



SUMMARY



NEW NATION MOVEMENT NPC AND OTHERS v. PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS [2020] ZACC 11

INTRODUCTION

Over five months ago, the Constitutional Court ruled that the Electoral Act 73 of 1998^[1] is unconstitutional to the extent that it prevents adult citizens from standing for and being elected to the National Assembly and Provincial Legislatures as independent candidates. The judgment ruled in favour of New Nation Movement and Others that the Act is unconstitutional to the extent that it requires that adult citizens may be elected to the national and provincial legislatures only through their membership of political parties infringes on political rights and association rights meant to be enjoyed under the Bill of Rights. The order of unconstitutionality is suspended for 24 months to allow Parliament an opportunity to fix the limitations giving rise to the unconstitutionality. The Minister of Home Affairs was ordered to pay the applicants' cost in the High Court and the Constitutional Court.

BACKGROUND

New Nation Movement NPC, Ms Chantal Dawn Revell, GRO and Indigenous First Nation Advocacy SA PBO, and the Mediation Foundation for Peace and Justice NPC^[2] originally instituted an urgent application to the Western Cape High Court in late 2018. Of the four respondents they cited, only two opposed the application namely, the Minister of Home Affairs and the Independent Electoral Commission (IEC). The Presidency and Parliament abided by the decision of the Court. An argument advanced by all four applicants was that the Electoral Act is unconstitutional for unjustifiably limiting the right to stand for public office and, if elected, to hold office conferred by section 19(3)(b) of the Constitution^[3]. In addition, some applicants

submitted that the Electoral Act infringes their right to freedom of association protected by section 18 of the Constitution^[4]. The application in the High Court was dismissed based on the fact that section 1(d) of the Constitution mentioned a 'multi-party system of democratic government' and did not explicitly mention independent candidates. Additionally, the Court relied on sections 46(1)(a) and 105(1)(a) of the Constitution, under which Parliament is empowered to choose which type of electoral system ought to be applied. The applicants sought leave to appeal directly to Constitutional Court against the judgment on an urgent basis. The Constitutional Court heard the argument only on the question of urgency on 2 May 2019. On that day it concluded that the matter lacked urgency and postponed it for hearing in



the ordinary course on 15 August 2019. The judgment was delivered on 11 June 2020.

THE CONSTITUTIONAL COURT DELIVERED THREE JUDGEMENTS

On 11 June 2020, the Constitutional Court delivered three judgments: Madlanga J (majority); Jafta J (concurring) and a dissenting judgment by Froneman J. The bench, save for Froneman J, concurred in Jafta J's interview which means that the principles laid down in the judgment of Jafta J are as much part of law as those in the judgment of Madlanga J. There was also a lone dissent by Froneman J.

Madlanga J (majority)

In the first judgment penned by Madlanga J, the Court held that the tangential freedom of association challenge was inextricably linked to the content of section 19(3) political rights. He noted that rights under section 19 (3)(b)^[5] are intertwined with the rights of freedom of association found under section 18. He therefore contends that all of these rights should be read together because they give context to the other. In accordance with section 19(1)^[7], Madlanga J interprets the constitutional provision to extend to include the choice not to form a political party. Madlanga J interpreted the right to freedom of association to mean either the right to associate or not to associate. Because Madlanga J's interpretation of the right to freedom of association is asymmetrical, the requirement of joining political parties infringes on these rights of freedom of association. Madlanga J also bases his judgment on his interpretation of Section 10 of the Constitution^[7]. Madlanga J found that not allowing adult citizens freedom of choice infringes on the right to human dignity as protected under Section 10. In addition to these rights, Madlanga J found

that section 15(1) of the Constitution, the right to freedom of conscience was implicated, as by forcing an individual such as Chantal Dawn Revell, a representative and leader of the Korana nation to join a political party, she may be susceptible of the party's values and dictates, thereby limiting her exercise of individual conviction.

Jafta J (concurring)

Jafta J's judgment concurs with the first judgment (Madlanga J) but underscores a different path; a starting point based on section 19(3) of the Constitution. Jafta J finds that by allowing adult citizens to be elected to the National Assembly and Provincial Legislatures only through membership of political parties, Parliament omitted to cater for the exercise of the rights under section 19(3) by individuals. Political parties stand for elections in their own right and the source of that right is not section 19(3)(b). Thus, requiring citizens to exercise the right to contest elections and hold office through political parties only subverts section 19(3)(b).

Froneman J (dissenting)

Froneman J concludes that "based on these constitutional values and norms it seems fair to conclude that the right to stand and hold elective office in terms of section 19 (3) (b) is an individual right to represent the people in a multi-party system through the medium of political parties that results in general, in proportional representation."

WAY FORWARD?

The Court's decision in this case will have legal, political, and practical implications on the electoral system. Nonetheless, the ruling does



not speak to which electoral system is better or which system better affords the electorate accountability. “The pros and cons of this or the other system are best left to Parliament - which in terms of sections 46(1)(a)^[8] and 105(1)(a)^[9] of the Constitution - has the mandate to prescribe an electoral system”. The Court’s concern, however, is whether the chosen system is compliant with the Constitution. Parliament consequently has 24 months to decide what kind of electoral system to use to allow individuals to contest for national and provincial elections. While there are many options for different electoral schemes, the main constraint on Parliament is that it must find a way of including independent candidates in a system that results in proportionality.

CONCLUSION

This court order implicated many fundamental rights, including but not limited to, the right to freedom of association, freedom of conscience; the right to stand for public office and, if elected, to hold office, and the right to dignity. But that is not the end of the matter, the judgment implicated “Parliament’s power to pass legislation that regulates the right, but it cannot enact legislation that prevents the exercise of the right.”

^[1] Electoral Act 73 of 1998 including Regulations

^[2] This entity did not litigate in this Court.

^[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] Everyone has the right to freedom of association.

^[5] See footnote 3.

^[6] 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.

^[7] Everyone has inherent dignity and the right to have their dignity respected and protected.

^[8] Composition and election of the National Assembly.

^[9] Composition and election of provincial legislatures.