

THE CONSTITUTIONAL COURT ORDERS PARLIAMENT TO INSTITUTE ELECTORAL REFORM

By Dave Steward, Chairman of the FW de Klerk Foundation

In an historic judgement yesterday, the Constitutional Court upheld the appeal of New Nation and others against the judgement last year of the Western Cape High Court regarding the right of individuals to stand as independent candidates in national and provincial elections. The Court declared that “the Electoral Act 73 of 1998 is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties.” It ordered Parliament to remedy this defect within the next 24 months - in time for the next national and provincial elections.

The Western Cape High Court dismissed New Nation’s constitutional challenge in April 2019 on the basis that section 19(3)(b) of the Constitution does not specifically refer to independent candidates as opposed to members of a political party.

In its original case in the Western Cape High Court, New Nation relied on Chief Justice Moegoeng’s remarks in the 2018 Constitutional Court judgment of *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* (My Vote counts) to the effect that the Electoral Act was unconstitutional to the extent it did not give effect to section 19(3)(b) of the Constitution. In *My Vote Counts*, the Chief Justice held that “the right to stand for public office is tied up to the right to ‘vote in elections for any legislative body’ ...every adult citizen may in terms of the Constitution stand as an independent candidate to be elected to municipalities, Provincial Legislatures or the National Assembly. The enjoyment of this right is not and has not been proscribed by the Constitution. It is just not facilitated by the legislation”.

New Nation and the other parties that appealed against the Western Cape High Court’s judgement once again based their argument primarily on section 19(3)(b). They also argued that the present Electoral Act contravenes their right under section 18 to freedom of association. This included the right not to be coerced to join a political party in order to enjoy their rights under section 19(3)(b).

In the Constitutional Court’s view these rights are inextricably linked and requiring candidates to be members of political parties inevitably breached their right to freedom of association:

“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.”

The judgement has far-reaching implications for the manner in which South Africa’s constitutional democracy will function in future.

Since 1994 the perception has grown that Parliament has become a rubber stamp in the hands of the Executive. Parliament is constitutionally mandated to represent the people and “ensure government by the people” but the reality is that MPs do not account to the people; they account to their respective political parties. In terms of section 47(3)(c) of the Constitution “a person loses membership of the National Assembly if that person...ceases to be a member of the party that nominated that person as a member of the National Assembly...” This means, in effect, that MPs serve at the pleasure of their parties - and their parties are controlled by the same people who control the Executive. Failure to tow the party line in parliamentary votes might accordingly result in ejection from Parliament and all the benefits of a political career.

The effective control that political parties exercise over MPs has seriously undermined a proper separation between the executive and the legislature. The failure of Parliament to exercise proper legislative oversight became disturbingly obvious during the presidency of Jacob Zuma. Parliament routinely approved executive actions and policies that contributed to President Zuma's state capture agenda. In December 2017 - the Constitutional Court took the unusual step of castigating the National Assembly for its failure to carry out its constitutional duty in this regard in *Economic Freedom Fighters and Others v. The Speaker of the National Assembly and President JG Zuma*. The Court found that the National Assembly had failed its constitutional obligation to hold President Jacob Zuma (ANC) accountable.

Parliament must now devise a new electoral system that will comply with yesterday's Constitutional Court's judgement. Fortunately, a great deal of work has already been done in designing such a system. The present electoral system was intended to be used only for the first election in 1994. It was accepted that the newly elected parliament should consider a model that would better suit the requirements of South Africa's emerging constitutional democracy.

In 2002, the Cabinet appointed an Electoral task team headed by Dr Frederik Van Zyl Slabbert to investigate electoral reform. The task team identified four criteria which an electoral system must satisfy, namely fairness, inclusivity, simplicity, and accountability. Accountability was specifically identified as a weakness, and public surveys showed the need for individual accountability in the electoral system - a representative accounting to a designated area. Collective accountability was not enough.

The Van Zyl Slabbert majority report accordingly recommended a "mixed system" where 300 members of the National Assembly would be chosen from multi-member constituencies and the remaining 100 on the current proportional representation system. The majority proposed that 69 multi-member constituencies be established to elect 300 members to the National Assembly. The number of members elected by a constituency would depend on its population and would vary from 3 to 7. The advantage of this system is that it would also ensure minority representation that would not occur in a single-member first past the post system.

Sadly, the Van Zyl Slabbert report was left to gather dust - possibly because the current proportional system gives party bosses effective control over MPs - and accordingly over Parliament. All this might change if South Africa accepts a new electoral system in which members of Parliament will be directly accountable to the voters who elect them. It is the voters - and not the political bosses - who should decide who sits in the National Assembly.

The Court's judgement gives a much-needed boost to national confidence in this otherwise gloomy period. It shows that the Constitution is still a foundational factor in our society; it reaffirms the authority of a strong and independent judiciary and it affirms the role that ordinary citizens and organisations - like New Nation - can play in the development of our democracy.