregarding fractions, is the amended quota of votes per seat for the recalculation.
>
> 48.4 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.
>
> 48.5 With this calculation, not all the seats may be allocated. This is because the contesting candidates may not, between them, obtain sufficient votes to meet the full quota of seats. The unallocated seats are awarded based on 'the largest remainder method': the surplus votes accruing to each party or independent candidate (i.e., the remainder 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."

[194] Mr Mamabolo then deals with vacancies that arise when an independent candidate dies or resigns from the National Assembly or a provincial legislature. He points out that such vacancies are dealt with in items 22 to 24 of Schedule 1A. Item 22 deals with vacancies that arise when a member of the National Assembly or provincial legislature who is a party representative dies or resigns. Item 23 deals with vacancies which occur when an independent candidate dies or resigns as a member of the National Assembly or provincial legislature. Since an independent candidate is not associated with any other person or party, his or her seat cannot just be reallocated to another person. Mr Mamabolo points out that instead there needs to be a recalculation of the votes cast to determine which party or independent candidate who contested the preceding elections is entitled to be allocated the vacated seat.

[195] Mr Mamabolo points out that the recalculation method is "akin to that applied when seats are forfeited". He then explains the recalculation thus:

> "49.3.1 The votes allocated to the independent candidate causing the vacancy are disregarded.
>
> 49.3.2 The votes and seats allocated to independent candidates already in office are also disregarded. Since individual candidates cannot, by definition, hold a second seat, independent candidates already in office are not eligible to be allocated the vacant seat and are accordingly excluded from the recalculation.
>
> 49.3.3 An amended quota of votes per seat is determined for the region (or province) by dividing the total number of votes cast minus the number of votes cast in favour of the individual candidate that caused the vacancy and minus the number of votes cast in favour of individual candidates that have already been allocated a seat, by the number of seats, plus one, reserved for the region (or in the province) minus the number of seats held by independent candidates. Simply put, the votes cast for the independent candidate that caused the vacancy are not counted in determining the amended quota, and nor are the votes cast

for, and the seats held by, independent candidates that already hold office in the legislature.

49.3.4 The result plus one, disregarding fractions, is the amended quota of votes per seat for the recalculation.

49.3.5 The number of seats to be allocated to the parties and independent candidates participating in the recalculation is then determined 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.

49.3.6 Any unallocated seats are awarded based on the largest remainder method.

49.3.7 Importantly, item 24 provides that if any party or independent candidate should stand to lose a seat following the recalculation contemplated in item 23, the party or independent candidate will retain that seat, and a further recalculation must be done by the method prescribed in item 24. This ensures that a party or candidate may never lose a seat already allocated to it as a result of a recalculation conducted to fill a vacancy."

[196] OSA's gripe with the recalculation provided for by the EAA is that the recalculation of outcomes in the event of forfeiture and vacancies should not disregard the votes cast for independent candidates as that affects the proportionality between the votes cast and allocated seats and advantages the largest party. In short, OSA contends that upon recalculation in terms of items 7, 12 and 23 as the case may be, the quota to be awarded a seat becomes progressively smaller. Mathematically, that is correct.

[197] Mr Mamabolo explains that the rationale for disregarding independent candidate's 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 re-allocation of that seat. He points out that in this way 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 recalculation of seats for political parties or other eligible independent candidates. He

also says that, by the same token, if a vacancy arises, the votes in favour of the previous incumbent should not influence the determination of the new incumbent to fill the seat. He adds:

> "The fact that the independent candidate has vacated the seat implies that the votes cast originally for that candidate must be disregarded since the retention of the votes for that candidate would result in the same outcome, electing the same person."

[198] OSA's objection to the recalculation includes the suggestion that a vote for an independent candidate is not a vote for that individual but a vote that rejects party politics. As I understand the position, OSA criticises the notion that votes that were cast for an independent candidate can end up being awarded to a political party. There is no merit in this suggestion by OSA. A voter can vote for an independent candidate in regard to a provincial legislature and for a party in respect of the National Assembly. Therefore, just because a voter has voted for an independent candidate does not mean that he or she necessarily does not want political parties.

[199] Furthermore, the votes in favour of the independent candidate whose seat is forfeited or vacated is not awarded to a political party – those votes are removed altogether in the calculation. If OSA is suggesting that these discarded votes should instead be reallocated to other independent candidates, the suggestion is untenable. The fact that a voter chose to vote for independent candidate X does not mean that, if the vote for X has to be disregarded, the voter would want his or her vote instead to go to independent candidate Y. There is no way of knowing what the voter's "second choice" would have been – it might have been for another independent candidate or for a political party, or the voter might have preferred to spoil his or her paper.

[200] OSA also criticises the recalculation method provided for by the EAA and says it entails that political parties have "a second bite at the cherry". This refers to the occasion when the amended quota is applied. Mr Mamabolo rejects this criticism by OSA and provides this explanation:

> "54.1 In the case of forfeiture, the recalculation is done after a provisional allocation of seats. If the provisional allocation results in the allocation of excess seats – to parties or independent candidates – those seats are forfeited, and the allocation is amended (by applying the amended quota). The allocation is only made final on the recalculation. The votes cast in favour of political parties are thus only counted once for the purpose of the final allocation; the only difference is the application of the vote count to the amended quota.
>
> 54.2 If a vacancy arises, all the votes cast for eligible candidates in the previous election – parties and unrepresented independent candidates alike – are simply applied to the amended quota to ascertain the eligible candidate to acquire the vacated seat."

[201] Mr Mamabolo explains that disregarding the votes cast for independent candidates in the event of forfeiture or vacancies ensures that inter-party proportional representation is maintained in the legislature. He says that the votes for any independent candidate in an electoral system based on proportional representation inevitably affects inter-party proportional representation in the legislature as independent candidates can only hold one seat irrespective of how many votes they win. Mr Mamabolo states that by disregarding the votes cast for independent candidates who are not eligible to be allocated the seat in the recalculation, that influence on inter-party proportionality is limited.

[202] Mr Mamabolo also responds to OSA's contention that the recalculation method provided for by the EAA unfairly benefits larger political parties. He states that the Commission accepts that there is a numerical bias in favour of parties with more overall votes – which is a reference to larger parties under the amended quota. Mr Mamabolo says that this is not necessarily inevitable. He states that it is by no means the case that smaller parties and eligible independent candidates (that is, independent candidates who did not initially win a seat) cannot gain seats under the recalculation method. He attaches annexure "PSM 1" to his affidavit which seeks to show that it is by no means

the case that smaller parties and eligible independent candidates cannot gain seats under the recalculation method. With reference to that annexure, Mr Mamabolo says:

> "57.1 The analysis compares the allocation of votes on the basis of a regional quota without forfeiture (Quota 1) and on the amended quota to account for forfeiture of a single seat by an independent (Quota 2) in three hypothetical scenarios.
>
> 57.2 The first two scenarios demonstrate that where there is a substantially larger party (Party A), it will tend to gain on reallocation.
>
> 57.3 However, as illustrated in the third scenario, where there is a more even spread of the votes (such that Party A is only marginally larger), a smaller party (Party C) may be allocated the forfeited seat. In this scenario, where there is less of a disparity in the overall vote count, the highest remainder of surplus votes becomes important."

[203] Mr Mamabolo goes on to say that it is also not mathematically impossible for a smaller party to gain a seat on recalculation – even when a larger party dominates. Moreover, says Mr Mamabolo, the outcome of the amended quota is simply the mathematical consequence of taking into consideration the overall votes while disregarding the votes cast for eligible candidates in recalculating the seats. He says that this is not an unfair or disproportionate outcome, as it gives effect to the overall support for the respective participants.

[204] It is for a reason that I have referred extensively to Mr Mamabolo's explanatory affidavit. OSA filed its papers in which it attacked the recalculation method provided for in the EAA. After some time the IEC filed its explanatory affidavit deposed to by Mr Mamabolo, the Minister filed his answering affidavit and the Speaker and the Chairperson of the NCOP filed their answering affidavit deposed to by Mr Chabane. In these affidavits these parties provided explanations for some of the things for which OSA criticised the EAA. Indeed, in some cases they provided answers to the contentions contained in OSA's founding affidavit but OSA did not file any replying affidavit to deal with the contents of these affidavits.

[205] I accept that the Rules of this Court do not give an applicant in an application for direct access the right to file a replying affidavit. However, as I put it to OSA's Counsel at the hearing, if, after receiving all these affidavits, OSA took the view that it was necessary to respond to any matters in the answering affidavits and explanatory affidavit, it would have been open to OSA to approach the Court or the Chief Justice and ask to be granted leave to file a replying affidavit but OSA never did that. The result is, therefore, that the explanations given in these affidavits have not been challenged or refuted. That being the case, OSA's case is weakened by the absence of the replying affidavits.

[206] In my view the explanatory affidavit filed by the IEC and the answering affidavits filed by the Minister and Parliament have adequately shown OSA's case to have no merits and have provided explanations which have not been challenged in any way by OSA. Another point which must be emphasised which shows that OSA's application has no merit is this. Mr Atkins, who prepared a report on which OSA relied for its case or part of its case, proposed an alternative to the recalculation method provided for in the EAA. That alternative is supported by OSA.

[207] The alternative proposed by OSA and Mr Atkins is proposed as an interim measure for the forthcoming 2024 elections in case this Court upheld OSA's constitutional challenges. The alternative proposal applies "the largest remainder method" to allocate excess seats or vacated seats. This alternative is to the effect that the seat is awarded to the party that, or independent candidate who, has the highest remainder of the votes that did not meet the threshold of the quota for receipt. Mr Mamabolo expresses the view that one difficulty with this alternative proposal is that the votes cast in favour of a candidate who forfeits a seat or causes a vacancy will continue to influence the final outcome of an election.

[208] Another difficulty with OSA's alternative proposal is that a forfeited or vacant seat could be awarded to a party or independent candidate with a low absolute number

of votes. Counsel for the Minister made this point, too, as did Mr Mamabolo. Mr Atkins has acknowledged the difficulty with the alternative proposal. In his report Mr Atkins states that "this is a valid concern, and one that should be balanced carefully with the problem of unfairness and disproportionality". Of course, contrary to Mr Atkins' view, there is no unfairness and unacceptable disproportionality that the recalculation method provided for in the EAA causes.

[209] As Counsel for the Minister put it in their written submissions, OSA's proposed alternative contains "the seeds of its own destruction". He submitted that OSA's alternative proposal produces a problem of "low remainders" and allows for a solution where a seat may be allocated to a party or candidate with low overall voter support. He submitted, in my view correctly, that that is patently antithetical to the principles of the Constitution including the obligation to achieve proportional representation.

[210] Counsel for the Minister drew our attention to the fact that, despite the fact that OSA knew from Mr Atkins own report that Mr Atkins acknowledged this difficulty with the alternative proposal they advocated, they did not deal with this difficulty in their founding affidavit. Indeed, Counsel for the Minister said that the Minister pointed this out in his answering affidavit and yet even the written submissions filed on behalf of OSA were silent on this difficulty. This was despite the fact that the Minister had drawn attention in his answering affidavit to the fact that in its founding affidavit OSA was silent about this difficulty of which it was aware. The Minister, the IEC and Parliament raised this difficulty in their written submissions and yet when Counsel for OSA presented her main address at the hearing, she did not deal with this difficulty. In fact, she did not argue OSA's second constitutional challenge at all in her main address. This led Counsel for Parliament and Counsel for the Minister to indicate, when they presented their respective oral argument, that they believed that OSA had abandoned the second constitutional challenge. In reply, Counsel for OSA only said something about OSA's second challenge when I asked her whether she had abandoned the point. Even then, she said very little.

[211] Having regard to all the above I am satisfied that OSA's second challenge is devoid of any merit and falls to be rejected. In the result I would have dismissed OSA's application in regard to the signature challenge with no order as to costs, regard being had to *Biowatch*.[76] OSA's application in regard to the recalculation challenge falls to be dismissed with no order as to costs in the light of *Biowatch*.

Order

[212] The following order is made:

1. The applicant is granted direct access to this Court.
2. The application in respect of the recalculation challenge is dismissed.
3. There is no order as to costs.

KOLLAPEN J (Maya DCJ, Mhlantla J concurring in respect of the whole judgment. Theron J and Rogers J concurring in respect of only direct access and the signature requirement point):

Introduction

[213] This case is about the constitutional right to stand for and hold public office. In particular, it is about the boundaries within which that right may be exercised and given effect to. Much has been said in this matter regarding independent candidates' ability to contest elections successfully. However, contestation requirements ought not to be based solely on a candidate's ability to win or lose. Elections serve a variety of purposes beyond securing office. They must consider a further, equally important purpose: expression. In the diversity that represents South Africa and in the commitment to inclusion that characterises our Constitution, a multiplicity of views enriches rather than diminishes the quality of our democracy.

[76] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[214] Simply put, democratic elections are not solely a matter of arithmetic, nor are they only about winners and losers. Instead, elections have an intrinsic value wholly separate from the outcome of the vote. They nurture a regular forum for the exchange of ideas and views which provide the basis for what Nobel Laureate Amartya Sen calls "government by discussion".[77] This Court – in *Mogale*[78] – and courts abroad have endorsed this value. As articulated by the Canadian Supreme Court, "the right to run for office provides . . . the opportunity to present certain ideas . . . as a viable policy option; the right to vote provides . . . opportunity to express support for [those] ideas".[79] The focus is not exclusively on which candidates win or lose but also on the voting public – which definitively loses if ideas are not freely ventilated.[80] It is in this constitutional and political context that the signature requirement for contestation will be considered.

[215] I have read and considered the comprehensive judgment of the Chief Justice (first judgment). I agree with the conclusion reached therein that a proper case is made out for direct access with regard to the interests of justice. I also agree with the reasoning and conclusion reached on the recalculation challenge. I differ, however, with the conclusion in the first judgment that the applicant's signature requirement challenge falls to be dismissed. Instead, a proper case has been advanced in support of a declaration of unconstitutionality of section 31B(3) of the Electoral Act (Act) as inserted by the Electoral Amendment Act (Amendment Act). This conclusion comes by way of two related propositions: (a) the impugned provision limits the rights in section 19 to stand for public office and other associated rights, and (b) the state respondents have not shown that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

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[77] Sen *The Idea of Justice* (Belknap Press, Cambridge 2009) at 324.

[78] *Mogale v Speaker of the National Assembly* [2023] ZACC 14; 2023 JDR 1816 (CC); 2023 (9) BCLR 1099 (CC) at para 4.

[79] *Figueroa v Canada (Attorney General)* 2003 SCC 37; [2003] 1 SCR 912 at 936.

[80] In *Illinois State Board of Elections v Socialist Workers Party* 440 US 173 (1979) (*Illinois State Board*) at 185-6, the United States Supreme Court similarly expressed the dual role of elections: "An election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression".

[216] Because the first judgment fully sets out the background facts, this judgment reiterates them only as necessary.

Legislative amendment process

[217] Before the Amendment Act's enactment, political parties were subject only to a registration requirement. Political parties that wished to register for elections were required to submit 1 000 signatures in support of their registration (registration requirement). The legislative amendment process gave rise to an additional contestation signature requirement in various forms (signature requirement).

[218] Initially, the signature requirement had two relevant aspects: (a) the third respondent, the Independent Electoral Commission (IEC), was to prescribe the number of signatures required and (b) the requirement was to apply only to independent candidates. After deliberation, the position changed in both respects. Parliament elected to prescribe the percentage in the legislation, which started at 50% of the relevant voting quota and settled at 15%. The signature requirement was also extended to unregistered political parties. Below, I discuss the parliamentary deliberations on these two aspects before the National Assembly and National Council of Provinces (Parliament), the fourth and fifth respondent in this matter, respectively.[81]

[219] When Parliament began to consider a prescribed percentage for the signature requirement, the IEC made a presentation on 5 July 2022 to the National Assembly's relevant Portfolio Committee. The IEC indicated that the regional quota from the 2019 elections ranged from 68 474 to 92 601 across the nine regions. Further, it set out the number of signatures that would be required at 50% (34 237 to 46 301); 30% (20 542 to 27 780); 20% (13 695 to 18 520); and 15% (10 271 to 13 890).

[81] The parliamentary deliberations can be found here: Parliamentary Monitoring Group *Electoral Amendment Bill* (B1-2022), available at: https://pmg.org.za/bill/1054/.

[220] On 12 July 2022, the Portfolio Committee resolved that the signature requirement should be 50% of the relevant regional quota in the previous election. In a responsive opinion dated 21 July 2021, Counsel expressed the view that 50% (approximately 22 000 votes) would be an unjustifiable limitation and advised that Parliament prescribe no more than 20%. In making this calculation, Counsel relied on the previous quota for a seat in the National Assembly of approximately 44 000. I pause to mention that this quota was incorrect. The figure of 44 000 differs from the regional quota range of 68 474 to 92 601 in the IEC's presentation and was the approximate quota for compensatory seats, based on the 2014 and 2019 elections. I return to this issue later.

[221] Consequently, on 4 August 2022, the Portfolio Committee decided to lower the percentage of signatures required to 30%, approximately 14 667 signatures. In an opinion dated 26 September 2022, Counsel once again cautioned against the proposal as an unjustifiable limitation which might pose an impossible hurdle for independent candidates. Counsel calculated that 30% of the 44 000 quota would require approximately 14 667 signatures. This represented an error by Counsel and the Portfolio Committee in two ways. First, they incorrectly relied on the 44 000 figure. Then, they mistakenly asserted that 30% of 44 000 is 14 667. It is not. Thirty percent of 44 000 is 13 200. One-third of 44 000 is 14 667.

[222] Then, on 4 October 2022, the Portfolio Committee opted to yet again lower the percentage to 20%. Parliament also chose to extend the requirement to unregistered political parties. In doing so, Counsel calculated that 20% of the 44 000 quota would be 8 800 signatures and expressed concern that it would be more than eight times the 1 000 signatures required of unregistered political parties. On this basis, Counsel agreed with Parliament's decision to extend the requirement to unrepresented political parties. Again, while 44 000 was the incorrect figure, Parliament used it consistently.

[223] On 2 February 2023, in a presentation to the Portfolio Committee, the IEC addressed the issue of the incorrect quota, pointing out that it had provided the correct

figures for the regional quotas to the Portfolio Committee in its previous presentation and did so again. Seemingly prompted by the IEC's clarification, in an opinion dated 1 February 2023, Counsel accepted that the regional quota may ultimately be higher than 44 000 but emphasised that the focus was the percentage, not raw numbers. Counsel supported 20% but advised that 15% could still be considered if concerns persisted. On 7 February 2023, the Portfolio Committee resolved to lower the signature requirement to 15%. There it stayed.

The parties' submissions

[224] The applicant submits that the signature requirement gatekeeps elections and serves as a barrier to entry for independent candidates. As such, the applicant argues the requirement limits the following rights contained in our Constitution:

(a) the section 19(3) right of citizens to stand for public office and if elected to hold office;

(b) the section 18 right to associate, as well as the right not to associate, by running as an independent candidate;

(c) the section 19(1) right of every citizen to be free to make political choices; and

(d) the independent candidates' section 10 right to dignity.

[225] Prior to the signature requirement under consideration, political parties were only required to solicit 1 000 signatures to register as a political party with the IEC. This, the applicant says, sufficed as a contestation requirement, if one was needed at all. For political parties represented in Parliament, there is no signature requirement for contestation. Parliament has, however, introduced a signature requirement for contestation equaling 15% of the regional quota for independent candidates as well as for political parties that are not represented in Parliament.

[226] In raw numbers, the applicant previewed what the signature requirement would entail by region. The requirement for contesting a seat in the National Assembly ranges from 10 271 in the Northern Cape to 13 890 in Gauteng. This is no small feat, in part, because the label "signature" requirement does not capture the fact that independent candidates must also record signatories' names and identity numbers. An independent candidate will be required to provide the names, identity numbers, and signatures of that number of voters in support of their candidacy as a pre-emptive requirement.

[227] The applicant submits that the signature requirement is arbitrary because it was based on an incorrect quota of 44 000 and because the reduction of percentage over time was done without any demonstrated rationale. The applicant also claims that the numbers required are not only exorbitant but are out of kilter with the rest of the electoral system. By comparison, the 1 000 signature registration requirement represents an ordinary, feasible and reasonable measure.

[228] The applicant adds in summary that the impugned signature requirement sets an unjustifiable and disproportionate threshold. One thousand signatures, however, would achieve the object of a reasonable and justifiable threshold. It would also balance the attainment of the political rights the applicant relies on with the need, if any, for a contestation threshold.

[229] The respondents oppose the relief sought on many fronts, including that:

(a) the signature requirement does not constitute a limitation of any right but rather a measure necessary for the effective management of elections;

(b) the applicant has not offered any evidence to suggest that its members who are independent candidates will be unable to meet the signature requirement and has therefore not proved a limitation of any right; and

(c) even if it does constitute a limitation of rights, the signature requirement is reasonable and justifiable as contemplated in section 36 of the Constitution.

Issues to be determined

[230] This judgment follows the well-established two-stage approach to determine whether there has been an unjustified infringement of a right. First, this approach asks whether there has been a limitation of fundamental rights. If so, it asks whether that 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 those listed in section 36(1). This judgment determines that there has indeed been an unjustified violation of a right and does so as follows:

(a) The primary point of departure from the first judgment is the application of the standard set by *New National Party*.[82] Contrary to the first judgment's analysis, the *New National Party* standard exists in a carefully limited and delineated space. It applies when government takes positive steps to facilitate or give effect to a right. Further, it has subsequently been applied and clarified in non-election cases. In particular, this Court's judgments in *Moloto*[83], *Garvas*,[84] and *Mlungwana*[85] indicate that the regulation of the exercise of a right will amount to a limitation when it goes beyond regulation and has a limiting and deterring effect.

(b) This disagreement with the first judgment is fundamental as it leads to a different conclusion on the first stage, whether the signature requirement constitutes a limitation.

(c) Two inquiries form part of the first stage as set out in *Walters*,[86] (i) the content and scope of the rights; and (ii) the meaning and effect of the signature requirement and whether it constitutes a limitation of the

[82] *New National Party* above n 15.

[83] *Moloto* above n 74.

[84] *Garvas* above n 23.

[85] *Mlungwana* above n 25.

[86] *Ex Parte Minister of Safety and Security: In re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) at para 26.

content and scope of the rights. The first *Walters* inquiry covers rights enumerated in sections 18(1), 19(1), and 19(3). The second *Walters* inquiry evinces that the signature requirement goes beyond mere regulation and has a limiting purpose. As such, I conclude that the signature requirement constitutes a limitation of the applicant's rights to freedom of association, freedom to make political choices and to stand for and hold public office, if elected.

(d) The second stage probes the state's justification for the limitation. In short, the limitation is not justifiable. I reach this conclusion by applying section 36 and taking into account the following: (i) the purpose of the limitation is of low importance; (ii) the nature and extent of the limitation is arbitrary and extensive; (iii) there was a limited relation between the limitation and its purpose where Parliament consistently relied on the wrong quota; and (iv) the 1 000 signature registration requirement constituted less restrictive means to achieve the same purpose.

[231] Having set out the issues to be determined in this judgment, I now turn to expand on the primary point of departure with the first judgment. As a starting point, it would be germane to recall the two-stage test laid down in our law for determining a right's violation.

Determining a right's violation

[232] In *New National Party*, this Court said that it was pre-eminently the function of Parliament to determine the structure of the electoral scheme but that it was not at liberty to do so without any constraints. It said:

> "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."[87]

[233] I pause to mention that the two constraints referred to are separate and distinct as set out in *New National Party* above. I focus exclusively on the latter and find that, however rationally linked the signature requirement may be to a legitimate government purpose, it constitutes an unjustifiable limitation on a right. The conclusion reached arising out of the rationality enquiry is not dispositive of the infringement enquiry. They represent separate tests.

[234] The two-stage approach to determine a rights infringement is well-established in South African constitutional law.[88] The first stage considers whether the impugned law limits a right. The second stage assesses whether the limitation is reasonable and justifiable in terms of section 36 of the Constitution. The court only moves to the second stage if a rights limitation is established at the first.

[235] At the first threshold, *Walters* requires this Court to—

[87] *New National Party* above n 16 at paras 19-20.

[88] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 21; *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 100-2; *Ferreira v Levin N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 44; *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 1.

> "determin[e] whether or not the enactment in question constitutes a limitation of one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b)."[89]

Accordingly, this first stage poses two inquiries: what are the boundaries of the right with regard to its scope and content (the first inquiry); and did the effect of the impugned provision cross those boundaries (the second inquiry)?[90]

[236] The first judgment finds that the signature requirement is not a limitation. In doing so, it does not apply *Walters*, but instead, impermissibly relies on *New National Party*. It finds that the applicant fell short in addressing what steps independent candidates would reasonably be expected to take in order to be able to exercise their right to stand for office. As such, it concludes that the applicant has failed to show that the 15% signature requirement constitutes a limitation of any rights. I take a different view on limitation and find that *New National Party* is not applicable. Accordingly, before analysing whether there has been a limitation, it is necessary to deal with this primary point of departure.

What is the New National Party reasonable steps standard?

[237] In *New National Party*, when assessing whether a bar-coded ID requirement was an infringement of the right to vote, this Court held as follows:

> "Parliament must ensure that people who would otherwise be eligible to vote are able to do so if they want to vote and if they take reasonable steps in pursuit of the right to vote. More cannot be expected of Parliament. It follows that an impermissible consequence will ensue if those who wish to vote and who take reasonable steps in pursuit of the right, are unable to do so.
>
> . . .

[89] *Walters* above n 86 at para 26.

[90] Cheadle et al *South African Constitutional Law: The Bill of Rights* Service 34 (2023) at 30-3 to 30-4. See also Woolman and Botha "Limitations" in Woolman et al (eds) *Constitutional Law of South Africa* Service 5 (2013) at 34-3 to 34-6; Currie and De Waal *Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 145-6.

> Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. I conclude, therefore, that *the Act 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*."[91] (Emphasis added.)

[238] This Court found that a limitation would be established if the applicants could show that they were unable to exercise their right to vote, even if they acted reasonably in pursuit of the right to vote. The *New National Party* approach was followed in *Democratic Party*[92] and *Richter*.[93]

[239] *Democratic Party* concerned a challenge to the requirement that a potential voter had to have a bar-coded identity document in order to vote on the basis that it was discriminatory. This Court dismissed the challenge and held as follows:

> "*No more recent evidence of the effect of the provisions has been furnished*. On the assumption that the opinions expressed in the [Human Sciences Research Council] and *Opinion 99* reports are correct, there is no evidence as to which category of persons referred to therein might be among the millions of South Africans who, after the promulgation of the Electoral Act, applied for and were issued with the necessary documents, and as a result were able to register on the national common voters' roll. *In the absence of evidence showing that the impugned provisions have had the effect suggested by the [Democratic Party]*, it cannot be found that the provisions, on that account, were unconstitutional."[94] (Emphasis added.)

[91] *New National Party* above n 16 at paras 21 and 23.

[92] *Democratic Party* above n 33.

[93] *Richter* above n 34.

[94] *Democratic Party* above n 33 at para 12.

[240] *Richter* dealt with regulations which precluded certain categories of citizens from voting in national elections while they were abroad. Unlike *New National Party* and *Democratic Party*, this Court found that there was a limitation. It stated:

> "In approaching each of the provisions in question in this case, therefore, I would suggest that to determine whether any provision constitutes an infringement of section 19 of the Constitution, we must establish whether the consequence of any of the challenged provisions is such that, *were a voter to take reasonable steps to seek to exercise his or her right to vote, any of the provisions would prevent the voter from doing so*. In determining what would constitute reasonable steps for the voter to take, we should bear in mind both the fact that the process of voting inevitably imposes burdens upon a citizen as well as the important democratic value of fostering participation in elections that I discussed above. *Should it be found that the provision would prevent a voter from voting despite the voter's taking reasonable steps to do so, the provision will constitute an infringement of section 19*. The next question that will arise is whether the infringement is justifiable in terms of section 36 of the Constitution."[95] (Emphasis added.)

[241] While the *New National Party* standard is clear, I am not convinced that it finds application in this matter. This view rests on two observations: (a) its application by this Court in subsequent cases; and (b) the delineated space within which it emerged.

Point of departure

Subsequent case law

[242] In addition to the above cases, our courts have subsequently applied the *New National Party* standard in non-election matters and clarified its application. This Court in *New National Party* recognised that some regulation may be required to facilitate the effective exercise of the right to vote.[96] The subsequent case law is useful for this matter. It tells us that, even if intended solely to regulate the right, laws or conduct that effectively restrict the right constitute a limitation. It is not the case that

[95] *Richter* above n 34 at para 58.

[96] *New National Party* above n 16 at paras 10-3.

any law that purports to regulate the exercise of a right is permanently shielded from constitutional scrutiny as a limitation of that right. An overview of the following cases demonstrates that.

[243] This overview commences with *Affordable Medicines*[97] and *South African Diamond Producers Organisation*.[98] These two cases give guidance as to how to determine where a regulation of a right may limit it. In *Affordable Medicines*, this Court considered whether a requirement to dispense medicines only from licensed premises limited the section 22 right to choose a profession. It said that the "question is whether the law which purports to regulate the practice of a profession, viewed objectively, would *impact negatively* on the choice of a profession".[99] Notably, the Court said that "Parliament may not unconstitutionally limit the right to practise a profession under the guise of regulating it".[100]

[244] The standard set by *Affordable Medicines* was further ventilated in *South African Diamond Producers Organisation*, where this Court found that the section 22 right to choose a trade, occupation and profession would be limited either by a "legal barrier" that prohibits persons from entering a trade or excluding persons from continuing to practice that trade; or by an "effective limit" that renders "the practice of that trade or profession so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited".[101] However, neither of these cases refers to *New National Party*. This occurred in *Moloto.*

[245] In *Moloto*, Yacoob J grappled with the relationship between the right to strike and its implementing legislation – section 64 of the LRA. *Moloto* cautioned that any interpretation of such legislation should not restrict the right more than required by the

[97] *Affordable Medicines* above n 15.

[98] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O.* [2017] ZACC 26; 2017 (6) SA 331 (CC); 2017 (10) BCLR 1303 (CC) (*South African Diamond Producers Organisation*).

[99] *Affordable Medicines* above n 15 at para 68 (emphasis added).

[100] Id at para 73.

[101] *South African Diamond Producers Organisation* above n 98 at paras 66-71.

Act's language. This is especially true when reading-in an implied limitation. It said that:

> "Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least intrusive of the right, if the text is reasonably capable of bearing that meaning.
>
> . . .
>
> The point of departure in interpreting section 64(1) is that we should not restrict the right to strike more than is expressly required by the language of the provision, unless the purposes of the Act and the section on 'a proper interpretation of the statute . . . imports them.'"[102]

[246] The Court also distinguished the concepts of regulating or giving effect to a right from limiting a right and distinguished the matter from *New National Party*. It said:

> "This Court, in *New National Party*, held that where legislative provisions facilitate the exercise of a constitutional right it cannot be said that they are limitations of that right that need justification under section 36 of the Constitution. Workers, however, can go on strike in the sense of withholding work without needing section 64 to enable them to do it.
>
> From this it can be seen that *procedural pre-conditions for the exercise of a constitutional right place some limit on that right*. This limitation would then have to be justified under section 36 of the Constitution. One of the considerations in the justification analysis is whether less restrictive means could achieve the same purpose."[103] (Emphasis added.)

[247] While the Court referred to the *New National Party* standard, it found that section 64 was not a legislative provision that "facilitate[d] the exercise of a constitutional right" as "[w]orkers . . . can go on strike in the sense of withholding work

[102] *Moloto* above n 74 at paras 52 and 54.

[103] Id at paras 69-70.

without needing section 64 to enable them to do it".[104] Instead, section 64 "expressly requires minimal procedural pre-conditions for the statutorily protected exercise of that right".[105]

[248] *Moloto* also made reference to the Labour Appeal Court's judgment in *CWIU*.[106] There, that Court considered the issue of procedural pre-conditions in relation to the right to strike and material conditions as to whom may strike.[107] It concluded that such conditions limited the right to strike, which was conferred without express limitation in the Constitution.[108] This Court in *Moloto* agreed with this analysis that the effect of procedural pre-conditions and material conditions as to who may strike constituted a limitation.[109]

[249] This judgment is relevant for three pertinent reasons. First, it considered the *New National Party* framework outside the exclusive context of voting rights. Second, it closely examined legislation to determine whether or not it facilitated the exercise of the right to strike. Third, because the Court found that the legislation did not facilitate the right, its analysis fell outside the *New National Party* framework and did not apply.

[250] *Garvas*[110] is also instructive. There, the Court addressed the right to assemble and the liability of organisers for damages arising from gatherings.[111] The crisp issues relevant for the purpose of this application were: the characterisation of the right to assemble (not restricted in the Constitution), including measures to regulate the right;

[104] Id at para 69.

[105] Id.

[106] *CWIU* above n 75.

[107] Id at para 29.

[108] Id at para 21.

[109] *Moloto* above n 74 at para 69.

[110] *Garvas* above n 23.

[111] Id at paras 61 and 71.

and whether those measures went beyond regulation.[112] This Court, as in *New National Party* and *Moloto*, held that measures to regulate the right may not in themselves constitute a limitation.[113] It examined the provisions of section 11(2) of the Regulation of Gatherings Act which provided a defence to the claim for liability for riot damage and concluded that the section went beyond regulating the right.[114] It had the effect of limiting the right to assemble, found the Court, which then immediately proceeded to the justification analysis.[115]

[251] The Court dealt with the difficulty such a defence would introduce in terms of costs and effect in a general sense but said those were matters for consideration in the justification stage of the analysis.[116] It did not embark on the reasonable steps standard that the Court adopted in *New National Party* and largely for the same reason advanced in *Moloto*,[117] namely, the distinction between measures to give effect to a right and those that limit a right.

[252] Finally, in *Mlungwana* this Court again had to consider the constitutionality of provisions of the Gatherings Act which sought to regulate the right to assemble. The impugned provision resulted in the risk of criminalisation of an organiser for failing to give notice of the gathering. Confirming *Garvas*, this Court held as follows:

> "Section 12(1)(a) goes beyond mere regulation. In Garvas. . ., this Court found that deterring the exercise of the right in section 17 limits that right. The reason is obvious. Deterrence, by its very nature, inhibits the exercise of the right in section 17.

[112] Id at para 32.

[113] Id at para 55. Here, the Court said:

> "The mere legislative regulation of gatherings to facilitate the enjoyment of the right to assemble peacefully and unarmed, demonstrate, picket and petition may not in itself be a limitation. Section 11(2), read with section 11(1), goes further than simply to regulate the exercise of the right in order to facilitate its full and appropriate enjoyment by those who organise and those who participate."

[114] *Garvas* above n 23 at paras 34-43.

[115] Id at para 60.

[116] Id at para 59.

[117] Id at para 57.

> Deterrence means that the right in question cannot always be asserted, but will be discouraged from being exercised in certain instances.
>
> In this matter, the criminal sanction in section 12(1)(a) deters the exercise of the right in section 17. The respondents not only admit this, but invoke the self-same deterrent effect to explain section 12(1)(a)'s purpose and justify its provisions. The possibility of a criminal sanction prevents, discourages, and inhibits freedom of assembly, even if only temporarily. In this case, an assembly of 16 like-minded people cannot just be convened in a public space. The convener is obliged to give prior notice to avoid criminal liability. This constitutes a limitation of the right to assemble freely, peacefully, and unarmed. And this limitation not only applies to conveners, but also to all those wanting to participate in an assembly. If a convener is deterred from organising a gathering, then in the ordinary course (save for the rare spontaneous gathering) a gathering will not occur."[118]

[253] In *Garvas* and *Mlungwana*, the legislation in question was enacted for the purpose of giving effect to the right to strike and the right to assemble.[119] In *Garvas*, the Court found its effect was to limit the right and proceeded with the justification analysis.[120] The Court did not interrogate whether the gathering's organisers could show that, even if they had taken reasonable steps, they could not have enjoyed the right to assemble (the *New National Party* test).[121] That question did not arise because the Court, having distinguished measures to give effect to a right and measures that limited the right, found that the measure in question limited the right.[122] That concluded the limitation inquiry. In *Mlungwana*, the impugned provision was also found to go beyond regulation. No inquiry into reasonable steps was taken. The mere possibility, even temporary, of criminal sanction was seen as having a deterring effect that limited the right.

[118] Id at paras 46-7.

[119] Id at para 130 and *Moloto* above n 74 at para 20.

[120] *Garvas* above n 23 at para 130.

[121] Id at paras 81-4.

[122] Id at para 57.

[254] The conclusion arising from this Court in these three matters could not be clearer: when a measure gives effect to a right, courts apply the reasonable steps test from *New National Party*; when a measure limits a right, courts proceed with the justification analysis.

[255] A second strong thread emerges from these cases. They highlight that the threshold for determining when a regulation goes beyond giving effect to a right is relatively low. This is, in part, because the boundaries of the right are to be interpreted generously and the determination on limitation is not dispositive to a constitutional challenge. A conclusion on limitation still affords the state the opportunity to show that the limitation is reasonable and justifiable in an open and democratic society.

[256] In these cases, mere deterrence – measures discouraging or inhibiting the exercise of the right – sufficiently extended the regulation into the arena of limitation. The impugned measures were not outright legal barriers and, on the face of it, were not particularly burdensome. Still, the first judgment claims that limitations must be "total or complete denial[s] of the right or prohibition[s] of the right".[123] This raises the threshold way beyond where this Court has said it should be located.

[257] In *Mlungwana*, this Court, cited in support of its reasoning the approach taken by the European Court of Human Rights that interference with the right did not need to amount to an outright ban, but could occur as a result of other conditions or requirements. It concluded that criminalising a failure to give notice of a gathering constituted a limitation of the right of assembly. As was noted in *Mlungwana*:

> "Similarly, regarding the right to freedom of assembly under the European Convention of Human Rights (ECHR), the Grand Chamber of the European Court of Human Rights (Grand Chamber) held that 'the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the

[123] First judgment at [177]. See also at [104].

foundations of such a society. Thus, it should not be interpreted restrictively'. The Grand Chamber went on to find that—

> 'the interference [with the right in article 11(1)] does not need to amount to an outright ban, legal or de facto, but can consist in various other measures taken by the authorities. The term "restrictions" in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards. For instance, a prior ban can have a *chilling effect* on the persons who intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities. A refusal to allow an individual to travel for the purpose of attending a meeting amounts to an interference as well. So too do measures taken by the authorities during a rally, such as dispersal of the rally or the arrest of participants, and penalties imposed for having taken part in a rally.'"[124] (Emphasis in the original.)

[258] To summarise:

(a) *New National Party* established the standard that where impugned law or conduct gives effect to the exercise of a right to vote, it only limits the right if it is shown that its probable consequence is that those who want to exercise the right will be unable to do so, even though they act reasonably in pursuit of the right.

(b) *Moloto* is authority for the proposition that the *New National Party* standard is not confined to political rights cases.

(c) *Garvas* and *Mlungwana* confirm that an enactment that goes beyond giving effect to a right and creates a barrier to the exercise of the right, will amount to a limitation.

[259] Accordingly, our courts have developed the principle that a limitation arises where the impugned law goes beyond regulation and creates a legal barrier through

[124] *Mlungwana* above n 25 at para 51.

explicit exclusion or in effect through a deterrent which negatively impacts the right. Both are considered to exceed the prescripts of mere regulation. *New National Party* only applies when the Government takes positive steps to give effect to a right and thereby creates reciprocal duties. It does not apply when those steps go beyond giving effect to the right and result in a limitation of the right.

[260] Given the clear distinction between (a) measures which give effect to and limit a right and (b) the consequences which flow from either (as established in *New National Party* and supported in *Moloto*, *Garvas* and *Mlungwana*), the second *Walters* inquiry directs this Court to determine the impugned provision's nature.[125]

The context of New National Party

[261] I also differ from the first judgment in part because it fails to properly take into account the context within which *New National Party* arose.

[262] *New National Party*'s reasonable steps standard arose in the specific context of election cases and has been the subject of considerable debate.[126] The ability to meaningfully exercise a right will, in many instances, create an obligation on the part of government to take positive steps to realise or give effect to that right.[127] This obligation may be expressly stated in the Constitution as is the case with section 32 (the right of access to information) and section 33 (the right to just administrative action).[128] At other times, the obligation may be necessarily implied as is the case with the rights to vote and stand for public office.[129] It is largely within this context that the

[125] *Walters* above n 86 at para 27.

[126] Brickhill and Babiuch "Political Rights" in Woolman et al (eds) *Constitutional Law of South Africa* Service 5 (2013) vol 3 at 45-18 and 45-19; Rautenbach "Political Rights" in *Bill of Rights Compendium* Service 37 (2018) at 1A67.4.

[127] Brickhill and Babiuch above n 128 at 45-21.

[128] Sections 32 and 33 of the Constitution.

[129] *New National Party* above n 16 at para 118.

New National Party standard applies, namely where positive government action must be coupled with reasonable exercise by the rights-bearers.

[263] *New National Party* is confined to this constitutional space. The positive obligations placed on the state are to facilitate or give effect to the enjoyment of the right.[130] This may still require reasonable steps on the part of the citizen in return. It is, in part, about the reciprocity of obligations which may characterise the relationship between state and rights-bearer if a right is to be meaningfully exercised.[131] This Court has held that in giving effect to the right to vote, positive obligations are imposed on the state[132] and citizens.[133]

[264] For instance, the regulatory framework that requires voters' names and details to be captured on a voters' roll and a bar-coded identity document to identify the voters on election day gives effect to the right to vote.[134] There is an inextricable and necessary link between these positive steps that the government takes and the realisation of the right to vote. Those steps remain inchoate unless and until citizens take reasonable measures to apply to have their names recorded on the voters' roll and to apply for a bar-coded identity document.[135] It would then not constitute an infringement of the

[130] Id.

[131] *Richter* above n 34 at para 55.

[132] Positive obligations imposed on the state include: (a) setting a date for elections; (b) securing the secrecy of the ballot; (c) establishing an independent and impartial IEC to ensure free and fair elections and to take reasonable steps to ensure eligible voters are registered; (d) providing the legal framework, infrastructure and resources necessary for the holding of free and fair elections; (e) ensuring that national, provincial and municipal elections are held in terms of an electoral system which must be prescribed by national legislation; (f) an electoral system that must, in general, result in proportional representation; (g) elections for the National Assembly must be based on the national common voters' roll; and (h) elections for provincial legislatures and municipal councils must be based on the province's segment and the municipality's segment of the national common voters' roll respectively. *Richter* above n 34 at paras 53-4; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 28; *New National Party* above n 16 at para 13; *August* above n 35 at para 16.

[133] Positive obligations imposed on citizens include: (a) registering in good time; (b) travelling to a voting station (which may be at a distance); (c) being in possession of a bar-coded identity document; and (d) potentially standing in a long queue to vote. See *Richter* above n 34 at para 55; *New National Party* above n 16 at para 15.

[134] *New National Party* above n 16 at para 26.

[135] *Richter* above n 34 at para 55.

right if citizens were able to access the mechanisms to have their names recorded on the voters' roll or to apply for and receive a bar-coded identity document.[136] It is under these circumstances that a conclusion of a limitation will only arise when the citizen is able to show that, despite reasonable steps, they will be unable to exercise the right.[137]

[265] It is a different matter when the government's positive action limits the right.[138] This implicates the first leg of the *Walters* inquiry.[139] When positive action limits rather than gives effect to a right, the government must justify the limitation.[140]

[266] Government action may both give effect to a right and simultaneously limit it. When government action primarily gives effect to a right, it is accompanied by an individual's duty to take reasonable measures to access the right.[141] If, however, those reasonable measures do not enable the right to be realised, a limitation may still result.[142] This is the effect of the holding in *New National Party*.[143] This Court did not purport to change the law on limitation. The Court did not address the position on limitation but rather located the decision in relation to a law that gives effect to the right to vote.[144] The jurisprudence on the first stage, described above,[145] was left intact.

[267] On the other hand, when the primary intention or effect of government action limits a right, the right is limited as a matter of law.[146] The test then moves to the second stage – the justification. This distinction is both necessary and important as it

[136] *New National Party* above n 16 at para 21.

[137] Rautenbach "Political Rights" above n 128 at 1A67.4.

[138] *Walters* above n 86 at para 27.

[139] Id at para 26.

[140] *Moloto* above n 74 at paras 69-71 and *Garvas* above n 23 at para 60.

[141] *New National Party* above n 16 at para 23.

[142] Rautenbach "Political Rights" above n 128 at 1A67.4.

[143] Id.

[144] *New National Party* above n 16 at para 26.

[145] See [234] to [236] above.

[146] Rautenbach "Limitations" *Bill of Rights Compendium Service* 37 (2018) at 1A31.

jurisprudentially retains the difference between a limitation of a right and the justification of a limitation under section 36. It cannot be correct that the state attracts no duty to justify the limitation, merely because its stated intention was to give effect to the right rather than to limit it.

[268] For the above reasons, I differ with the first judgment's determination of whether there is a limitation in this matter. I now turn to consider whether a limitation has been established and start such a consideration with the first *Walters* inquiry: what are the boundaries of the rights in question?

The first stage: has there been a limitation?

The first inquiry: what are the boundaries of the rights?

[269] The instant matter implicates a cluster of three rights contained in our Constitution: the section 18 right to freedom of association, the section 19(1) right to freedom to make political choices, and the section 19(3) the right to stand for and hold public office.[147] In *Ramakatsa*,[148] this Court held that "the text of a section in the Bill of Rights must be read generously and purposively in order to give the right-holders the full protection afforded by the guaranteed right".[149] Further, this Court in *New Nation Movement* provides particular guidance as to the interpretation of the rights raised in this matter:

> "The importance of these rights cannot be overstated in the South African context where – for centuries – those rights were enjoyed only by the white minority. Accordingly, the rights at stake here fall to be interpreted generously, rather than restrictively. In *August* Sachs J 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

[147] Sections 18, 19(1) and 19(2) of the Constitution.

[148] *Ramakatsa v Magashule* [2012] ZACC 31; 2013 JDR 2203 (CC); 2013 (2) BCLR 202 (CC).

[149] Id at para 70.

> 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. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. . . . Legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.'"[150]

Section 19(3) – the right to stand for and hold public office

[270] Our Constitution explicitly guarantees the right to candidature.[151] The Constitution does so for two reasons: the legal right to candidacy is well established internationally and in foreign jurisdictions, and the moral right to candidacy invokes far more than legal instruments. It is grounded on values like equality, autonomy, and participatory democracy. In his autobiography, former President Nelson Mandela recounts an early observation of traditional participatory democracy at the local level: "all men were free to voice their opinions and were equal in their value as citizens".[152] It is this freedom to participate, and the dignity found therein, which informs our right to candidacy.

[271] While supported by international and foreign law, the right to candidacy and the principles underpinning it, are neither new nor foreign to South Africa. The Freedom Charter itself so proclaims.[153] Included within its first demand, The People Shall Govern!, the South African Congress Alliance pressed that "[e]very man and

[150] *August* above n 35 at para 74.

[151] Section 19(3)(b) of the Constitution.

[152] Mandela *Long Walk to Freedom* (Little, Brown and Company, 1994) at 28.

[153] African National Congress "The Freedom Charter", available at: https://www.anc1912.org.za/the-freedom-charter-2/.

woman shall have the right . . . to stand as a candidate for all bodies which make laws".[154]

[272] More recently, this Court in *My Vote Counts II*[155] said that the Constitution did not prohibit adult citizens from standing as independent candidates, there was just no legislation to facilitate such candidacy:

> "This 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."[156]

Similarly, in *New Nation Movement*, this Court found that section 19(3) was inextricably linked to the freedom of association.[157]

[273] And so, when independent candidates invoke their right to stand for public office, law and principle dictate that such candidates should not be disadvantaged by their choice not to associate with political parties. The choice to associate and not to associate are both worthy of equal constitutional protection, which must manifest itself in the rules and arrangements that govern elections.

[274] The language of section 19(3)(b) creates the right to stand for public office and does so without limitation, except that it applies to adult citizens only.[158] Given the importance of this right both in itself as well as in relation to the cluster of political rights, its boundaries must be drawn generously. Both implied and express limitations are inimical to a constitutional framework designed to give effect to, rather than circumscribe, section 19(3)(b).

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[154] Id.

[155] *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC).

[156] Id at para 29.

[157] *New Nation Movement* above n 3 at para 14.

[158] Section 19(3)(b) of the Constitution.

[275] Accordingly, the ambit of the right is wide, in that it seeks to ensure an open and democratic political system in which all eligible candidates can participate in the electoral system and all citizens are able to exercise their right to vote for their preferred candidate.

Section 19(1) – freedom to make political choices

[276] The purpose of the freedom to make political choices is twofold. It is positive in that it safeguards an individual's political choice, and it is negative, in that it bars the state from curbing such a choice.[159] The Constitution elaborates on this right by enumerating concomitant rights to form a political party, to participate in the activities of, or recruit members for, a political party, and to campaign for a political party or cause.[160] This list in section 19(1) is not exhaustive.[161] The right also protects "[a] conscious choice not to form or join a political party".[162] Its scope is expansive as it contains the intersection of various rights and freedoms of a political character, including expression, association, belief, opinion and conscience.[163]

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[159] Cheadle et al above n 90 at 14-3.

[160] Section 19(1) of the Constitution states:

> "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."

[161] *New Nation Movement* above n 3 at para 17.

[162] Id.

[163] In this regard, in *Pilane v Pilane* [2013] ZACC 3; 2013 JDR 0295 (CC); 2013 (4) BCLR 431 (CC) at para 69, this Court stated as follows:

> "It strikes me that the exercise of the right to freedom of expression can be enhanced by group association. Similarly, associative rights can be heightened by the freer transmissibility of a group's identity and purpose, expressed through its name, emblems and labels. These rights are interconnected and complementary. Political participation, actuated by the lawful exercise of these rights, can and should assist in ensuring accountability in all forms of leadership and in encouraging good governance."

My Vote Counts II above n 157 at para 27 states the following:

> "Choice is of its own a loaded concept. And much more is required of a choice-maker if the choice to be made is political in character and affects important national interests. The gravity of the choice is more pronounced in relation to the right of an adult citizen to participate or vote

Section 18 – freedom of association

[277] The right to freedom of association protects against coercion in our private and political lives.[164] The right has dual content in that it allows for a person to freely associate (positive element) as well as to decide not to associate at all (negative element).[165] Although not inherently political, the right to association has political corollaries. For instance, it nurtures "vigorous exchanges and debates between competing interest groups to give real choices to the electorate to confront the political class".[166] Association is an expansive right directly related to the political rights in question, as was held in *New Nation Movement* in respect of section 19(3).[167]

[278] In conclusion, against the backdrop of South Africa's colonial-apartheid history, the inclusion of these rights in our Bill of Rights holds significant symbolic value which supports the inherent importance of this cluster of rights.[168] Their inclusion, both individually and collectively, is crucial for the functioning of our constitutional

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> in the elections for 'any legislative body'. This is because of the centrality of elections in the functioning, preservation and effectiveness of our constitutional democracy."

See also Cheadle et al above n 90 at 14-3; Brickhill and Babiuch above n 128 at 45-30; Rautenbach above n 128 at 1A67.1.

[164] *New Nation Movement* above n 3 at para 27 captures Haysom's reasoning for the protection of freedom of association:

> "These are a wide range of reasons why freedom of association is so highly prized, vigorously protected and widely acclaimed as a cornerstone of a democratic society. These reasons belong to one or other of two perspectives: a perspective which emphasises the need to associate in order to realise fully one's humanity – to interact, combine, make common purpose and enjoy life with other persons sharing one's cultural, personal, political or economic interests. The second perspective emphasises the necessity to a functioning democracy of such a freedom, for a proper and coherent expression and interplay of collective interests. Both perspectives are, however, grounded on the same understanding that a person alone is an atomised, powerless, lonely being without a foundation for developing an identity or the capacity to influence or change his or her physical environment or social world."

Haysom "Significance of the Freedom of Association" in Cheadle et al (eds) in *South African Constitutional Law: The Bill of Rights* Service 27 (2019) at 13.1.

[165] *New Nation Movement* above n 3 at para 22.

[166] Haysom "Significance of the Freedom of Association" above n 166 at 13.1.

[167] *New Nation Movement* above n 3 at para 14.

[168] Id at para 143.

democracy. South Africa was founded on the values of universal adult suffrage; a national common voters' roll; regular elections, and a multi-party system of democratic government.[169] The Constitution does more than enumerate these rights; it establishes various institutions to give effect to them, such as the IEC.[170]

[279] The content of these rights must be interpreted to promote the value system of an open and democratic society based on human dignity, equality, and freedom. As to their scope, the interrelatedness of the rights is indicative of their wide breadth. It has been found that the right to stand for public office is linked to the right to make political choices and freedom of association.[171]

[280] Further, international and regional law widely recognises the interrelationship between the vote, suffrage, association, and candidacy.[172] Most notably, the Universal Declaration of Human Rights links direct participation to Article 21's right to take part in the government.[173] While the Drafting Committee originally included the right to candidacy in the Declaration, South Africa's apartheid government was one of two nations to object to enumerating candidacy as a human right.[174] What may be

[169] Section 1(d) of the Constitution and Cheadle et al above n 90 at 14-1.

[170] Section 181(1)(f) of the Constitution.

[171] In *New Nation Movement* above n 3 at para 14, this Court stated as follows:

> "It seems to me that in the context of this matter the freedom of association challenge is inextricably linked to what the content of the section 19(3)(b) right really is. That is so because the applicants' plea is not only about adult citizens not being coerced to be members of political parties. It is about not being so coerced so that they may exercise the section 19(3)(b) right. And they can exercise that right in this fashion only if it is guaranteed by section 19(3)(b)."

[172] Article 25 of the International Covenant on Civil and Political Rights, 1994 (enshrining the rights "to vote and be elected"); Article 23 of the American Convention on Human Rights, 1969; Article 13 of the African Charter on Human and People's Rights, 27 June 1981 (proclaiming that "every citizen shall have the right to participate freely in the government of his country"); Protocol 1, Article 3 of the European Convention on Human Rights, 1953 (interpreted to include the right to stand for election in 1987 in the decision in *Mathie-Mohin v Belgium* (1988) 10 EHRR 1 at para 51).

[173] Article 21 of the Universal Declaration of Human Rights, 1948.

[174] Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, UN doc E/CN.4/82/ADD.4 (1948) at 23, available at: https://documents-dds ny.un.org/doc/UNDOC/GEN/GL9/001/46/PDF/GL900146.pdf?OpenElement.

fundamental in other democracies[175] has acquired a heightened significance for post-apartheid South Africa.

[281] Having considered the boundaries of the rights in question, I now turn to the second inquiry, a determination of whether the signature requirement crosses these boundaries and constitutes a limitation.

The second inquiry: does the signature requirement cross the boundaries of the rights?

[282] Whether or not the signature requirement crosses the boundaries of the rights in question requires determining the nature of the infringement.[176] An impugned law will cross a right's boundaries where it intentionally seeks to restrict protected activity or unintentionally limits the right where it is overbroad or has deterring effects.[177] As established above, this can occur even when the impugned law seeks to give effect to the exercise of the right.

[283] Does the impugned provision constitute a limitation? The impugned signature requirement creates a threshold requirement that any person seeking to stand for public office must meet. It is a procedural precondition and a material limitation on who may exercise the right to stand for election and of the kind described in *CWIU* and *Moloto*. It also entails a precondition of substance in its demand that a potential candidate actively seek out and secures the written support of a designated number of voters for their candidacy. The inability to do so would bar them from standing for public office as contemplated in section 19(3)(b) of the Constitution.

[175] The constitution of Canada explicitly protects the right to candidacy. Canadian courts have interpreted this provision to be "one of the most fundamental in the Charter, going as it does to the very heart of a free and democratic society". *Harvey v New Brunswick (Attorney General)* 1996 CanLII 163 (SCC); [1996] 2 SCR 876 at 905.

[176] Cheadle et al above n 90 at 30-3 to 30-4.

[177] Id; Woolman and Botha above n 30 at 34-5 fn 2.

[284] The rights in this matter, and the right to stand for public office, in particular, do require a degree of regulation to be given effect to. According to the respondents, independent candidates could take reasonable steps to meet the signature requirement. If the impugned provision were one that simply gave effect to the rights in this matter, then this criticism would be valid, and the infringement challenge would be dismissed. The impugned provision does more than give effect to the right, however. It limits the right. As such, *Moloto*, *Garvas* and *Mlungwana* advise that the justification analysis – not the reasonable steps test – must follow. In that event, the consideration of reasonable steps simply does not arise at the limitation stage but may well do so at the justification stage.

[285] Though the imposition of a signature requirement gives effect to, facilitates or regulates the right to stand for public office, the signature requirement set out in the impugned provision creates a legal barrier or a pre-condition for its exercise. This is very different from a requirement to having a bar-coded identity document or taking steps to apply to have one's name on a voters' roll. These measures are formal in nature, the citizen has the right to have his or her name on the voters' roll and to have a bar-coded identity document issued and can take legal action to assert such a right if need be. But more than that, such a requirement may well be necessary to facilitate the vote. These requirements, unlike the signature requirement in the present case, do not have as their object to cut down the number of candidates, let alone to do so in order to make the administration of elections easier.

[286] During the legislative process, the overt purpose of adopting the signature requirement was to curtail the number of independent candidates that could stand for office. In other words, the object was that, with this signature requirement, there should be fewer independent candidates than there would have been without the signature requirement.

[287] In addition, it is relevant to consider what the respondents say about the impugned provision in their papers before this Court:

(a) The Minister submitted that the signature requirement was "a sifting mechanism" that sought "to discourage independent candidates and political parties who have no plausible hope of obtaining a seat from contesting the elections" and to prevent political parties and independent candidates from contesting an election "frivolously", thereby keeping ballot papers at "manageable length".

(b) The IEC explains the two-fold purpose of the signature requirement as follows:

> "12.1 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
>
> 12.2 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." (Emphasis added.)

(c) Parliament states that "the purpose of the signature requirement is to *minimise the prospect of frivolous entries* into the election race" and describes it as a "pre-emptive requirement that operates before the elections".

[288] The signature requirement was intended to exclude potential candidates from standing for public office. This purpose is manifest from the requirement in its own terms. The rationale offered by the state respondents and the IEC puts this beyond doubt. The introduction of the signature requirement was to limit the right to stand for public office to those who were able, in the respondents' view, to demonstrate that they had a serious chance of winning. While a signature requirement in itself may not be a limitation, what this case calls for us to do is consider whether a signature requirement set at 15% of the regional quota and requiring 10 000 to 14 000 signatures constitutes a

limitation. At 15% of the regional quota, the signature requirement places a substantial burden on independent candidates who wish to contest elections.

[289] The first judgment says that the applicant has not stated why the 15% signature requirement constitutes a barrier nor has the applicant proven that the requirement goes beyond mere regulation. This is incorrect. Further, the first judgment faults the applicant's May 2023 application for not arguing that candidates had insufficient time to collect the requisite signatures.

[290] In order to illustrate the extent of the burden, the applicant calculated the number of signatures from each voting district independent candidates would need to collect in order to obtain the requisite number of signatures in the respective regions. They are as follows:

(a) In the Eastern Cape, an independent candidate would have to obtain the equivalent of three signatures from voters in each of 4 869 voting districts.

(b) In the Free State, an independent candidate would have to obtain the equivalent of eight signatures from voters in each of 1 582 voting districts.

(c) In Gauteng, an independent candidate would have to obtain the equivalent of five signatures from voters in each of 2 799 voting districts.

(d) In KwaZulu-Natal, an independent candidate would have to obtain the equivalent of three signatures from voters in each of 4 972 voting districts.

(e) In Limpopo, an independent candidate would have to obtain the equivalent of four signatures from voters in each of 3 223 voting districts.

(f) In Mpumalanga, an independent candidate would have to obtain the equivalent of seven signatures from voters in each of 1 813 voting districts.

(g) In North West, an independent candidate would have to obtain the equivalent of seven signatures from voters in each of 1 737 voting districts.

(h) In the Northern Cape, an independent candidate would have to obtain the equivalent of 15 signatures from voters in each of 732 voting districts.

(i) In the Western Cape, an independent candidate would have to obtain the equivalent of nine signatures from voters in each of 1 572 voting districts.

[291] The applicant further argues that the time, resources, and energy that independent candidates would have to invest in order to meet the 15% signature requirement to secure the requisite signatures would be immense. It points out that, at 15% of the regional quota, this is between 1 000 and 1 400 percent increase from the previous 1 000 signatures required from registration to contest elections. I am inclined to agree with the applicant on this score. While the applicant need not obtain a signature in all voting districts described above, this illustration reveals the extent of the burden. The purpose of the signature requirement was to prevent frivolous contestation. The effect of it is that at 15% of the regional quota, the signature requirement places a significant burden on independent candidates to contest elections.

[292] Accordingly, and again leaving aside the merit of the requirement, the signature requirement limits the right to stand for office, to vote, to make political choices and to freely associate, by limiting these rights' protected activity and making inroads into the boundaries of these rights. It cannot, therefore, be said that the impugned legislation merely gives effect to these rights. On the contrary, it intentionally limits them, alternatively, has the effect of limiting them. This in turn triggers the justification analysis.

[293] This is where I depart from the first judgment. It is incorrect to apply the *New National Party* standard whenever government action allegedly limits political rights. The standard is restricted in scope to situations where impugned law or conduct gives effect to the right. *New National Party*, *Moloto*, *Garvas* and *Mlungwana* confirm as much. None of these cases says that where a provision facially constitutes a limitation then no limitation exists, and that the applicant must meet a further

evidentiary burden. The signature requirement limits candidacy both in intention and effect.

[294] Finally, on this aspect, I take the view that the *New National Party* standard and the doctrine of limitation coexist in separate though related constitutional spaces. If a right is found to be limited using the criteria in *Walters*, the bearer of the right cannot then be expected, in addition, to demonstrate that by taking reasonable steps they will not be able to exercise the right. It is for these reasons that I conclude that the rights have been limited and that the *New National Party* standard does not apply.

[295] The first judgment concludes that the 15% signature requirement does not adversely affect an independent candidate as it does not require them to do anything unconnected with their personal goals or ambitions.[178] This is not the test which must be applied. The test is whether the impugned law crosses the boundaries of what the right seeks to protect. This is the test that the applicants have met. In any event, the logistics involved in obtaining individual signatures from thousands of people appear to be a task of some magnitude if regard is had to how the first judgment suggests that this could be achieved.[179]

[296] Although, for these reasons, the applicant did not bear a burden of proving that its members could not by taking reasonable steps meet the signature requirement, a brief observation on the reasonable steps standard is apposite. The applicant launched these proceedings in June this year. The date of the next national elections had not been announced and is yet to be announced, but it will be in the period between May to August 2024. At the time the application was launched, therefore, the election date was unknown and lay nearly a year or more ahead. Furthermore, no regulations had as yet been promulgated to prescribe the form in which signatures were to be obtained, and

[178] First judgment at [171].

[179] First judgment at [72].

this is still the case.[180] It is not apparent, in the circumstances, how potential independent candidates could have been expected to start the process of trying to gather signatures in order to gauge the achievability of the signature requirement. Voter registration weekends had not been held, voters at that early stage might be apathetic and the formal requirements for collecting signatures were not yet in place.

[297] Section 36 of the Constitution permits the state to limit a right, provided of course, that it is reasonable and justifiable in an open and democratic society based on human rights, dignity and freedom. This singular and unequivocal constitutional standard applies to all rights and therefore no separate limitation regime can exist in respect of any cluster of rights, be it political rights or voting rights as the first judgment suggests. Simply put when the state limits a right it carries with it the duty to justify the limitation.

[298] There is nothing in *New National Party* that signals a departure from this standard nor the creation of a different standard – the Constitution simply does not permit it and we must be careful of reading into *New National Party* what is not there. The test in *New National Party* can therefore only fit into the scheme of the Constitution if it fits into the space *New National Party* says it was designed for – instances where an enactment regulates a right.

[299] Where an enactment goes beyond this and limits a right then section 36, *Garvas, Mlungwana* and the doctrine of justification all tell us the same thing – the duty of the state to justify the limitation is triggered. To suggest that the existence of the limitation can be ignored and the rights-bearer be burdened in showing that the right cannot be achieved by taking the reasonable steps the enactment provides for, does an injustice to section 36, offends the principle of accountability and fundamentally unsettles the approach to limitation that the Constitution demands. Its implications could be far-reaching and ominous.

[180] Draft regulations were published on 28 July 2023 for comment by 27 August 2023: GN 1934 of 2023, *GG 49051*, 28 July 2023.

[300] In the presence of a limitation, the second stage of the analysis probes its justification.

The second stage: is there a justification?

[301] Section 36(1) of the Constitution provides that a limitation will be regarded as reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom when it is effected, in terms of a law of general application, after taking all relevant factors into account, 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.

[302] A section 36 justification analysis is a balancing exercise, described by this Court in *Manamela*[181] as follows:

> "[T]he Court must engage in a balancing exercise and arrive at a global judgment on proportionality . . . . As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."[182]

[303] In the main, the state respondents argue that the signature requirement serves two legitimate government purposes. First, arising from the historical trend of increased

[181] *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC).

[182] Id at para 32.

participation in elections, the signature requirement ensures that those running are *bona fide* candidates with serious intentions and avoids frivolous participation. Second, the signature requirement: avoids confusing, unwieldy ballots; decreases spoilt ballots; lowers the cost implications; and avoids delays in voting, voting counting and the declaration of results. The state submits that the threshold set is reasonable as it is less than one-fifth of the total number of votes and is fair as it applies to independent candidates and unregistered political parties equally. Further, it is submitted that 1 000 signatures would not constitute a less restrictive means to achieve the same government purpose as the requirement for 1 000 signatures was a registration requirement and not a contestation requirement.

The nature of the rights

[304] The rights in question form a cluster of political rights. They are indispensable to both a functioning democracy and the dignity of those who bear such rights. I have already dealt in some detail with their importance earlier in this judgment and no more need be said on the issue, save to state that—

> "[a] right that is of particular importance to the Constitution's ambition to create an open and democratic society based on human dignity, freedom and equality will carry a great deal of weight in the exercise of balancing rights against justifications for their infringement."[183]

The importance of the purpose of the limitation

[305] The limitation is purportedly designed to prevent frivolous contestation and the logistical complications that arise as a result. Perhaps these purposes are legitimate. But they are also brand new. The limitation is based largely on the assumption that the introduction of independent candidates, without a signature threshold for contestation, will increase the number of frivolous and unmeritorious candidates. There is simply no evidence to suggest this is likely to happen.

[183] Currie and De Waal above n 90 at 178.

[306] In fact, the evidence from past election patterns points in the opposite direction. In its explanatory affidavit, the IEC provides an overview spanning six elections for the National Assembly over the period 1994 to 2019. From this, it appears that the number of political parties contesting elections increased by more than 250% from 19 in 1994 to 48 in 2019. The overwhelming majority of them – some 70.8% – were unsuccessful in the 2019 election. Of the 34 unsuccessful parties, 22 (65% of them) obtained fewer votes than the lowest threshold now in place for the 2024 election. In addition, there are some 322 registered political parties all of whom would have, but for the amendment of the Electoral Act, been eligible to contest the elections, subject to meeting only a registration requirement of 1 000 signatures.

[307] Thus, prior to the decision of this Court in *New Nation Movement* and with no contestation threshold in place, save for the registration requirement of 1 000 signatures, the large and increasing number of registered political parties did not create a risk to the electoral system. Previously, a relatively large number of parties have unsuccessfully contested elections and secured relatively low voter support. However, none of this prompted concern about a low threshold or the need to consider a higher signature requirement for registration. Evidently, there was no need to do so. Therefore, one can safely assume that, but for the decision of this Court in *New Nation Movement*, the 2024 election would have been conducted without any signature contestation threshold for political parties, save for the requirement of 1 000 signatures to be registered.

[308] Although the requirement of 1 000 signatures for registration as a political party is, in form, a requirement for registration, rather than contestation, it has always been a de facto contestation requirement. In terms of section 26(a) of the Act, only registered political parties may contest elections. There would seem to be little purpose for a political party to register except so as to have the option of contesting elections. The requirement for registration must thus have been set by the IEC on the basis that it was

an appropriate threshold for allowing a political party to participate fully in political activity, including elections.

[309] The Electoral Commission Act (ECA) makes this apparent.[184] The very fact that the registration of political parties is regulated by the ECA and overseen by the IEC shows the close link between registration as a political party and election contestation. In terms of section 15(1) of that Act, an application for registration as a political party has to be made to the chief electoral officer, and must be made either for the entire Republic, a particular province, or particular district or metropolitan municipality. The proviso to section 15(1) states that a registered party's right to contest an election is confined to its geographic registration. In terms of section 17(1) of the ECA, the IEC may cancel a party's registration if satisfied, among other things, that the party has no intention to participate in an election; or is not currently represented in a legislature and has not participated in an election since the date of its registration or since the date it was last represented in a legislature.

[310] This being so, the introduction and increases in the threshold requirements for registration as a political party are revealing. In 1994, there was no signature requirement. In 2000, regulations were introduced that required a party to have 50 voter signatures for registration.[185] In 2008, this figure was increased to 500 for national participation and 50 for municipal participation.[186] As recently as August 2021, the requirement was increased to 1 000 signatures for national participation, 500 for provincial participation, and 300 for municipal participation.[187] In August 2021, when the most recent threshold regulations were passed, the IEC knew everything about the trends from 1994 to 2019, on which it and the other respondents now rely to justify a contestation requirement of 15% of the relevant quota. In 2021, it only increased the

[184] 51 of 1996.

[185] Regulations for the Registration of Political Parties, GN R712 *GG* 21386, 13 July 2000. Regulation 3 required the party's deed of foundation to be signed by at least 50 qualified voters.

[186] Regulations for the Registration of Political Parties, GN R1204 *GG* 31452, 22 September 2008.

[187] Proc R35 GG 45060 of 27 August 2021. The signature requirements are contained in regulation 3(1)(a).

registration requirement from 500 to 1 000 signatures, without any suggestion of a separate contestation requirement. In 2023, just two years later, the signature requirement has been introduced with much said about the need for a contestation threshold.

[311] Parliament says that there was historically no need for a signature requirement until *New Nation Movement* since "[political] 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 the National Parliament of the Provincial Legislature". Parliament's characterisation of the politics and the economics of contestation suggests that frivolous or meritless contestation has never been a problem with political parties. Political parties, Parliament tells us, make sensible political and economic decisions around whether and when to contest an election. This begs the question: why should the same not be expected of independent candidates? This question goes unheeded and unanswered.

[312] The extent of the problem is unknown. However, past data suggests that the absence of signature contestation thresholds did not result in frivolous or meritless contestation nor were the respondents concerned as much. This leads me to the conclusion that there is a relatively low importance for the purpose of the signature requirement.

The nature and extent of the limitation

[313] Based on the 2019 elections, the signature requirement would require that independent candidates obtain 10 000 to 14 000 signatures from voters.[188] There are three considerations that I wish to make in determining whether this is a serious infringement. The first consideration is the arbitrariness of the signature requirement

[188] The number of signatures required at 15% of the regional quota for the 2019 elections, as per the IEC's July 2022 presentation, range from: 10 271 (Northern Cape); 10 652 (North West); 11 329 (Limpopo); 11 340 (Free State); 11 657 (Eastern Cape); 11 925 (Mpumalanga); 13 045 (Kwa-Zulu Natal); 13 201 (Western Cape); to 13 890 (Gauteng).

where it was based on incorrect quantifications. The second consideration is the extent to which the requirement is out of line with foreign democracies. And the third consideration is the assumptions regarding the prospects of winning a seat. I deal with them in turn.

[314] The signature requirement was calculated by Parliament as a percentage of the votes per regional quota for the National Assembly in the 2019 election, which was about 44 000 votes – the wrong vote quota. In actuality, the quotas were to be calculated based on the regional quota for a seat in the National Assembly. The quota was determined by reference to the last elections which were in 2019. They were as follows:

Region	**Regional Quota**
Eastern Cape	77 713
Free State	75 602
Gauteng	92 601
KwaZulu-Natal	86 967
Limpopo	75 529
Mpumalanga	79 499
North West	71 016
Northern Cape	68 474
Western Cape	88 008
Weighted average	83 511

[315] The Amendment Act imposes a signature requirement of 15% of the quota for the region in the preceding election, as per the figures in the table above. The quota in this formula is in all instances substantially higher than 44 000 votes, which was the figure used by Parliament in its deliberations and debates in setting the signature threshold. Had the correct figures been utilised – and it is clear that they are the only figures that could properly have been used, as that is what section 31B of the Act provides for – a totally different picture would have emerged in respect of the raw

numbers required. Those numbers are illustrated below, using a rounded weighted average of 83 500 as the regional quota:

Percent	Raw number using 44 000 quota	Raw number using 83 500 quota
50%	22 000	41 750
30%	13 200	25 050
20%	8 800	16 700
15%	6 600	12 525

[316] If the percentage set at 15% is calculated based on a 44 000 quota, then 6 600 signatures are required. But, if it is calculated based on an 83 500 quota, then 12 525 signatures are required. Evidently, the differences in the signature requirements are substantial – almost 100% higher using the correct quota. This discrepancy exists at every point the percent is set at. This is critically important and underpins the importance of the raw numbers that would in the end be required to secure standing for election. If the use of the 44 000 quota proved to be incorrect, then the raw numbers change considerably upward as the table demonstrates.

[317] Simply to further illustrate the point, Counsel used the incorrect 44 000 quota in its advice on three of the four percentage levels, as follows:

(a) When the threshold was set at 50%, Counsel calculated this to require 22 000 signatures. On the correct quota, it would be 41 750. Counsel's advice was that the substantially lower requirement of 22 000 signatures would be an unjustifiable limitation, and no more than 20% should be prescribed.

(b) When the threshold was set at 30%, Counsel calculated this would require 14 667 signatures (though it should have been 13 200). On the correct quota, it would be 25 050 signatures. Counsel's advice was that the substantially lower requirement of 14 667 signatures would be an unjustifiable limitation.

(c) When the threshold was set at 20%, Counsel calculated this would require 8 800 signatures. On the correct quota, it would be 16 700 signatures. Counsel's advice was that the substantially lower requirement of 8 800 signatures was eight times the requirement for political parties to be registered with the IEC, and that the contestation requirement should thus be extended to political parties not yet represented in Parliament.

[318] Ultimately, when Parliament resolved to adopt the 15% requirement, it did so after it had received submissions from the IEC and an opinion from Counsel addressing the use of the incorrect quota. None of the documents, opinions or memoranda put up by Parliament reference the correct quota in raw numbers or the correct base quota – the regional quota. The only inference that can be drawn is that Parliament believed, mistakenly so, that it was setting a threshold of 15% of 44 000 – which translates to a signature requirement of 6 600 – while, in reality, it set a signature requirement of between 10 271 and 13 890. In many regions, this is close to or equates to 100% more than the 6 600 contemplated. It is neither clear nor explained why Parliament used the wrong figure. It is also not clear whether Parliament's final resolution was on the basis that 15% would require 6 600 signatures (on the incorrect quota) or 12 525 signatures (on the correct quota).

[319] This is quite remarkable. The error was clear and previously identified in the IEC's February 2023 response to the submissions. The relevant section was even entitled "Wrong Quota". The correct quota was provided to the Portfolio Committee by the IEC in July 2022 and again in February 2023.

[320] Moreover, the incorrect quota was pointed out by the applicant in its application to this Court. In response, Parliament did not adequately address the error in assumption. It simply said that it has no knowledge of the "erroneous assumptions". It was only during the hearing of the matter that Counsel for Parliament conceded that the incorrect quota was used. Under those circumstances, lawmakers would have

deliberated and voted on a signature requirement based on figures that were materially incorrect.

[321] The response from Parliament is inaccurate, inadequate and fails to address the core of the problem. The quota was almost 100% higher when using the correct quota. This should not be a matter of speculation as the correct quota had been provided to the Portfolio Committee in July 2022. It is not clear why the correct figure was not used (between 68 474 to 92 601). In addition, it was the raw numbers that ultimately mattered – the percentage was merely the calculating tool. There can be little doubt that Parliament cared about the raw numbers. At each instance, Counsel's concerns prompted Parliament to seek a reduction in the applicable percentage. The problem was that it consistently used the incorrect base quota. This had the effect of fundamentally tainting the accuracy and the reasonableness of the process.

[322] In the absence of any clear motivation as to why the requirement was set at the level it was, and given its movement from 50% to 15%, past data is again instructive. From a 1 000 signature threshold, it is now fixed at a threshold between 10 000 and 14 000 signatures.[189] Independent candidates must secure these signatures in order to even stand for election. Parliament accepted Counsel's view that a figure of 14 667 (in fact, 33% of the 44 000 quota, and not 30% as Counsel said) could arguably be an unjustifiable limitation of the section 19 right to contest elections as independent candidates. Even a threshold of 8 800 (20% of the 44 000 quota) prompted similar concerns that, at eight times more than the 1 000 signatures political parties required to register, the contestation requirement might be arbitrary and unfair.

[323] To overcome this concern, the registration requirement was extended to unrepresented political parties, but this did not address the problem identified by Parliament. It pertinently recognised that a political party would have a greater ability to motivate voters to assist it in registering to contest elections than an independent

[189] See fn 190.

would. And so simply extending an admittedly arbitrary and unfair signature requirement to unrepresented political parties so as to create a veneer of an equal and non-discriminatory requirement was no solution at all. Expanding the reach of an arbitrary and unfair requirement to others does not vitiate its capriciousness. For these reasons, it must follow that the final threshold of between 10 000 and 14 000 signatures constitutes an unjustified limitation and an unfair and arbitrary one.

[324] To this extent, the absence of any evidence of reasonable steps by the applicant to demonstrate that the attainment of the requirement is onerous or beyond their reach, cannot assist the respondents in the justification analysis. The onus is on the respondents to demonstrate that the justification is reasonable and necessary in an open and democratic society. The above strongly suggests that they too saw the requirement as being unjustified and possibly arbitrary and unfair.

[325] A second consideration under this factor is how the signature requirement compares to other jurisdictions.

[326] In search for a comparison, the IEC relies on signature requirements in Denmark. The IEC may be right to pick Denmark as a useful comparator. Currently, there are 16 parties represented in the Danish Parliament compared to 14 in our National Assembly.[190] As is soon to be the case here, Denmark also allows independents to run alongside party candidates. In Denmark, voters elect parliamentarians by choosing either independent candidates or candidates presented on a party list. Voters are also free to cast their vote for a party without indicating specific candidate preferences. One hundred and thirty-five parliamentarians are chosen in such a manner. The remaining 40 seats are distributed to parties based on their percentage of the national vote as compensatory seats, to achieve proportionality.

[190] The Danish Parliament *Political Parties*, available at: https://www.thedanishparliament.dk/political-parties; and Parliament of the Republic of South Africa *National Assembly*, available at: https://www.parliament.gov.za/national-assembly.

[327] The IEC notes that Denmark – with an electoral system akin to South Africa's – required 20 194 signatures in its 2022 parliamentary elections. This is only partially correct. While Denmark did indeed require 20 194 signatures, it only did so for political parties.[191] Independent candidates, on the other hand, "ha[d] to submit between 150 and 200 recommendations in writing from voters resident in the nomination district".[192]

[328] By way of comparison, the Danish example – properly construed – has a signature requirement far lower than that endorsed by the IEC. The same is true elsewhere.[193] In our region, South Africa is an anomaly. Candidates for the Assembly in Zimbabwe must collect only five of their compatriots' signatures. In Lesotho, two signatures are required. Zambia asks for 15. A candidate in Botswana must obtain nine signatures. Namibia – where the figure is highest, apart from South Africa – requires 300 signatures. These figures stand in stark contrast to the 10 000 to 14 000 now needed for independent candidates in South Africa. The table below demonstrates that many of the world's democracies that permit independent candidates to participate in elections, present similarly low signature requirements for independent candidates:

No.	State	Structure of Parliament	Electoral System	Signature or nomination requirement
1.	Albania[194]	Unicameral	Proportional	300

[191] Ministry of the Interior and Health and The Danish Parliament *The Parliamentary Electoral System in Denmark* (2011) at 19, available at: https://elections.im.dk/media/15737/parliamentary-system-dk.pdf.

[192] Id.

[193] The first judgment at [178] claims my consideration of foreign jurisdictions "violates their right to a fair public hearing guaranteed by section 34 of the Constitution". This is not so. The matter of comparative jurisdictions was traversed on the papers. It addresses precisely the legal issue before us: signature requirements for independent candidates. Rather than representing an infringement on the parties' right to a fair hearing under section 34, my consideration of foreign law directly aligns with section 39(1)(c)'s encouragement to "consider foreign law" when interpreting the Bill of Rights. Section 1(1) of the Law of Evidence Amendment Act 65 of 1988 provides in relevant part: "Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty. Our courts do this often, and this matter is no different.

[194] Inter-Parliamentary Union *Albania Kuvendi (Parliament), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2001_B.htm.

2.	Australia[195]	Bicameral (House and Senate)	House: majority, direct preferential vote; Senate: proportional single transferable vote	House: 6, Senate: 50
3.	Botswana[196]	Unicameral	Simple majority direct election	9
4.	Canada[197]	Bicameral (House of Commons and Senate)	House of Commons: single-member plurality system, first past the post	50-100
5.	Denmark[198]	Unicameral	Proportional with compensatory seats	150-200
6.	Finland[199]	Unicameral	Proportional	100
7.	Germany[200]	Bicameral (Lower House and Upper House)	Both proportional and first past the post	200
8.	Greece[201]	Unicameral	Proportional with some majority vote constituencies	12
9.	India[202]	Bicameral (House of the People and Council of States)	House of the People: majority vote	1-10
10.	Italy[203]	Bicameral (Chamber of Deputies and Senate)	Chamber of Deputies: mixed proportional and first past the post	500-1 000

[195] Inter-Parliamentary Union *Australia (Senate), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2016_B.htm.

[196] Inter-Parliamentary Union *Botswana (National Assembly), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2041_B.htm.

[197] Inter-Parliamentary Union *Canada (House of Commons), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2055_B.htm.

[198] Inter-Parliamentary Union *Denmark (Folketinget), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2087_B.htm.

[199] Inter-Parliamentary Union *Finland (Eduskunta Riksdagen), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2111_B.htm.

[200] Inter-Parliamentary Union *Germany (Deutscher Bundestag), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2121_B.htm.

[201] Inter-Parliamentary Union *Greece (Vouli Ton Ellinon), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2125_B.htm.

[202] Inter-Parliamentary Union *India (Lok Sabha), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2145_B.htm.

[203] Inter-Parliamentary Union *Italy (Camera dei Deputati), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2157_B.htm; and ACE Project: the Electoral Knowledge Project *Parties and Candidates*, available at: https://aceproject.org/main/english/pc/pcc05a.htm.

11.	Kenya[204]	Bicameral (National Assembly and Senate)	National Assembly: majority first past the post; Senate: first-past-the post	Senate: 2 000
12.	Lesotho[205]	Bicameral (National Assembly and Senate)	National Assembly: mixed-member proportional representation	2
13.	Mauritius[206]	Unicameral	Majority vote	6
14.	Namibia[207]	Bicameral (National Council and National Assembly)	National Assembly: proportional party-list system	300
15.	Zambia[208]	Unicameral	First past the post	15
16.	United Kingdom[209]	Bicameral (House of Commons and House of Lords)	House of Commons: Single-member plurality system, first past the post	10
17.	Zimbabwe[210]	Bicameral (National Assembly and Senate)	National Assembly: majority first past the post	5

[329] Ultimately, Parliament chose a number out of kilter with most foreign democracies. Perhaps this difference is best explained by the respondents' peculiar reason for setting the signature bar so high. Contrary to the respondents' assertions, the purpose of a signature requirement should not be to prejudge someone's viability as a candidate. Instead, as summarised by the Venice Commission, "the right to stand for election may be subject to the support . . . of a certain number of electors to exclude

[204] Inter-Parliamentary Union *Kenya (Senate), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2168_B.htm.

[205] Inter-Parliamentary Union *Lesotho (National Assembly), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2181_B.htm.

[206] Inter-Parliamentary Union *Mauritius (National Assembly), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2209_B.htm.

[207] Inter-Parliamentary Union *Namibia* (National Assembly), *Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2225_B.htm.

[208] Inter-Parliamentary Union *Zambia (National Assembly), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2359_B.htm.

[209] Inter-Parliamentary Union *United Kingdom (House of Commons), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2335_B.htm.

[210] Inter-Parliamentary Union *Zimbabwe (National Assembly), Electoral System*, available at: http://archive.ipu.org/parline-e/reports/2361_B.htm.

frivolous candidates".[211] The Commission continues that even when screening for frivolity, signature requirements are only "acceptable if the number is sufficiently small".[212] When compared to other nations, South Africa has introduced a requirement both untethered from its conventional purpose and far from sufficiently small.

[330] As a final consideration, in its arbitrary setting of the signature requirement at 15% of the regional quota, the lawmaker has also made an unjustifiable assumption about the link between the signature requirement and the prospects of winning a seat. In accordance with a typical South African election timetable, an independent candidate will need to register for an election about two months before polling day. This means that the collection of 10 000 to 14 000 signatures will have to be done several months before voting day. At that stage, voters will not be as caught up in electioneering as they will be later. The independent candidate effectively has to run two campaigns. First, a preliminary campaign to garner 10 000 to 14 000 signatures; and then a second campaign to win a seat, once their candidacy has been accepted by the IEC.

[331] An independent candidate with limited resources is faced with a quandary as to whether to devote them to the preliminary campaign or the real thing. The fact that, in such circumstances, the candidate may only muster one or two thousand signatures at the preliminary stage does not mean that he or she will not do very much better once voters become interested in issues and the candidate goes on an all-out campaign. And their prospects might be beneficially affected by missteps by political parties in the run-up to polling day.

[332] By confusing the purpose of signature requirements, the respondents also disregard elections' holistic value. Elections are not solely a matter of arithmetic – who wins a seat and who loses. Instead, elections have value wholly separate from the

[211] Venice Commission *Report on thresholds and other features of electoral systems which bar parties from access to parliament* (March 2010) at 3
available at:https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)007-e.

[212] Id.

outcome of the vote. In Canada and the United States, this sentiment has been reinforced in matters challenging restrictive ballot measures. Similarly, to the Canadian Supreme Court,[213] the United States Supreme Court expressed the dual role of elections: "an election campaign is a means of disseminating ideas as well as attaining political office".[214]

[333] In light of these considerations, I am of the view that the signature is an arbitrary and extensive limitation.

The relation between the limitation and its purpose

[334] Setting the requirement was no easy task, and this judgment does not suggest otherwise. The respondents demonstrated the difficulty in striking a balance between limiting elections to serious contenders and setting a threshold that is not arbitrary, unfair, or unconstitutional. To this end, it was resolved by Parliament that the requirement would be set as a percentage of votes per seat obtained in the previous election. While a percentage represented a useful and necessary tool to properly manage the quantification of the signature requirement, the raw numbers are what ultimately matter. Those raw numbers that would determine whether the signature requirement could be said to be unfair, arbitrary or unconstitutional since they tell us what conditions are required to be met by a candidate seeking to access the right to stand for public office.

[335] The initial proposal was set at 50%. There is nothing on the papers that provides any insight as to how 50% was identified as the initial threshold. In time, the threshold was moved to 30%, then to 20% and finally to 15%, largely out of concerns that it was too high. In all of this time, neither the Minister nor Parliament said what informed their approach to the setting of the requirement. In the 1 February 2023 opinion, Counsel advised Parliament that if a candidate could not obtain the support of 15% of

[213] See *Figueroa* above n 79.

[214] *Illinois State Board* above n 80 at 186.

the voters for contestation, they were unlikely to obtain enough votes to win a seat. Parliament made the same argument in its submissions before this Court. This, however, is no explanation at all for setting the mark at 15%.

[336] As I have said, the process, the timing, and the formal requirements to get support for a nomination are different from that of getting electoral support. In addition, it appears that 50% was an entirely random requirement to start with and its subsequent reduction was equally random. There appears to have been little regard, except in passing, for the time, effort, costs, and logistics, which would be involved in securing between 10 000 and 14 000 signatures in support of contestation. That is precisely why it was changed as often and as substantially as it was – simply because there was no way to test it except for what may have been an instinctive sense of what would constitute too high a figure in raw numbers.

[337] There is an inexplicable gap, both in the reasoning and the process, leading to the signature requirement. While we know it is intended to limit frivolous participation and avoid logistical frustrations to ensure free and fair elections, we do not know why it was set at 50% and then finally reduced to 15%. Nor do we know how the requirement was linked to the objective it sought to achieve.

[338] I have set out the nature of the limitation, how the limitation evolved, and concerns about the raw numbers used. There is a discrepancy that arises with regard to: (a) the numbers that were used in determining whether the figure arrived at would be acceptable; and (b) the correct numbers that should have been used.

[339] While the proposed signature requirement was to be calculated at a percentage of the regional quota in the previous election, approximately 83 500 votes, the compensatory quota of approximately 44 000 votes was used. In real terms, this emerges from opinions attached to Parliament's answering affidavit: according to Parliament, the raw numbers ranged from 22 000 (50%), 14 667 (30%), 8 800 (20%), and to 6 600 (15%). This is on the basis that the base figure to be used was 44 000

votes. By using the incorrect and low base of 44 000, the raw figures were considerably lower than what they actually turned out to be. The raw numbers mattered and, ultimately, the raw numbers relied on throughout were incorrect. It is this error that tainted the process of how the signature requirement was set. The relationship between it and the purpose it sought to achieve was fundamentally distorted.

Less restrictive means to achieve the purpose

[340] It is noteworthy that the only signature requirement that was in place at the time of our most recent national elections, those of 2019, was that of 500 signatures for national registration as a political party and that this was increased to only 1 000 as recently as August 2021. This increase in August 2021 occurred when the IEC was fully aware of our election trends over the period 1994 to 2019. During that period, modest signature requirements served the electoral system well and without exception. To this end, no consideration was given to setting a requirement fixed at 1 000 signatures, or one in proximity to that.

[341] The respondents identify the risk of frivolous contestation and logistical difficulties in broad terms but present little evidence to support it. Even if such risks do exist, the extent of the risks remain unknown. And it must also be borne in mind that the signature requirement is not the only mechanism for discouraging frivolous contestation. An independent candidate will also be required to lodge a monetary deposit. The draft regulations promulgated for comment in July 2023 set the deposit at R20 000. For all these reasons there was no proper evaluation of less restrictive means to achieve the purpose.

Conclusion on justification

[342] For all these reasons, I am not satisfied that the state respondents have shown that the limitation is reasonable and justifiable in an open and democratic society. The applicant's rights challenge must be upheld, entitling it to the relief it seeks on one aspect of its challenge.

[343] *New Nation Movement* has led to a historic moment in the journey of our young constitutional democracy. For the first time, independent candidates will stand for seats in the national and provincial legislature. Parliament meets this historic moment with a first-of-its-kind signature requirement for independent candidates. We must be cautious and guard against such a requirement becoming a barrier to contestation. In effect, the signature requirement renders somewhat hollow the promise that *New Nation Movement* heralded in unlocking and giving section 19 of the Constitution its full and proper effect.

[344] There is a final issue I wish to address. Parliament created signature requirements for both independent candidates and unrepresented political parties. It foisted identical restrictions onto unrepresented political parties via section 27(2)(cB) as it did onto independent candidates via section 31B(3). Owing to the similarity between the two sections, the amicus submitted that this Court's judgment will have an impact on both sections and both types of candidates. However, the contours of this Court's consideration are sketched by the applicant, not the amicus. A challenge to section 27(2)(cB) was not properly before us in this matter. The general rule is that courts should only consider the issues properly before them.[215] As such, section 27(2)(cB) falls beyond the scope of our review.

[345] While there are instances when a court may raise questions of law *mero motu*, those questions may only be asked when doing so "involves no unfairness to the parties".[216] This is not such an instance. The respondents deserve a proper opportunity to ventilate section 27(2)(cB). For instance, although the provisions read identically, the plausible justifications for their enactment may differ. Parliament presses a legitimate concern: the imbalance in capacity between independents and unrepresented

[215] *Molusi* above n 14 at paras 27-8.

[216] Id; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) at paras 109-14; *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68; and *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 39.

political parties may warrant disparate treatment. True or not, this Court would benefit from argument on this point and others like it. To hold otherwise would be "unfair".

[346] Furthermore, that the applicant has failed to challenge section 27(2)(cB) alongside section 31B(3) should not impact the remedy I fashion. The applicant has successfully challenged section 31B(3) as an unjustified limitation to the rights contained in sections 19 and 18. They are entitled to the relief they seek.

Remedy

[347] The proper remedy for an unjustified infringement of a right is a declaration of constitutional invalidity. The applicant submits that the order of invalidity should be suspended for a period of 24 months for Parliament to attend to the defects and that, during the period of suspension, a limited striking-out of the 15% requirement should be combined with a reading-in of 1 000 signatures as a contestation requirement. I agree.

[348] Given the policy-laden nature of such a matter, Parliament – not this Court – should decide the ultimate number for the signature requirement. The design features of our electoral system fall squarely within Parliament's remit. As *New Nation Movement II*[217] reminds us:

> "Parliament's description of the research and actions undertaken to amend the Electoral Act indicate just how policy-laden the legislative choices that Parliament must make are. It is a process that requires not just the parties that are before us to provide submissions, but also to allow other interested parties and the public to have their say."

[349] While the Court would not generally intervene in such a policy decision, practical concerns warrant an interim determination before the next general election

[217] *Speaker of the National Assembly v New Nation Movement NPC* [2022] ZACC 24; 2022 JDR 1766; 2022 (9) BCLR 1165 (CC) at para 76.

between May and August 2024. There is insufficient time for Parliament to address the matter. This is the sole reason we go beyond adjudicating the requirement's constitutionality. In these circumstances, the Court must make an interim determination until Parliament is able to set a constitutionally compliant signature requirement.

[350] In the interim, the only plausible figure is 1 000 signatures. First, no other alternative figure exists. Setting aside the impugned 15% requirement, the sole extant signature requirement is the 1 000 signatures required for registration as a political party. Second, while labelled a "registration requirement", this figure is essentially a threshold for allowing parties to contest elections. In other words, it is a de facto contestation requirement. If not for *New Nation Movement*, the 1 000 signature requirement would have applied to unregistered political parties wishing to register and contest in the next election. I have referred earlier to the fact that a low contestation requirement has not had a prejudicial effect on the management of past elections. Under these circumstances, I would read in a 1 000 signature requirement for contestation by independent candidates.

[351] This reading-in will only apply for the period of 24 months while the order of invalidity is suspended to afford Parliament an opportunity to properly consider the signature requirement and remedy the defect. The consideration of any other figure would require this Court to embark on an exercise in speculation.

[352] This consideration must be left to Parliament to assess through its deliberative and consultative processes during the suspension period. In the event that Parliament does not effect the required amendments to the section within the two-year period, or any extended period that this Court may grant, then section 31B(3), as read-in, will continue to endure either permanently or until such time as Parliament effects amendments to the section.

Costs

[353] While the applicant has achieved success in its challenge to the constitutionality of the signature requirement, the state respondents have successfully withstood the challenge to the recalculation provisions in the Act. The cost order that must follow must take cognisance of this as it must the principle in *Biowatch*.[218] On that basis the applicants are entitled to those costs incurred in relation to the signature challenge but not those in relation to the recalculation challenge. They would ordinarily be liable for those costs of the respondents incurred in successfully resisting the recalculation challenge, but *Biowatch* immunises them from such an adverse costs order.

[354] That being the case and broadly quantifying the share of the two issues in the overall costs of the application, I would say that 50% represents a fair allocation of those costs to the signature requirement and the other 50% to the recalculation challenge. The Atkins report was used wholly in support of the challenge on recalculation and to the extent that that challenge was not successful the applicant should not be entitled to recover the costs associated with that report. This is in no way a reflection of the competence or otherwise of Mr Atkins but rather a common sense and practical determination as to how costs are to be awarded given the conclusions reached by this Court. I intend making an order that the respondents pay 50% of the applicant's costs of the application, which costs are to exclude those associated with the report of Mr Atkins. Given the truncated timeframes and the complexity of the matter, the costs of two Counsel are warranted.

Order

[355] I make the following order:

1. The applicant is granted direct access to this Court.
2. The recalculation relief sought in prayers 4, 6.2 and 6.3 of the applicant's notice of motion is refused.

[218] *Biowatch* above n 76.

3. Section 31B(3)(a)(i) and (ii) of the Electoral Act 73 of 1998 (Electoral Act) as inserted by the Electoral Amendment Act 1 of 2023 is declared invalid and inconsistent with the Constitution, to the extent that it unjustifiably limits the rights to freedom of association, freedom to make political choices and to stand for public office.
4. The declaration of invalidity referred to in paragraph 3 is suspended for 24 months from the date of this order to afford Parliament an opportunity to remedy the constitutional defects giving rise to the constitutional invalidity.
5. From the date of the order of this Court and during the period of suspension, section 31B(3)(a)(i) and (ii) of the Electoral Act will read as follows, the underlined words being read into the section with the words in strike-out text being severed:

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

(*a*) A completed prescribed form confirming that the independent candidate has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear—

(i) in the case of an election of the National Assembly in respect of regional seats, on the national segment of the voters' roll and who support his or her candidature, totalling 1 000 signatures for each region in which the candidate intends to contest an election;

~~(*aa*) totalling 15 percent of the quota for that region in the preceding election, if intending to contest only one region; or~~

~~(*bb*) totalling 15 percent of the highest of the regional quotas in the preceding election, if intending to contest more than one region, provided that where 15 percent of the highest of the~~

~~quotas is not achieved, that the independent candidate may only contest the region or regions as determined by the next highest quota;~~

(ii) in the case of an election of a provincial legislature, on the segment of the voters' roll for the province and who support his or her candidature, totalling 1 000 signatures ~~least 15 percent of the quota of that province in the preceding election, which the independent candidate intends to contest~~,

provided that an independent candidate who was elected to either the National Assembly or a provincial legislature as an independent candidate in the preceding election shall be exempt from this requirement.

6. In the event that Parliament does not remedy the constitutional deficiency in section 31B(3)(a)(i) and (ii) within the period provided for in paragraph 4 of this order, or any extended period granted by this Court, then section 31B(3)(a)(i) and (ii) will be deemed to read as set out in paragraph 5 above.

7. The second, fourth and fifth respondents, jointly and severally, are to pay fifty percent (50%) of the applicants' costs, which costs shall include the costs of two Counsel. The applicant is not entitled to recover any costs associated with the report of Mr Atkins.

THERON J (Rogers J concurring):

Introduction

[356] This is an application for direct access to this Court by One Movement South Africa NPC (OSA or the applicant). The applicant challenges the constitutionality of the Electoral Act (Act) as amended by the

Electoral Amendment Act (Amendment Act) on two grounds. First, the applicant contends that the Amendment Act has introduced a signature requirement which acts as an impermissible and arbitrary barrier for independent candidates to contest elections. Second, the applicant contends that the recalculation method introduced by the Amendment Act is unconstitutional in that it results in an unfair advantage for political parties with a larger share of the vote (large political parties) and a disadvantage for political parties with a smaller share of the vote (small political parties) as well as for independent candidates.

[357] I have read and considered the judgments of my brothers, the Chief Justice (first judgment), and Justice Kollapen (second judgment). I agree with the first judgment insofar as it holds that direct access should be granted on the signature challenge. I agree with the second judgment to the extent that it finds that the signature requirement is unconstitutional in terms of section 31B(3)(a)(i) and (ii) of the amended Act. I therefore concur in the order of the second judgment insofar as it relates to the signature requirement. And, given the conclusion I reach on the recalculation challenge, I also agree with the second judgment's order on costs.

[358] The purpose of this judgment is to briefly express my concerns about the constitutionality of the recalculation method. The facts have been adequately set out by the first two judgments and I do not propose to repeat them except where necessary.

[359] A vacancy can occur in the National Assembly or provincial legislature for the following reasons:

(a) when an independent candidate gains sufficient votes to be awarded two or more seats and thus has to forfeit the seats in excess of the one he or she is able to take up;

(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 is elected to both the National Assembly and provincial legislature and thus has to forfeit a seat in one or other of the legislative bodies;

(d) when an independent candidate gains election in more than one region for the National Assembly and thus has to forfeit the regional seats in excess of the one he or she is able to take up;

(e) when an independent candidate vacates a seat through death or resignation; and

(f) where a party represented in a legislature is dissolved or ceases to exist.

[360] When a vacancy arises in respect of a candidate from a political party, the party concerned will fill the seat by nominating a person from the party according to item 22 of Schedule 1A of the Act.[219] This Court in *New Nation Movement* found that the Act was unconstitutional to the extent that it prevented adult citizens from standing for election to the National Assembly and provincial legislatures as independent candidates.[220] An independent candidate can only ever hold *one* seat, and they cannot nominate a representative to fill a vacancy if they cease for any reason to hold a seat. Therefore, a recalculation is necessary in order to re-allocate the seat or seats that were initially allocated to an independent candidate.

[219] Item 22 of the amended Schedule 1A, which is a repeat of item 23 of the unamended Schedule 1A, says the following:

> "(1) In the event of a vacancy in a legislature of a seat allocated to a party, the party which the vacating member represented must fill the vacancy by nominating a person—
>
> (a) whose name appears on the list of candidates from which that party's members were originally nominated; and
>
> (b) who is the next qualified and available person on the list.
>
> (2) A nomination to fill a vacancy must be submitted to the Speaker of the legislature in writing.
>
> (3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of section 47(3)(c) or section 106(3)(c) of the Constitution, the seats in question must be allocated to the remaining parties with the changes required by the context as if such seats were vacated seats in terms of item 23 and item 24, as the case may be."

[220] *New Nation Movement* above n 3 at para 120.

[361] Items 5, 7, 11, 12, 23 and 24 of the amended Schedule 1A of the Act deal with recalculation in the event of a vacancy. The applicant contends that these items are unconstitutional to the extent that they disproportionately favour large political parties. Both the applicant and the respondents agree that the recalculation method benefits large political parties and thus skews proportional representation. However, the respondents assert that the recalculation method still complies with the constitutional injunction that the electoral system must result "in general, in proportional representation" as required by sections 46(1)(d) and 105(1)(d) of the Constitution.

The recalculation method

[362] Parliament is empowered to determine how elections are to be run. It is not for the courts to determine if there are better ways of conducting elections or if the methods chosen by Parliament are reasonable.[221] Courts must be mindful of the fact that elections are a highly technical, policy-laden and polycentric matter. A court must be careful not to attribute to itself superior wisdom in relation to a responsibility entrusted to Parliament.[222]

[363] However, this does not mean that this power is unfettered. Parliament's decisions are subject to judicial scrutiny: they must be rational and cannot limit any fundamental rights enshrined in Chapter 2 of the Constitution,[223] unless the limitation can be justified in terms of section 36 of the Constitution.

[364] As the second judgment makes clear, the regulation of the exercise of a right which goes beyond regulation, and which has a limiting effect, will amount to a

[221] Id.

[222] *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 48.

[223] *New National Party* above n 16 at paras 19-20.

limitation.[224] When a measure limits a right, a court is required, in terms of section 36 of the Constitution, to conduct a justification analysis in order to determine whether the limitation is reasonable and justifiable. It is not the case that any law that purports to regulate the exercise of a right is shielded from constitutional scrutiny.[225] To hold otherwise would be untenable.

[365] The recalculation method is required to strike a balance between allowing independent candidates to contest elections and ensuring that the electoral system results, in general, in proportional representation.[226] The respondents contend that the "options to address the concerns raised in respect of vacancies were limited" and that the fact that the system favoured large political parties was "simply a logical mathematical consequence". They also contend that the Constitution, as confirmed by this Court in *New Nation Movement*, does not require the electoral system to result in perfect proportionality.

[366] The applicant argues that Parliament should adopt a recalculation method that awards the vacant seat to the candidate who has the highest number of remainder votes in terms of the initial allocation phase (highest remainder method). According to the applicant, this is far more representative and democratic. The respondents claim that the highest remainder method also distorts proportionality.

Does the recalculation method infringe section 19 of the Constitution?

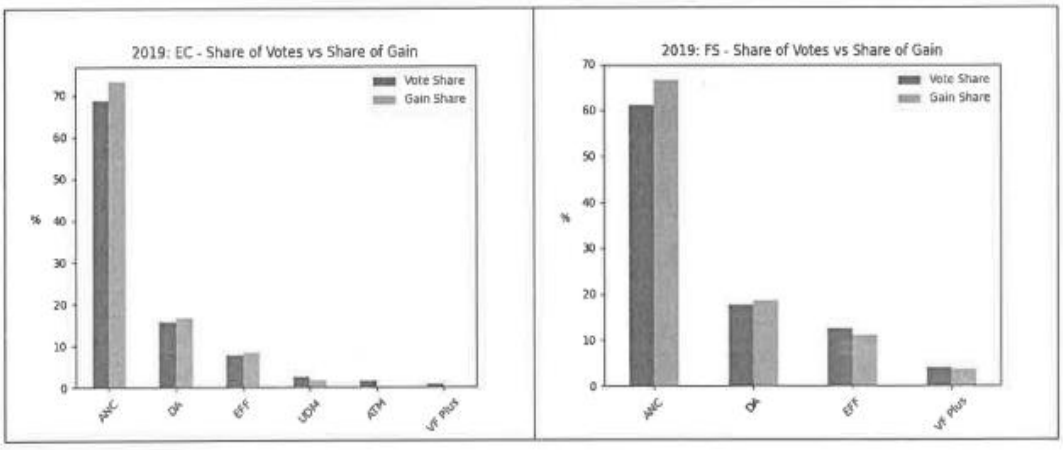
[367] It is common cause between the parties that the result of the recalculation is that votes cast for large political parties count more than votes cast for small political parties or independent candidates.

[224] Second Judgment at [230].

[225] Id at [242].

[226] Sections 46(1)(d) and 105(1)(d) of the Constitution.

[368] The figures provided by Mr Atkins demonstrate this. For illustration, I have inserted two graphs from the Atkins report. The lighter bars represent the vote gain after recalculation. The graphs, which reflect a comparison for parties that obtained seats in the 2019 provincial elections in the Eastern Cape and Free State, clearly illustrate that large political parties have a larger vote gain than small political parties in the recalculation. The graphs for the other provinces exhibited a similar pattern. Essentially, this means that large political parties are advantaged in each recalculation.



[369] The applicant argues that the gains of each party in the recalculation should be in proportion to their initial vote share.[227]

[370] I now consider whether the recalculation method limits the rights of voters, independent candidates and small political parties under section 19 of the Constitution.

[371] In my view, the recalculation method limits the norm that voters should have an equal say as to who will represent them in Parliament. The principle of one person one vote is foundational to our representative and participatory democracy. It is an inherent component of the right to free and fair elections. This principle was espoused in a report drafted by the Electoral Task Team, appointed by Cabinet to draft legislation for the 2004 elections, as follows:

[227] "Vote share" is the proportion of the total votes cast that is received by a particular party.

> "Taking its cue from the Constitution, the majority felt not only that every eligible voter should have the opportunity to vote but that, *as far as possible, all votes should be of equal value*. This was the understanding of proportionality 'in general', where every vote has some relevance in the composition and membership of the national and provincial legislatures. Fairness also lies in the closeness of the relationship between votes cast and the composition of the body elected."[228] (Emphasis added.)

[372] In *Doctors for Life*,[229] Sachs J stated that it is important in a democracy that equality of the vote is complemented with equality of voice. Sachs J references Dworkin in "Equality, Democracy and Constitution: We the People in Court" where Dworkin argues that:

> "In a genuine democracy, the people govern not statistically but communally . . . . When we insist that a genuine democracy must treat everyone with equal concern, we take a decisive step towards a deeper form of collective action in which 'we the people' is understood to comprise not a majority but everyone acting communally."[230]

[373] The importance of the equality of the vote, given South Africa's historical dispensation cannot be overstated. The vote was used in apartheid to silence and denude people of their dignity. Every person should feel that they are "part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy".[231] I clarify my apprehension with reference to the formula itself.

[374] Parties are awarded seats by way of quota seats and remainder seats. If the quota is reduced, which generally occurs in recalculation, then either the number of quota seats is increased or the number of remainder votes is increased. The quota reduction is due to independent candidates no longer being included in the recalculation.

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[228] Electoral Task Team *Report of the Electoral Task Team* (January 2003), available at https://pmg.org.za/policy-document/346/.

[229] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 12 BCLR 1399 (CC) at fn 10.

[230] Dworkin "Equality, Democracy and Constitution: We the People in Court" (1990) 28 *Alberta Law Review* 324.

[231] *Doctors for Life* above n 233 at paras 19-20.

Sometimes, this may result in small political parties or independent candidates gaining a seat. However, the Atkins report demonstrates that the recalculation generally results in large political parties gaining seats. It also means that large political parties' vote gain after recalculation is not in proportion to their initial vote share. This presents a difficulty not only because it creates a bias for large political parties, but also because it fails to actualise the intention of the voter.

[375] When participating in the national elections, there are a range of available options to a voter: they can choose not to participate at all; they can spoil their ballot or they can vote for a candidate or party. If they do chose to vote, that vote has a twofold purpose. First, they cast a vote towards a particular party or individual. Second, they cast a vote to effect the overall election results. For example, one can choose to not vote for the dominant political party to ensure that the seats awarded in Parliament are distributed more evenly. This is a strategic decision that a voter can make to strengthen our multiparty democracy. It also is doubtful that when a voter votes for an independent candidate they are cognisant of the fact that their vote will favour large political parties in the event of recalculation.

[376] Insofar as small political parties and independent candidates are concerned, they do not benefit equally from the recalculation. In general, large political parties have a larger vote gain than small political parties. The result of the recalculation is that there is a disparity between the vote gain after recalculation and the vote share. This disparity must inevitably raise a constitutional concern. In my prima facie view, the result of the recalculation method is that small political parties and independent candidates' section 19 rights are infringed. This is because favourable treatment would be a breach of the right of small political parties and independent candidates' right to stand for public office in free and fair elections. This Court has alluded to this, albeit in a different context, where it said:

> "It was wisely not suggested that political parties would be treated more favourably than independent or unaffiliated candidates. That would be a clear and unjustifiable

> breach of the constitutional right of such candidates to stand for public office in free and fair elections."[232]

[377] I am also concerned that this limitation is not justifiable. The second judgment neatly highlighted the importance of the rights under section 19 of the Constitution. It is therefore not necessary to reiterate this. I am alive to the difficult task Parliament was faced with and also the fact that perfect proportionality in an electoral system is impossible or near impossible to achieve. However, the respondents failed to justify this limitation.

[378] Generally, the legislature or the party relying on the legislation must justify the limitation.[233] This Court in *Moise v Greater Germiston Transitional Local Council* put the matter thus:

> "It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. . . . The obligation includes not only the submission of legal argument but placing before court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment."[234]

[379] The respondents have not justified why Parlaiment chose this recalculation method over the highest remainder method. On the evidence, Parliament seemingly failed to consider other methods or the implications of the chosen method. The respondents failed to provide an adequate explanation as to why the votes cast for

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[232] *Kham v Electoral Commission* [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC) at para 76.

[233] *S v Makwanyane* above n 88 at para 102.

[234] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at para 18.

independent candidates should not continue to influence the outcome in the recalculation.

[380] As the second judgment points out, elections serve a variety of different purposes.[235] They are about more than merely securing office – they are also about expression. A vote for an independent candidate is not necessarily only a vote for that candidate. It can also be a vote which rejects the other parties or candidates. These votes should therefore potentially influence the outcome in recalculation.

Does the recalculation method infringe upon sections 46(1)(d) and 105(1)(d) of the Constitution?

[381] Section 46(1)(d) of the Constitution states that the National Assembly is made up of members who are elected in terms of an electoral system that "results, in general, in proportional representation". In terms of section 105(1)(d) of the Constitution, the provincial legislature is constituted of members elected in an electoral system that "results, in general, in proportional representation". It is clear that what is required is not "perfect" proportionality. These sections recognise that perfect proportionality is hard or near impossible to achieve, particularly when independent candidates are introduced, and so Parliament is afforded some leeway in designing the electoral system. Therefore, some deviation from perfect proportionality is not per se problematic. However, it is the fact that the recalculation method favours large political parties that is of concern.

[382] Further, it is not sufficient for Parliament to deviate from proportionality, as provided for in sections 46(1)(d) and 105(1)(d) of the Constitution, without providing sufficient reason for this. The respondents appear to justify the deviation on the basis that it is "a logical mathematical consequence" that the system favours large political parties. I find this unconvincing. It bears emphasis that the respondents have failed to

[235] Second Judgment at [213].

produce any evidence to demonstrate why the favouring of large political parties is inevitable.

[383] However, the Atkins report shows that this bias often only results in one or two seats being allocated to large political parties. It is not possible, for a number of reasons, to determine whether this is trivial or strays too far from the requirements of sections 46(1)(d) and 105(1)(d) of the Constitution. Before we can rule the current recalculation method unconstitutional, we must be sure that there is an alternative method that would not have its own pitfalls. The applicant's proposal for remedy has its own difficulties. While the matters raised by Atkins are legitimate concerns, it is not possible, in my view, to find that the current recalculation method is unconstitutional. The urgent circumstances in which the case was litigated has not allowed this to be sufficiently explored. During the hearing of this matter, the applicant's Counsel made no oral submissions on the point, as a result of which the respondents only touched on it in passing. The Court did not have the benefit of a proper engagement on the issue in oral argument. It is thus not in the interests of justice to decide this challenge.

Conclusion

[384] It is clear that the first judgment centralises the rights enshrined in section 19 of the Constitution. This is a red herring. Although the matter evidently triggers those rights, it rests on accountability, a founding value of our Constitution. More precisely, it is about Parliament's duty to justify its decisions when those decisions limit rights contained in the Constitution. In the same manner that our political rights have found new meaning since 1994, so too has Parliament's duty to justify its decisions. As Etienne Mureinik aptly put it—

> "If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by

> government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command."[236]

I am not convinced that Parliament has adequately adhered to these prescripts.

[385] However, for the reasons I have stated, I do not consider that we can do justice to the recalculation challenge by way of the present urgent application for direct access. Accordingly, if I had commanded the majority, I would have declined to grant urgent direct access in respect of the recalculation challenge. This does not affect my agreement with the second judgment's costs order, since both on my approach and on the second judgment's approach the applicant would not have achieved success on the recalculation challenge.

[236] Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights." (1994) 10 *South African Journal of Human Rights* at 32.

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