CONSTITUTIONAL COURT OF SOUTH AFRICA

One Movement South Africa NPC v President of the Republic of South Africa and Others

CCT 158/23

Date of Judgment: 4 December 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Introduction

Today, the Constitutional Court handed down its judgment in an application for direct access brought by One Movement South Africa NPC (OSA) on an urgent basis, which was heard by this Court on 29 and 30 August 2023. The application was brought against the President of the Republic, the Minister of Home Affairs, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces (NCOP) and the Independent Electoral Commission (IEC).

Background

In 2020, this Court handed down its judgment in *New Nation Movement* in which it declared the Electoral Act, 1998 to be inconsistent with the Constitution and, therefore, invalid insofar as it did not allow an adult citizen to stand for public office independently of a political party. The Court suspended that declaration of invalidity for 24 months to afford Parliament the opportunity to correct the constitutional defect that this Court had identified in that case.

In response to *New Nation Movement*, Parliament passed the Electoral Amendment Act 1 of 2023 (EAA) in February 2023 which made it possible for an adult citizen to stand for public office independently of a political party provided that such independent candidate met certain conditions or complied with certain requirements.

Apart from asking for direct access and that the matter be dealt with on an urgent basis, OSA mounted two constitutional challenges to the EAA. The first challenge was directed at the provisions of section 31(B)(3), which require an independent candidate and a new political party – that is, a political party that is not yet represented in the National Assembly or in any Provincial Legislature – to secure and produce supporting signatures of registered voters in the relevant region amounting to 15% of the quota of the relevant region in the preceding election in order to be allowed to contest an election. For convenience, this requirement will be referred to as the 15% signature requirement. A quota is the total number of votes that a political party or independent candidate must obtain in an election in order to get one seat.

The second constitutional challenge mounted by OSA relates to those provisions of the EEA which prescribe how the recalculation of allocations of seats is done whenever a seat in the National Assembly or a Provincial Legislature previously occupied by an independent candidate becomes vacant, either as a result of death or resignation. The relevant provisions are item 11(f) of the amended Schedule 1A, which relates to a seat in a Provincial Legislature, item 5(i) of the amended Schedule 1A and item 23 of Schedule 1A. OSA's second challenge will be dealt with shortly. It is necessary to deal with the first challenge first.

OSA's challenge of the signature requirement

OSA's first constitutional challenge was that the 15% signature requirement constituted a barrier for independent candidates who wish to contest elections. Although this was not spelt out clearly in OSA's papers, it seems that part of its complaint was that the 15% signature requirement was too high and that that requirement should be replaced by a requirement of 1 000 signatures. The Regulations under the Electoral Act include provisions that require that a political party should produce 1 000 signatures of registered voters who support it when it seeks to register with the IEC. That is a registration requirement. The 15% signature requirement applies to independent candidates and new political parties when they want to contest elections. OSA contended that the 15% signature requirement detrimentally affects independent candidates' rights to disassociate, their right to make political choices, their right to stand for public office, their right to dignity and the right not to associate with the political party system by running as an independent candidate.

The Minister of Home Affairs (Minister) and Parliament opposed OSA's application to have certain sections of the EEA declared constitutionally invalid. They did not oppose the application for direct access and that the matter be dealt with on an urgent basis. The IEC did not oppose OSA's application and filed a notice to abide the decision of the Court. It also filed an explanatory affidavit to assist the Court.

The Minister, Parliament and the IEC set out how over an extended period the signature requirement moved from 50% of registered voters in the relevant region to ultimately 15% as decided by Parliament. They explained that the 15% signature requirement applies to both independent candidates and new political parties but did not apply to political parties which were already represented in the National Assembly or in a Provincial Legislature.

Parliament, the Minister and the IEC explained in their respective affidavits that the purpose of the 15% signature requirement in the EAA is to ensure that independent candidates and new political parties which contested elections would be those who are serious and have credible prospects of obtaining at least one seat in the elections.

OSA did not dispute that this is the purpose of the 15% signature requirement. Parliament, the Minister and the IEC also stated that there was a rational connection between this requirement and a legitimate government purpose. Parliament, the Minister and the IEC made it clear that the 15% is the 15% of the quota of a region or province in the preceding election. In this regard Parliament had decided to use provinces or regions constituencies. They also pointed out that Parliament had decided not to use a fixed number of signatures such as, for example, 1000 but decided to use a percentage of a quota. In this regard Parliament had decided upon 15% of a quota of a region.

This matter has produced two judgments in respect of the 15% signature requirement. The first judgment is penned by the Chief Justice. The second judgment is penned by Kollapen J. There is also a judgment by Theron J in regard only to the recalculation challenge.

The first judgment

The first judgment holds that OSA made out a case for direct access and for the matter to be dealt with on an urgent basis. The first, judgment, therefore grants direct access.

On the 15% signature requirement the first judgment points out that, although OSA contended that this requirement is an unfair barrier, OSA did not substantiate this contention so as to show why it was contending that the requirement is a barrier and why it was contending that the requirement is unfair. The first judgment also refers to the fact that in its founding affidavit OSA said that its chief complaint was that section 31(B)(3) required both independent candidates and new political parties to comply with this 15% signature requirement but that OSA did not substantiate this contention either.

On his analysis of OSA's founding affidavit, the Chief Justice reasoned that OSA's real complaint was about the sizes of the regions or provinces and Parliament's decision to use provinces as constituencies. The first judgment points out that the regions or provinces had vastly different sizes and, as a result, they had different quotas. The first judgment highlights the fact that the bigger a province or region, the higher its quota and, therefore, the higher the number representing 15% of the quota of the region. The smaller the province or region or constituency, the lower the quota required to get one seat and the lower the number representing 15% of the quota. The first judgment says, if the quotas were low and the 15% translated into a number as low as 1000 or 3000, OSA would probably not complain. The first judgment points out that OSA does not ask this Court to invalidate Parliament's decision to use provinces as constituencies.

In his judgment the Chief Justice highlights the fact that OSA said that its chief complaint was that section 31(B)(3) of the EAA required both independent candidates and new political parties to comply with the same requirement, namely the 15% signature

requirement but did not anywhere in its founding affidavit elaborate on this to substantiate it. In other words, OSA did not say what was wrong with the EAA requiring both independent candidates and new political parties to comply with the same signature requirement. The first judgment points out that during the hearing this had been put to Counsel for OSA to enable her to point out the substantiation but she had not been able to.

The first judgment also states that, although OSA contended that the signature requirement was an unfair barrier for independent candidates wishing to contest the elections, OSA also did not elaborate on this so as to show why it was contending that the requirement was a barrier or an unfair barrier.

The first judgment says a proper consideration of OSA's case reveals that the source of OSA's real complaint is that Parliament decided to use provinces or regions as constituencies. The first judgment reasons that, although the provinces have different sizes – some bigger than others – they constitute large constituencies with the result that the number of votes that an independent candidate or a political party must get in order to get one seat (i.e. the quota) is high. The first judgment says that is a result of the fact that the provinces or regions are big in size as constituencies and therefore, have a high number of voters. The first judgment points out that, if the constituencies were so small 15% of a quota would probably not give rise to any complaint on OSA's part.

The Chief Justice also points out that, although OSA submitted that the 15% signature requirement limited the right to stand for public office, it did not specify how this requirement limited such right or the right to human dignity and any other right entrenched in section 19 of the Constitution.

To determine whether the signature requirement constitutes a limitation or infringement of the right to stand for public office, the first judgment takes the view that section 31(B)(3) – the provisions relating to the 15% signature requirement – does not constitute a total denial of the right to stand for public office but constitutes a regulatory provision. With reference to decisions of this Court such as *Garvas*, *Mlungwana* and *Affordable Medicines*, the first judgment concludes that a statutory provision that constitutes a mere regulation of a right does not constitute a limitation. The first judgment refers to at least three of the election cases that have previously been decided by this Court and uses the approach approved by this Court in those three cases to determine whether a statutory provision constitutes a limitation of the right to vote. With certain necessary changes that approach would also apply to the right to stand for public office. Those cases are *New National Party*, *Democratic Party* and *Richter*.

In those cases the test was articulated as being that, if the Electoral Act provided a machinery, mechanism or process that is reasonably capable of ensuring that those who want to vote and take reasonable steps in pursuit of that right are able to exercise the right, the statutory provision would not constitute a limitation or infringement of the right to vote. However, it was held that, if those who want to vote and take reasonable steps in pursuit of that right are not able to vote, the relevant provision would then constitute a limitation

or infringement of the right to vote. In the context of the present case one asks the same question and replaces the right to vote with the right to stand for public office.

In the present case the Chief Justice applied this test and concluded that OSA did not in its founding affidavit provide any evidence that shows that section 31(B)(3) is not reasonably capable of ensuring that those who want to stand for public office and take reasonable steps in pursuit of the right to stand for public office would be unable to exercise it. In the light of this, the Chief Justice concludes that the signature requirement does not infringe the any section 19 rights. The Chief Justice also referred to a judgment of this Court in *Affordable Medicines*.[1] In that case this Court held that not every regulation of a right amounts to a limitation of the right in question. It went on to say in effect that, where a regulation "merely regulates in the sense of facilitating the proper exercise of the right . . . . It does not limit the right . . . ." (para 94). The Chief Justice points out that in *Affordable Medicines* this Court said that it is where, objectively viewed, the regulation . . . impacts negatively" on the right, that it limits the right.

The Chief Justice holds that the signature requirement does not impact negatively on an independent candidate's right to stand for public office. What is required by section 31(B)(3) is that an independent candidate should do what he was going to do anyway in the end, namely go out to communities and persuade registered voters to support his or her candidature. Section 31(B)(3) requires an independent candidate to do earlier that which he or she was going to do later anyway if he or she is to stand any chance to get a seat in the elections. The 15% signature requirement advances a candidate's ambitions of winning a seat in the elections. It does not impact it negatively at all. Therefore, it does not meet the test in *Affordable Medicines*. The Chief Justice said whatever test one uses, the answer in the end is that the 15% signature requirement does not detrimentally affect any one's right. The Chief Justice points out that, if earlier on an independent candidate obtains 15% support of the registered voters in a region, he or she will not need to canvass the support of the same people. Later, he or she will only need to cover the remaining 85%. Accordingly, the Chief Justice rejected OSA's contention that section 31(B)(3) of the EAA is constitutionally invalid.

The Chief Justice also points out that, as long as in the elections an independent candidate will have to get 100% of the quota for a certain region in order to get one seat, if he or she can't or won't get 15% of that quota, such a candidate is unlikely to get all the votes of a quota to enable him or her to get one seat.

OSA's second constitutional challenge: the recalculation challenge

OSA challenges the recalculation of allocations of seats when seats are forfeited in the National Assembly or a provincial legislature or when vacancies arise either owing to death or resignation. A forfeiture occurs in three scenarios, namely:

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

(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.

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 applies to the National Assembly and item 12(3) to (5) which applies to provincial legislatures.

When vacancies arise in the National Assembly or in a provincial legislature either as a result of a death or resignation, such vacancies are dealt with in items 22 to 24 of Schedule 1A. OSA 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".

One of the grounds on which OSA attacked the recalculation is that a vote for an independent candidate is not a vote for that individual but a vote that rejects party politics. OSA criticises the notion that votes that were cast for an independent candidate can end up being awarded to a political party. The first judgment rejects this criticism as one that has no merit. A voter can vote for an independent candidate in regard to a provincial legislature and for a party in respect of the National Assembly. Just because a voter has voted for an independent candidate does not mean that he or she does not necessarily want party politics. 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.

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". The first judgment points out that this refers to the occasion when the amended quota is applied. The first judgment refers to an explanation given by Mr Mamabolo who rejects this criticism and says among other things that disregarding the votes cast for independent candidates in the event of a forfeiture or vacancies ensures that inter-play proportional representation is maintained in the legislature. The first judgment points out that as Mr Mamabolo explains in his affidavit, votes cast for any independent candidate in an electoral system based on proportional representation inevitably affects inter-party proportional representation in the legislature as an independent candidate can only hold one seat irrespective of how many votes they win. 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.

The first judgment found that Parliament, the IEC and the Minister provided explanations in regard, to all OSA's criticisms and, as OSA did not file affidavits to challenge or dispute those explanations, those explanations must be accepted. In the result the first judgment rejected OSA's second constitutional challenge as well.

The first judgment points out that the second judgment replaces the 15% signature requirement in circumstances where there is no basis to interfere with Parliament's decision to use a percentage of a quota rather than a fixed number. The first judgment points out that the 1 000 signature requirement decided upon by the second judgment does not help to assess whether an independent candidate has credible prospects of obtaining a single seat in the elections because it is too low and, furthermore, the regions are different sizes. The first judgment states its conclusion is in line with the decisions of this court in *New National Party*, *Democratic Party*, *Richter* and *Affordable Medicines*. Finally, the first judgment points out that the second judgment relies on foreign legislation applicable to certain countries without affording Parliament, the Minister and the IEC the opportunity to address the Court on those or to place before the Court other foreign pieces of legislation which may have portrayed a different picture.

In the result the first judgment would have dismissed OSA's application but would not have made any order of costs. With regard that part of the first judgment that relates to direct access, the following Justices concurred in the first judgment: Maya DCJ, Mhlantla J, Mathopo J, Kollapen J, Rogers J, Schippers AJ, Van Zyl AJ and Theron J.

With regard to direct to access all the Justices agree with the first judgment. With regard to the part of the first judgment that relates to the signature requirement, Mathopo J, Schippers AJ and Van Zyl AJ concurred in the first judgment.

With regard to the recalculation point or OSA's second constitutional challenge, Maya DCJ, Kollapen J, Mhlantla J, Mathopo J, Schippers AJ, Van Zyl AJ concur in the first judgment.

The Second Judgment

The second judgment, penned by Kollapen J (with Maya DCJ and Mhlantla J concurring in all respects and Rogers J and Theron J concurring except in respect of the conclusion on the recalculation challenge) found that a proper case was advanced in support of a declaration of unconstitutionality of section 31B (3) of the Act. The second judgment makes two central findings: (a) the impugned provision limits the rights in section 19 of the Constitution 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. The second judgment agrees with the first judgment's findings on both direct access and the applicant's recalculation challenge.

The primary point of disagreement with the first judgment is the application of the standard set by *New National Party*. The second judgment finds that, contrary to the first judgment's analysis, the *New National Party* standard exists in a carefully limited and delineated space. It applies when the 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*, *Garvas*, and *Mlungwana*. These cases 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. The second judgment found that it is not the case that any law that purports to regulate the exercise of a right is permanently shielded from constitutional scrutiny as a limitation of that right.

Turning to whether the 15% signature requirement in this matter passes constitutional muster, the second judgment followed the well-established two-stage approach to determine whether there has been an unjustified infringement of a right.

At the first stage, in analysing the content and scope of sections 18(1), 19(1), and 19(3) of the Constitution, the second judgment found that the inclusion of these rights in our Bill of Rights holds significant symbolic value which supports the inherent importance of this cluster of rights. Their inclusion, both individually and collectively, is crucial for the functioning of our constitutional democracy. Further, their interrelatedness of the rights is indicative of their wide breadth. In analysing the meaning and effect of the signature requirement and whether it constitutes a limitation of the content and scope of the rights, the second judgment found that the signature requirement goes beyond mere regulation and has a limiting purpose to prevent frivolous contestation. At 15% of the regional quota, the signature requirement places a significant burden on independent candidates to contest elections who would require immense time, resources, and energy to invest in order to meet the 15% signature requirement. As such, the second judgment concluded 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.

On the second (justification) stage, the second judgment found that the limitation is not justifiable. It reaches this conclusion by applying section 36 of the Constitution. It found that the purpose of the limitation is of low importance where a contestation has never existed previously, despite increasing trends. Political parties, Parliament have told us to make sensible political and economic decisions on the contestation of elections. Therefore, there was not a need for signature requirements until the matter *New Nation Movement*. Therefore, this begged the question, why should this not be expected for independent candidates? The nature and extent of the limitation is arbitrary where Parliament consistently relied on the wrong quota of 44 000 when calculating 15% of the regional quota. Further, it is extensive in comparison to signature requirements in other jurisdictions. The second judgement also found that there was a limited relation between the limitation and its purpose where Parliament consistently relied on the wrong quota and the previous 1 000 signature registration requirement constituted less restrictive means to achieve the same purpose.

The second judgement observes that *New Nation Movement* was a historic moment in democratic South Africa. For the first time independent candidates will stand for seats in the national and provincial legislature. Parliament has met a historic moment with the signature requirement. However, this requirement should not be a barrier to contestation and hollow the promise made in *New Nation Movement*, which is to give section 19 of the Constitution its full and proper effect.

Accordingly, the second judgment found that a declaration of constitutional invalidity should follow, with the order being suspended for a period of 24 months for Parliament to cure the defect. During the period of suspension, the first judgment found that a limited striking-out of the 15% requirement should be combined with a reading-in of 1 000 signatures, which prior to the amendment, served as a de facto contestation requirement.

The Third Judgment

The third judgment, penned by Theron J (Rogers J concurring), concurred in the order made in the second judgment, insofar as it relates to the signature requirement and costs. However, Theron J held that the recalculation method, introduced by the Electoral Amendment Act 1 of 2023, raises a serious constitutional concern. The result of the recalculation is that votes cast for large political parties count more than votes for small political parties or independent candidates. Theron J found that this favourable treatment of large political parties constituted a prima facie limitation of the rights of voters, independent candidates and small political parties under section 19 of the Constitution. Further, Theron J emphasised the failure of the respondents to justify this limitation. However, Theron J concluded that it would not be in the interests of justice to decide this challenge due to the matter not being sufficiently explored.