CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 110/19

In the matter between:

NEW NATION MOVEMENT NPC	First Applicant
CHANTAL DAWN REVELL	Second Applicant
GRO	Third Applicant
INDIGENOUS FIRST NATION ADVOCACY SA PBO	Fourth Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
ELECTORAL COMMISSION OF SOUTH AFRICA	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

Neutral citation: *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27

Coram: Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J

Judgment: Theron J (unanimous)

Heard on: 2 May 2019

Decided on: 3 July 2019

Summary: Direct Appeal — Urgency — Urgent Relief

JUDGMENT

THERON J (Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J and Nicholls AJ concurring):

Introduction

[1] This is an urgent application for direct leave to appeal to this Court against the judgment of the High Court of South Africa, Western Cape Division, Cape Town (High Court), delivered on 17 April 2019. The central question is whether it is constitutionally permissible to prohibit eligible South Africans from standing for election to the National Assembly and Provincial Legislatures other than through party lists. The applicants seek an order declaring certain provisions of the Electoral Act[1] invalid in so far as they do not allow independent candidates to stand for election. The matter involves novel and far-reaching questions of constitutional law.

[2] The application was lodged in this Court on 18 April 2019 and heard on 2 May 2019. On that day, the parties were requested to address the Court only on the question of urgency. At the end of the hearing, this Court concluded that the applicants had failed to make out a case for an urgent hearing and issued an order adjourning the matter to 15 August 2019, with no order as to costs and indicating that reasons for the order would follow.[2] These are the reasons.

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[1] 73 of 1998.

[2] In *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Partnership* [2006] ZASCA 51; 2006 (4) SA 292 (SCA) at para 9, the Supreme Court of Appeal held that urgency is a procedural and formal facet of a case. It is not a prerequisite for substantive relief. If a purportedly urgent matter is not actually urgent, then the appropriate order would

Background

[3] The first applicant is the New Nation Movement NPC. The second applicant, Ms Chantal Dawn Revell, describes herself as a representative of Khoi and San communities and a princess of the Korona Royal Household of the Khoi and the San First Nations.[3] At the time when the application was launched in the High Court, the third applicant, GRO, was in the process of being registered as a trade union. The fourth applicant is Indigenous First Nation Advocacy SA PBO. Save for Ms Revell, all the other applicants are not for profit companies or associations. The first respondent (President of the Republic of South Africa) and the fourth respondent (Speaker of the National Assembly) do not oppose this application, while the second respondent (Minister of Home Affairs) and the third respondent (Electoral Commission of South Africa) do.

[4] On 17 September 2018, the applicants approached the High Court on an urgent basis. In the High Court, the applicants sought an order—

(a) declaring section 57A of and schedule 1A to the Electoral Act unconstitutional and invalid;

(b) declaring that the Electoral Act is unconstitutional because it omits to regulate the position of individuals standing for election at national or provincial level; and

(c) directing Parliament to take all necessary steps to resolve these matters "before the 2019 elections".

[5] The applicants amended their notice of motion before the High Court to remove the reference to the 2019 elections. Instead, they requested that Parliament be directed to alter the electoral regime "*as soon as possible*". As explained in detail

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generally be to strike the matter off the roll or to postpone it. This then enables litigants to have the matter heard in the ordinary course.

[3] *New Nation Movement PPC v President of the Republic of South Africa*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 17223/18 (17 April 2019) (High Court judgment) at para 4.

below, this is the primary reason why their application is not urgent. The amendment of the applicants' relief is indicative of the fact that the applicants did not necessarily seek the alteration of the current electoral regime before the 2019 elections. There is therefore no need to adjudicate this matter on an urgent basis and before the 2019 elections are held.

Rules on urgency

[6] Urgent applications are governed by rule 12 of the Rules of this Court, which provides:

> "(1) In urgent applications, the Chief Justice may dispense with the forms and service provided for in these Rules and may give directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure, which shall as far as is practicable be in accordance with these Rules, as may be appropriate.
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> (2) An application in terms of subrule (1) shall on notice of motion be accompanied by an affidavit setting forth explicitly the circumstances that justify a departure from the ordinary procedures."

[7] This Court thus enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by its Rules. It is usually hesitant to dispense with its ordinary procedures, and when it does, the matter must be so urgent that ordinary procedures would not suffice.[4]

[8] In assessing whether an application is urgent, this Court has in the past considered various factors, including, among others:

(a) the consequence of the relief not being granted;[5]

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[4] *Kaunda v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at para 15.

[5] *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) (*Informal Traders*) at para 36; *Ex Parte Minister of Social Development* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at paras 18-20; and *Minister of Public Works v Kyalami Ridge Environmental*

(b) whether the relief would become irrelevant if it is not immediately granted;[6]

(c) whether the urgency was self-created.[7]

[9] In *AParty*, this Court stated that there is a need to announce its conclusions and reasoning within the shortest possible time where a matter is urgent and may impact upcoming elections.[8] This Court, however, recognised that it is not desirable that issues of considerable importance and complexity regarding elections be determined in haste.[9] Respondents who are defending or explaining an electoral system must have a fair opportunity to collect and present evidence. This Court emphasised that:

> "Matters concerning elections should ordinarily be brought at the earliest available opportunity because of their potential impact on the elections. If they are brought too close to the elections, this might result in the postponement of the elections. This is not desirable in a democratic society. There may well be circumstances where bringing a challenge earlier is not possible having regard to the nature of the dispute. These circumstances would be very rare. Where the challenge could and should have been brought earlier, a litigant must put out facts, covering the entire period of delay, explaining why the challenge could not have been brought earlier. Failure to do so may well result in the refusal of the relief."[10]

Facts

[10] On their papers, the applicants seek the invalidation of the Electoral Act and the enforcement of the purported right of independent candidates to stand for election.

Association (Mukhwevho Intervening) [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 112.

[6] *Kaunda* above n 4 at para 18.

[7] *South African Social Security Agency v Minister of Social Development* [2018] ZACC 26; 2018 JDR 1451 (CC); 2018 (10) BCLR 1291 (CC) at para 19; *AParty v The Minister for Home Affairs, Moloko v The Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at paras 57-8 and 66-9; *Ex Parte Minister of Social Development,* above n 5 at para 17; *Transvaal Agricultural Union v Minister of Land Affairs* [1996] ZACC 22; 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at paras 21 and 23.

[8] *AParty* id at para 1.

[9] Id.

[10] Id at para 66.

As indicated, the applicants initially sought to have the electoral regime overhauled before the 2019 elections. However, the amended relief sought did not aim to impugn the 2019 elections but rather to change the electoral system "*as soon as possible*".

[11] The consequence of the amended relief is that there is no pleaded reason why the matter should be determined before the elections. The relief would not become irrelevant after the elections – it could still be sought. The applicants contend in their papers that if the relief they seek is not granted, they may bring an application to review the 2019 national and provincial elections after they had been held. While the applicants held this possibility out as a reason justifying an urgent decision, it does the opposite. The existence of alternative relief demonstrates that a refusal by this Court to determine the matter on an urgent basis would be remediable. The parties will still be able to challenge the elections and if they succeed, they can ensure that the electoral system could be appropriately amended "*as soon as possible*".[11]

[12] The merits in this case relate to whether the Electoral Act is unconstitutional to the extent that it prohibits South African citizens from contesting elections and holding national or provincial public office as independent candidates. This is a matter of utmost importance. It delves into the ambit of the right to vote and its possible limitations. If the applicants' contentions are well-founded, it may mean that all past national and provincial elections took place under an unconstitutional electoral regime.

[13] These are matters which, quite plainly, cannot be considered or determined hurriedly or superficially. They are complex, important issues that ideally should not be decided urgently. Yet the applicants ask this Court to do precisely that. They seek direct leave to appeal to this Court and they seek to have this matter determined before

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[11] To some extent, the applicants' pre-election urgency was self-imposed. It cannot be said that the applicants only recently became aware of their inability to stand for election as independent candidates in the 2019 elections. The *Majola* decision by the High Court of South Africa, Gauteng Local Division, Johannesburg in 2012 – which concerned the inability of independent candidates to stand for elections in the current legislative framework – should have alerted them to this. See *Emperor Thembu (The Second) Votani Majola v State President of the Republic of South Africa* 2012 JDR 2214 (GSJ) (*Majola*).

the elections scheduled for 8 May 2019 – six days after the hearing of this matter. They do so without properly explaining why this matter cannot be dealt with in the ordinary course.

[14] This should be the end of the matter. But at the hearing of this application, the applicants drastically changed the relief they sought. They asked for new ballot papers (to include independent candidates) to be printed for the upcoming national and provincial elections. The applicants submitted from the Bar that should this printing not be possible before the 2019 elections are held, then the elections should be postponed. In terms of section 49(3) of the Constitution, if this Court sets aside an election, another election must be held within 90 days from the date the decision was taken.[12] The applicants further submitted that this would afford Parliament sufficient time to enact new legislation regulating the right of independent candidates to stand for election. The applicants invoked section 49(4) of the Constitution which provides that the National Assembly remains competent to function until the day before the first day of polling for the next Assembly.[13]

[15] There are, however, numerous, insurmountable problems for this new relief. First and foremost, the applicants have not made out a case on the papers for the printing of new ballot papers or a postponement of the elections – either before the High Court or in this Court. Consequently, the new case was not the case that the respondents were required to meet; the respondents have not had an opportunity to present their defence to this new case before the Court. Moreover, other parties might have applied to join the matter had this relief been clearly pleaded in the High Court and this Court. This is especially so in light of this Court's finding in *Mhlope* that postponing the elections might create a "constitutional crisis".[14]

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[12] It is not necessary, at this stage, for this Court to consider and pronounce on the applicability of section 49(3) of the Constitution.

[13] Section 49(4) of the Constitution provides that:

> "The National Assembly remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next Assembly."

[14] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) (*Mhlope*) at para 85.

[16] The submissions from the Bar also run counter to the applicants' evidence in the High Court. It was clear when the Commission filed its answering affidavit in the High Court in October 2018 that the electoral system could not practically be changed in time for the 2019 elections. The applicants accepted on oath before the High Court that it would *not* be possible for the regime they seek to be put in place in time for the 2019 elections. It was in that context that the applicants abandoned the prayer that Parliament must be ordered, before the 2019 elections, to effect amendments that enable individuals to stand for election to the National Assembly and Provincial Legislatures. They had since become content with an order that required amendments "*as soon as possible*".

[17] It is now all the more clear that the electoral regime cannot be altered before the 2019 elections. This case was heard with the main voting day merely days away. Over sixty million ballot papers had already been printed, packaged and distributed across the country. Moreover, voting in the elections had already begun – voters outside the country voted on Saturday, 27 April 2019. The applicants failed to account for whether the postponement of the elections would invalidate the votes of South Africans who had already voted.

[18] In addition to these practical concerns, there is a complex legal conundrum for the applicants. Parliament had been dissolved by the time this matter was heard. The question whether Parliament could be reconvened in order to effect the necessary legislative changes to accommodate the electoral regime they proposed, presents a further possible complication in granting the new relief sought. Section 49(4) of the Constitution provides that the National Assembly remains competent to function until the day before the first day of polling for the next Assembly. It may be that the first day of polling was on Saturday, 27 April 2019, when voters abroad had already cast their votes; in which case the National Assembly would no longer be competent.

[19] This Court is not in a position to make a finding as to whether the first day of polling had come and gone. It is not an aspect that any of the parties has addressed, either in their written or oral submissions. This Court is, with good reason, reluctant to pronounce upon complex matters that have not been fully ventilated.[15]

Conclusion

[20] It is unfortunate that the applicants brought this matter to this Court in this fashion. The consequences of adjudicating this matter on an urgent basis, and the nature of the remedies sought by the applicants, strongly swing the balance away from hearing it on an urgent basis. This is particularly so when the relief sought on the papers did not impact the impending elections, and will not become irrelevant should it be granted after the 2019 elections.

[21] In the result, the application for direct appeal was postponed to 15 August 2019.

[15] *AParty* above n 7 at para 56.

For the Applicants:	A Nelson SC, C Brown, R S Willis and S Gaba: Instructed by Aphalla Mokate Conradie Inc
For the Second Respondent:	N A Cassim SC and P Mhlana: Instructed by State Attorney
For the Third Respondent:	S Budlender, N Luthuli and M Gwala: Instructed by Moeti Kanyane Attorneys Inc
For the Fourth and Fifth Respondents:	M Vassen: Instructed by State Attorney