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1. Introduction: *New Nation Movement NPC & others v President of the Republic of South Africa & others 2020 (6) SA 257 (CC)* ('*New National Movement*')

In *New National Movement*, the Constitutional Court declared s57A in conjunction with Schedule 1A of the Electoral Act 73 of 1998 unconstitutional to the extent that it does not provide for independent candidates to stand for political office in the national and provincial legislatures. The Court held that the Electoral Act limits the right to freedom of association (s18) and political rights under s19(3)(b), which must be interpreted generously. The declaration of unconstitutionality's operation has been suspended for 24 months to afford Parliament an opportunity to remedy the defect.

2. The importance of an electoral system and whether *New Nation Movement* judgement requires the electoral system to be changed

An electoral system creates a framework by means of which the political wishes of the population is reflected and depends on the country's constitutional and other circumstances. De Villiers (1991) states that elections are the fundamental point of departure in any democratic government system and are amongst the most manipulated elements of a political system.

The electoral system of South Africa is provided for in the Electoral Act 78 of 1998. An electoral system determines the rules according to which an election is conducted and the process by which votes are translated into the distribution of governmental authority among elected representatives (De Villiers, 1991:43). South Africa's electoral system prior to the amendment was a pure proportional electoral system (PR) with closed lists, in terms of which the division of seats in the National Assembly and provincial legislature is determined in proportion to the actual support the party receives. In a closed list system, voters are not given the option to select specific candidates from party lists, rather the party's priority list will determine which of its candidates will be elected (Wolf, 2021, 63). It caters only to representation by political parties. The amendment of the Electoral Act in accordance with *New Nation Movement* requires changing South Africa's electoral system to one which makes provision for independent candidates.

s46(1)(a) and s105(1)(a) of the Constitution accord Parliament a discretion to prescribe an electoral system for the National Assembly and the provincial legislatures. However, these provisions do not provide Parliament with full authority to select *any* kind of electoral system. There are important safeguards aimed at ensuring appropriate protection for voters (*New National Party v Government of the Republic of South Africa*).

3. What is required of the amendment bill?

The legislation must be compliant with constitutional norms and must not infringe on any of the fundamental rights (*New Nation Movement*). s1(d) of the Constitution specifies several constitutional norms that have a direct bearing on the electoral system, relevant in this regard are universal adult suffrage and a multi-party system of democratic government to ensure accountability, responsiveness, and openness. Universal adult suffrage ensures the right to vote for all citizens and is supported by the principle of ‘one person, one vote’. When redesigning the electoral system, the legislature must ensure equality (s9) for political parties, independent candidates, and for voters. Additionally, the legislation should ensure free and fair elections in terms of s19(2) of the Constitution. Additionally, there must be a rational relationship between the scheme which Parliament adopts and the achievement of a legitimate purpose (*New Nation Movement*). The Court in *New National Party* suggest that it also be reasonable and not merely rational.

s46(1)(d) and s105(1)(d) requires an electoral system that ‘results in general, in proportional representation’. The general proportionality refers to the rounding up or down according to a formula, because it would not be possible to allocate seats that correspond mathematically exactly to the proportion of votes.

4. The Electoral Amendment Bill (B1-2022)

In April 2023, President Ramaphosa signed into law the Electoral Amendment Bill (B1-2022) to become Act 1 of 2023. He stated that the Bill “marks a significant milestone in the evolution of our democracy by expanding electoral participation and widening the pool of leadership choice...”. However, many civil society organisations and citizens have expressed their disapproval with the Bill, with OUTA calling it a “constitutional disaster”.

5. Concerns in the process leading to the passing of the bill

In its submission to the Parliamentary Committee, the New Nation Movement condemned Parliament’s apathy towards the importance of the electoral reform process and its failure to treat the matter with the appropriate weight and urgency.

The Constitutional Court judgement was given in June 2020. The Parliamentary Monitoring Group ('PMG') reported the following: in the same month, the Portfolio Committee on Home Affairs discussed the implementation of the bill, wherein the Minister stated that they had to act as swiftly as possible to meet the June 2022 deadline. In August 2020, the Portfolio Committee was presented with two options to implement the judgement and a timeline for the implementation of both which required work be commenced immediately. Despite this, Minister Motsoaledi established the Ministerial Advisory Committee in June of 2021. In January 2022, the Amendment Bill (B1-2022), which was fatally flawed, was introduced to Parliament and made available for public comment. The delay of the Minister meant that there would no longer have been time to adopt a constituency model. The late reporting to Parliament meant that the Court had to grant a 6-month extension on two separate occasions (*Speaker of the National Assembly v New Nation Movement NPC* 2022 and 2023). In its submission to Parliament, OUTA expressed its concerns on the reduction of public participation in attempts to meet the deadline by providing short deadlines for submissions and the lack of attempts to ensure that the bill is understood by the public. Political analyst, Michael Atkins adds that extensive and meaningful public participation was reduced in that the public was given no substantive choice on the electoral system adopted and presented with the choice of one of two systems chosen by the Minister.

6. Defects in the Bill:

6.1 The three-ballot system

The Amendment Bill imposes an additional ballot paper in elections for the National Assembly. The first is a national ballot containing only political parties (a PR system). The second is a regional ballot containing individual candidates and party representatives, wherein seats are contested within provinces (a constituency system). Independent candidates can only contest 200 seats in the National Assembly, but parties can effectively contest all 400 through party representatives on the regional ballot. Joosub of the *Mail & Guardian* states that province-sized constituencies would be too large to permit the intimate relationship to enable responsiveness and accountability between the Parliamentarians and the electorate. He adds that independent candidates would find it unfairly difficult to compete effectively against resourced parties in these large constituencies. For this reason, independent candidates are denied a free and fair political environment to run for office. The additional ballot system would also increase the amount of ballots to be counted by

the IEC without corresponding timelines and would increase the cost of ballots with its already constrained budget (Makinana, 2023).

6.2 Wasted votes:

An electoral threshold or quota is the minimum share or amount of all the votes cast that a candidate or party requires to secure a seat in the National Assembly or provincial legislature. Seats are determined in terms of the 'first calculation' for parties who reached or surpassed the quota to secure one or more seats and a 'second calculation' for remainder votes of the aforementioned parties and those parties who did not meet threshold. Remainder seats available after the 'first calculation' are distributed amongst those parties with most remainder votes. Since an independent candidate may only be elected to one seat, the votes cast for such candidate which exceed this threshold are discarded. Effectively throwing away votes negates the principle of 'one person, one vote' and the notion that everybody's vote counts'. The right to vote in s19(2) of the Constitution is aimed at preventing a recurrence of the wholesale denial of political rights that took place during the apartheid era. It is symbolic of our citizenship and represents the Constitution's recognition and protection of the dignity of every citizen (De Vos, 2021).

6.3 (Dis)-proportionality

Atkins (2023) explains that the national ballots counted alone achieve proportionality. However, the regional ballots do not. This is because political parties with larger support are the most likely to be gifted these remainder seats and smaller parties are less likely to achieve this higher quota for remainder seats. Thus, the wasted votes do not disappear, they are given to parties in proportion to the party's existing support. Thus, the proportional "reward" of remainder seats becomes a disproportional "reward" to the already most rewarded parties. Although the current Bill does away with half of the disproportionality of the previous proposed bill, it still retains half of the bonus effect for leading political parties by combining the two ballots to work out the overall total.

6.4 Requirement for signatures and vacating seats

The bill undermines meaningful and equal opportunity for participation by requiring independent candidates to obtain significantly more supporting signatures (15% of the quota, which is estimated at 6750 signatures) to register as a candidate than a political party, who require 1000 signatures. With regard to vacating seats, if an independent

candidate were to vacate their position once elected, the Bill allows for a recalculation that could result in a seat being filled by a political party instead of the vacancy being filled through a by-election.

7. Conclusion

The IEC has indicated that it would require 18 months to prepare for the upcoming elections and that it would not be ideal to have the electoral system challenged in court a year before elections stating. However, many civil society organisations and citizens are refusing to ignore the state of the Bill, especially in light of the upcoming 2024 elections.

The Amendment Act represents a missed opportunity for electoral reform not only to bring agency and hope to the disillusioned and despondent electorate, but also to amend the electoral system which is a once in one-or-two generations opportunity.