



THE BID TO CONTEST FOR ELECTION: INDEPENDENT CANDIDATES

INTRODUCTION

Independent candidates can be defined as individuals contesting for public office that are not appointed, endorsed or affiliated with any political party.¹ They are typically individuals that were part of a political party but due to some grievance left, individuals that have never been part of politics that hope to bring about change within the political system or individuals that are passionate about a specific cause that they want to advance. Electoral legislation in South Africa allows for independent candidates to run for office at local government level. However, the law does not facilitate for independent candidates to contest election for provincial and national legislature. This matter has been brought on the national agenda through the courts and advocacy in the last decade. This brief seeks to outline its progression and highlight from a global perspective what structures and systems are required to give independent candidates the most electoral strength should this right be affirmed.

HISTORY

South Africa's history is deeply rooted in apartheid. Apartheid was established in 1948 by the National Party (NP).² It was a system of institutionalised racial segregation that stripped black people of fundamental socio-economic and political rights.³ Black people were not allowed to vote neither were they allowed any political representation in parliament.⁴ After fifty decades of oppression, apartheid was dismantled in 1993. Several negotiations took place in the 1990s that laid the foundation for the new democratic South Africa. Elections were to be held in 1994 and an electoral system had to be negotiated.

The electoral system was negotiated at the Convention for a Democratic South Africa

(CODESA). It commenced on the 20th of December 1991. CODESA was attended by 8 political parties and former administrations of homelands. Discussions to do with it continued at the Multi-Party Negotiating Forum on the 26th of April 1993. This forum was attended by delegates from 26 political parties (parties). During negotiations, three main parties advocated for a proportional representation electoral system. This system dictates that a party wins seats in parliament in proportion to the number of votes it receives. The parties that advocated for this were the Democratic Party (DP), the National Party (NP) and the African National Congress (ANC).⁵

The NP was in favour of a proportional representation system in the first house of parliament with candidates standing for



election in various districts. The ANC supported the principle of proportional representation on a candidate-based list. This is because it felt that the diversity of South Africa warranted an electoral system that gave all South Africans the opportunity to be represented in parliament.⁶ As a result, a closed-list proportional system was agreed upon.

The 1994 election was administered under a closed-list system of proportional representation informed by the interim Constitution of 1993⁷ and accompanying transitional legislation. Post that, the Electoral Act⁸ was passed in 1998 in alignment with the Constitution of 1996.

ELECTORAL SYSTEM

South Africa's electoral system has remained a closed-list proportional representation system. National and provincial elections are held every five years. Our National Parliament functions on a bicameral system with a lower house and upper house. The National Assembly is the lower house and the National Council of Provinces (NCOP) is the upper house.⁹

The National Assembly consists of minimum 350 seats and no more than 400 seats. Seats in the National Assembly are allocated to political parties in proportion to the percentage of votes they receive in a national election.¹⁰ The main responsibilities of the National Assembly are to elect a President, to discuss issues of national importance, to pass legislation and to oversee the actions of the executive.¹¹

In contrast, the NCOP consists of 90 seats. Its mandate is to ensure that provincial interests are discussed and it participates in the national legislative making process. Each

province has 10 delegates.¹²

The national and provincial legislature are elected at the same time during general elections. On Election Day, voters are given two ballot papers, one for the national legislature and another for the provincial legislature. The electorate casts their vote in both instances for the political party of their choice.¹³

In South Africa, our system dictates that we vote for political parties, not individuals. Registered political parties compile lists of candidates that will represent them in parliament should they be voted in. Candidates are ranked on this list according to the decision of the party leadership.

ELECTORAL REFORM DEBATE

The electoral system has caused contention in recent years. Many have argued that it has created a culture where politicians are more loyal to party bosses than to voters. This argument is strengthened by the assertion that politicians are not directly accountable to voters but to their party leadership.¹⁴

For these reasons, the electoral reform debate has periodically come on and off the national radar. This is appropriate as the closed-list proportional representation system was not intended to be permanent. The system was meant to be transitional in order to usher us into a new democratic era in South Africa.¹⁵

Thus, in 2002, Cabinet set up an Electoral Task Team (the task team) to draft new electoral laws ahead of the 2004 elections. The team was headed by Frederik Van Zyl Slabbert and its function was to recommend a new electoral system that complied with the constitutional requirement of having proportional representation in general.



The task team produced a report known as the Van Zyl Slabbert Report.¹⁶ The majority of the task team recommended a mixed multi-member constituency system. However, the recommendations from this report were never implemented.

In 2013, James Selfe of the Democratic Alliance presented an Electoral Amendment Private Members Bill. The Bill sought to reform our system into a mixed proportional representation and constituency-based system.¹⁷

It was two years later, in 2019 when electoral reform was brought to the fore again by the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (Panel).¹⁸ The panel reiterated concerns around accountability that had been highlighted by the Electoral Task Team. However, nothing has come of its recommendations.

In 2019, leader of the Congress of People (COPE), Mosiuoa Lekota, gazetted his intention an Electoral Act Amendment Bill to allow independent candidates to run on national and provincial level.¹⁹

THE LEGAL FRAMEWORK

Our Constitution prescribes that our electoral system should result, in general, in proportional representation.²⁰ S19 (3) prescribes the political rights embedded in our Constitution. It reads as follows:

- “(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.**²¹

As reflected, section 19 3 (b) states that any adult citizen has the right to run for public office, and if elected, to stand for office. Constitutional challenges have arisen because the Electoral Act only makes provision for political parties to run at national and provincial level and not for independent candidates to do the same.²²

Constitutional Challenges through the Courts in South Africa

In 2010, this was challenged in the South Gauteng High Court. In the matter of *Majola v the President of the Republic of South Africa*.²³ The applicants contended that the Electoral Act was inconsistent with the Constitution because it did not allow for independent candidates to run. Judge Mokgoatheng found that the Electoral Act was in alignment with the Constitution. The judge concluded that a harmonious reading of the Constitution was required which concludes that any adult citizen can run and stand for office but under the confines of a political party.

In support of this, in 2012, in *Ramakhatsa & Others v Magashule & Others*²⁴, the court stated that voters in national and provincial elections vote for political parties and not individual candidates. Moreover, the court said the following about political rights, “The Constitution itself obliges every citizen to exercise the franchise through a political party. Therefore, political parties are indispensable conduits for the enjoyment of the right given by Section 19(3)(a) to vote in elections.”



However, it must be noted that this statement is an obiter dictum. An obiter (obiter) is an opinion of the judge not relevant to the decision of the court and it is not legally binding.

In 2018, a contrasting obiter was made in the *My Vote Counts v Minister of Justice and Correctional Services*²⁵ judgment. In this judgment, the Chief Justice stated that the Constitution does not forbid independent candidates from running for election at provincial and national level. He recognised that this right is not facilitated by legislation but dictated that the right is available to be exercised by whosoever desires to regardless of any logistical impediments.²⁶

Following this, a matter came before Judge Desai of the Western Cape High Court in April 2019²⁷. The matter was brought before the Court by the New Nation Movement, a non-profit organisation (applicants). The applicants' central argument rested on the obiter dictum in the *My Vote Counts* judgment. They sought to challenge the inconsistency of the Electoral Act with the Constitution.

In his decision, Judge Desai stated that if one considered the Constitution in its entirety, it would not support the legal interpretation offered by the applicants. He pointed out Schedule 1 of the Constitution that stipulates that South Africa is founded on, "*universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.*"²⁸

Judge Desai highlighted that provisions of section 46 (1) a and 105 (a) of the Constitution gives parliament the discretion to decide the electoral system of the National Assembly and

Provincial Legislatures which have to result, in general, in proportional representation. The judge acknowledged that although the remarks made by the Chief Justice in the *My Vote Counts* judgment were obiter and not binding, because they were coming from the Constitutional Court, they were highly persuasive.²⁹

Additionally, the Judge stipulated that until now our jurisprudence had never reflected that independent candidates have a right to run at provincial and national level. It is for this reason that the judge cautioned against relying on the *My Vote Counts* judgment to conclude that the electoral system is unconstitutional.³⁰

Judge Desai noted that the contrasting obiter dictums provided by the court in *Ramakhatsa* and in the *My Vote Counts* judgment did not provide much guidance as to how to rule in this matter. Therefore, the Court had to chart its own course. The judge concluded that parliament was already seized with matters of electoral reform since 2017, as a result of recommendations made by the High-Level Panel. He raised the question as to whether the court should interfere in this matter in these circumstances and concluded that this matter should rather be solved in the political arena and not in a court of law.³¹ The matter, was therefore dismissed.

The New Nation Movement made an urgent application to the Constitutional Court following this. The matter was heard on the 2nd of May 2019 and it was dismissed on the grounds of it not being urgent. However, the court will hear the matter on the 15th of August 2019.

Constitutional Challenges Internationally

International jurisprudence has explored the



constitutionality of banning independent candidates from running for election. This has been done in both Mexico and Tanzania. In the case of Mexico, *Gutman v Mexico*³², a constitutional challenge was made to allow an independent candidate to run in a presidential election. After unsuccessfully seeking relief in Mexican Courts, the matter was taken to an international tribunal, the Inter-American Commission on Human Rights. The Commission made a recommendation to the Mexican government stating that disallowing an independent candidate to run in the presidential election would be a violation of human rights. Unfortunately, this recommendation was never complied with.

In regards to Tanzania, a matter came before the African Court on Human and People's Rights (African Court) on the 14th of June 2013. The *Mtikila v The United Republic of Tanzania* case had gone through the High Court and the Court of Appeal of Tanzania before being escalated to the African Court. The matter challenged a constitutional ban on independents running for office at local, parliamentary and presidential levels.

The margin of appreciation doctrine was central to this decision. This doctrine is a feature of international human rights law. It requires both regional and international tribunals to give deference to policies of states when giving effect to human rights³³. The African Commission on Human and People Rights has stated that in regards to this doctrine, states have a better understanding when enacting policies and laws that promote and protect human rights. This is because they are more aware of the context of their history, culture, politics and socio-economic background.³⁴

The Court in this case found that the ban on independent candidacy was a violation of

the individual right to equal protection of the law and the prohibition against discrimination (Articles 2 and 3), the right to association (Article 10), and the right to political participation (Article 13) of the African Charter. The Court took into consideration, the fact that it was extremely difficult to form a political party in Tanzania. It stated that no valid argument in the national interest was given to justify an absolute ban on independent candidates running.³⁵

ESSENTIAL FEATURES FOR THE SUCCESS OF INDEPENDENT CANDIDATES

In South Africa, the legal interpretation of the Constitution in regards to independent candidacy is yet to be established. Notwithstanding that, it is extremely difficult to run as an independent candidate. Should independent candidates ever be permitted to run at national level it is critical that proper structures and systems are put in place to allow them to succeed. Therefore, this section will investigate some central features that support the success of independent candidates. This section will explore electoral systems, ballot access requirements, the electoral age and technological progression of a democracy in determining how well independent candidates perform.

An electoral system is pivotal to the success of independent candidates. Research indicates that independent candidates do better in plurality and majoritarian electoral systems. Majoritarian/plurality systems are also referred to as "first-past-the-post" and "winner-takes-all" systems. These are systems in which candidates win seats in parliament for winning a majority or plurality of the vote.³⁶ Academic literature suggests that politics in such electoral systems is more candidate rather than party centred. It is argued that voters in such systems are more informed about the



candidates contesting election.

Proportional representation tends to be more party centred than it is candidate centred. This system, especially when it is closed-list relies on political parties to decide who is elected into parliament should their party be voted in. This assertion is supported by studies conducted on Russia that reflect this.³⁷

However, open-list proportional representation systems are more favourable to independent candidates as the electorate votes for a candidate in addition to voting for a political party. Additionally, a preferential voting system rather than a non-preferential voting system in which candidates are able to vote for and rank their preferred candidates increases the electoral strength of independent candidates.³⁸ This is because the electorate can vote for an independent candidate without fearing that their vote would amount to being wasted.³⁹

The electoral age of a democracy can determine how well independent candidates may perform. Studies confirm that independent candidates perform better in early democracies rather than older ones. This is because in early democracies, the electorate is yet to establish a political culture of voting for political parties. Voters typically remain loyal to a political party for a long duration. Therefore, once a party-system culture has developed, it is difficult to change. Thus, independent candidates flourish in countries that are in political transitions, where there are low levels of partisanship and where there are unconsolidated party systems.⁴⁰

Barriers that may deter independent candidates from running for office are ballot access requirements. In most countries, to contest election, candidates are required to get a sufficient number of signatures from

eligible voters in their constituency and/or pay a deposit. These signatures and deposits are made to an electoral authority. The signature requirement is put in place to ensure that the candidate has enough support to contest the election. Political parties often have a sizeable number of members and volunteers that are able to go door-to-door to retrieve these signatures.⁴¹ However, independent candidates do not have these structures putting them at a disadvantage.

The deposit requirement is in place to avert too many individuals from contesting election. In most countries, the deposit is returned if the party receives a sufficient number of seats in parliament and is forfeited should a party fail in this endeavour. In 2003, in the United Kingdom, the Electoral Commission made a proposal to the government to outlaw deposit requirements.⁴² This proposal was rejected. Furthermore, in 2005, the first multi-party presidential election in Egypt has been described as not being competitive due to ballot access requirements.⁴³ It is important to note that when considering the amount a candidate should pay to run for office, it is important to look at that countries' economic development.⁴⁴ A deposit amount should not prevent a prospective candidate from exercising their constitutional right because it is exorbitant.

Lastly, the technological age of a country encourages the favourable participation of independent candidates. The emergence of electronic media has been linked to the personalisation of politics in liberal democracies. This began with television and will likely produce the same results with the internet. Voters' ability to access the internet would give independent candidates a greater reach, in terms of publicity, as they can campaign to a bigger audience at a cheaper cost. Important social movements



have been birthed through the use of social media and therefore, where this tool can be used to effectively campaign, it can increase the chances of election.⁴⁵

CONCLUSION

An electoral system should be crafted according to the context within which it operates. Additionally, electoral systems may be amended in response to the evolving demands of a democracy. Greater accountability is required in our electoral system and avenues in which this may be achieved must be explored. The question of whether independent candidates can run at provincial and national level needs to be addressed either in court or through a parliamentary process. However, should independent candidates be allowed to run at national and provincial level, systematic and structural changes will be required to give them a better chance at succeeding. This is important as it will create a more equitable playing field within the political system between all political players.

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²⁸ Ibid at para 14.

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³⁰ Ibid at para 27.

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