

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Case No.: CCT 110/19**

In the matter between:

**SPEAKER OF THE NATIONAL ASSEMBLY** First Applicant

**CHAIRPERSON: NATIONAL COUNCIL OF PROVINCES** Second Applicant

and

**NEW NATION MOVEMENT NPC** First Respondent

**CHANTAL DAWN REVELL** Second Respondent

**GRO** Third Respondent

**INDIGENOUS FIRST NATION ADVOCACY SA PBO** Fourth Respondent

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** Fifth Respondent

**MINISTER OF HOME AFFAIRS** Sixth Applicant

**ELECTORAL COMMISSION OF SOUTH AFRICA** Seventh Respondent

and

**COUNCIL FOR THE ADVANCEMENT OF THE  
SOUTH AFRICAN CONSTITUTION** First Amicus Curiae

**ORGANISATION AGAINST TAX ABUSE** Second Amicus Curiae

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**NOSIVIWE NOLUTHANDO MAPISA-NQAKULA**

do hereby make oath and state:

1. I am the Speaker of the National Assembly of the Republic of South Africa ("**Speaker**") and was elected to this position by the Assembly in terms of section 52(1) of the Constitution of the Republic of South Africa ("**the Constitution**") on 19 August 2021. As the Speaker, I am the custodian and representative of the Assembly and am duly authorised to depose to this affidavit on behalf of the Assembly.
2. In terms of section 42(1) of the Constitution, when I act in tandem with the second applicant, the Chairperson of the National Council of Provinces ("**the Chairperson**"), we duly represent Parliament. The confirmatory affidavit by the Chairperson of the NCOP accordingly confirms that this application is brought on behalf Parliament.
3. I formerly served as the Minister of Defence and Military Veterans from June 2012 to August 2021, before that as the Minister of Correctional Services from 2009 to 2012 and before that as the Minister of Home

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Affairs from 2004 to 2009. I am therefore familiar with the practice and workings of the Cabinet and the extensive processes that must be complied with by Ministers before they are permitted to introduce a Bill in Parliament.

4. The facts contained in this affidavit are within my personal knowledge and belief, unless the contrary is said or appears from the context, and are all, to the best of my belief, true.
5. In this affidavit, where I make legal submissions, I rely on the advice of my legal representatives, which advice I believe to be correct.

## BACKGROUND

6. In the matter of the *New Nation Movement NPC and Others v the President and Others* (CCT 110/19) ("**New Nation Movement**"), this Court considered whether the Electoral Act 73 of 1998 ("**the Electoral Act**") was unconstitutional "*to the extent that it allows individuals to be elected to the National Assembly and Provincial Legislatures only through membership of political parties*"<sup>1</sup>.

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<sup>1</sup> *New Nation Movement NPC and Others v The President and Others* (CCT110/19) at para 2.

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7. The Court handed down its judgment on the matter on 11 June 2020, and in terms of the majority judgment per Madlanga J, held, *inter alia*, that:

“4. ... 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.

5. The declaration of unconstitutionality referred to in paragraph 4 is prospective with effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.”<sup>2</sup>

8. This Court acknowledged that remedying the Electoral Act and choosing an electoral system involved complex policy issues. In this regard Madlanga J reasoned at paragraph 15 of the judgment as follows:

“... a lot was said about which electoral system is better, which system better affords the electorate accountability, etc. That is territory this judgment will not venture into. The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system. This Court’s concern is whether the chosen system is compliant with the Constitution.”<sup>3</sup>

9. The suspension of the order of invalidity of the Electoral Act lapses on 10 June 2022.

<sup>2</sup> *New Nation Movement*, at para 128.

<sup>3</sup> *New Nation Movement* at para 15.

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10. As Parliament is not in a position to pass an amendment to the Electoral Act before the suspension of the invalidity lapses, we seek an extension of the suspension period until 10 December 2022. The extension is sought for two purposes:

10.1. First, I emphasise that the extension is sought to enable Parliament to properly deliberate on the Bill before it and to ensure that our citizens across the country are afforded an opportunity to meaningfully participate and share their views on the Electoral Amendment Bill [B1-2022] ("**the Bill**") in accordance with sections 59(1)(a) and 72(1)(a) of the Constitution. Given that the Bill amends our electoral system, and historically the majority of South Africans were deprived of the right to vote, this Bill has engendered significant interest and its contents are highly contested. Given this, and the demands from civil society for further public involvement, in terms of the *dicta* of this Court in *Doctors for Life International v Speaker of the National Assembly and Others*<sup>4</sup>, Parliament would be acting unreasonably if it failed to accede to these requests for further public involvement. In *Doctors for Life International*, this

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<sup>4</sup> *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05).

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Court pointed out that the nature and importance of the Bill, the impact of the Bill and the degree of public interest, are relevant factors which determine the degree and extent of public involvement required and whether or not Parliament acted reasonably to facilitate such public involvement.

10.2. Secondly, and a corollary to the need to facilitate public involvement, this Court's approval is sought for the extension out of respect for the rule of law, governance under the Constitution and to preserve the comity of relations between the highest levels of government. Notwithstanding that there is no immediate consequence should Parliament not pass the Bill before 11 June 2022 and voters and candidates who wish to stand for election will not be prejudiced, Parliament is of the view that it is important for the functioning of our constitutional democracy that Parliament is seen to adhere scrupulously to orders and timeframes issued by our courts, especially our apex Court.

11. Parliament requests an extension of the period of suspension on the understanding that it is just and equitable to do so and that no prejudice to voters, candidates, political parties or the Electoral Commission will result

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if Parliament passes the Bill by 10 December 2022, instead of 10 June 2022.

12. I am advised that neither the Minister of Home Affairs (**“the Minister”**), who is the member of the Executive responsible for the Electoral Act, nor the Electoral Commission, tasked with organising the next election, objects to our application for an extension of the suspension of the invalidity period, provided that the extension sought is no longer than six months.
13. Given that the Act is administered by the Department of Home Affairs and an amendment thereof would involve complex policy issues which impact on all adult citizens who will be eligible to vote in the 2024 national and provincial elections, a Bill amending the electoral system, must necessarily be one sponsored and introduced in Parliament by a member of Cabinet.
14. While I set out fully the actions taken by Parliament together with the Minister and Electoral Commission since the judgment in *New Nation Movement* was delivered, it is for the Minister to explain the reasons why the Bill could only be introduced in the National Assembly on 10 January 2022. This left Parliament with just five months to pass a Bill of such significance and which requires both extensive public participation and deliberation.

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15. In summary, the primary purpose of this application is to apprise this Court that:

15.1. Parliament has not been supine in giving effect to the order of this Court;

15.2. an extension of six months will not prejudice the electorate, political parties and individuals who would like to stand for election, or the Electoral Commission; and

15.3. it is in the interests of justice that the extension be granted.

**THE ACTIONS UNDERTAKEN BY PARLIAMENT SINCE THE JUDGMENT WAS HANDED DOWN UNTIL THE BILL WAS INTRODUCED IN THE NATIONAL ASSEMBLY**

**Portfolio Committee on Home Affairs meeting of 25 June 2020**

16. Immediately after this Court handed down its judgment in *New Nation Movement* on 11 June 2020, the Portfolio Committee on Home Affairs (“**the Portfolio Committee**”) scheduled an online Portfolio Committee meeting for 25 June 2020 and invited the Minister and the Electoral Commission to

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attend. The purpose of the meeting was to develop a program of action to respond to the judgment of this Court. The draft minutes of the Portfolio Committee meeting of 25 June 2020 is annexed hereto as “**NM1**” and a recording of this meeting is available online at <https://www.youtube.com/watch?v=IYEAKB3tPR4>.

17. The Portfolio Committee was briefed by the Minister of Home Affairs, the Chairperson of the Electoral Commission, Mr Glen Mashinini and the CEO of the Electoral Commission, Mr Sy Mamabolo on the implications of the *New Nation Movement* judgment and the need to consider a new policy to amend the electoral system to accommodate independent candidates at provincial and national level.
18. The Electoral Commission advised the Portfolio Committee, *inter alia* that:
  - 18.1. the New Nation Movement judgment was the most significant judgment on the electoral system since democracy;
  - 18.2. given the potential scope of work necessary (should the system be changed to a constituency-based system), 24 months is insufficient time to prepare as the elections were four years away;

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- 18.3. should the new electoral system require a constituency-based system at national and provincial level, the Demarcation Board would require at least 24 months after the Electoral Act was amended to demarcate the new constituencies;
- 18.4. to comply with the judgment, a number of other laws, other than the Electoral Act, may also need to be amended;
- 18.5. the review of the electoral system therefore had to be amended as expeditiously as possible.
19. The Minister agreed with the Electoral Commission that swift action was required, and that Cabinet had been briefed on the judgment of this Court in *New Nation Movement* on 24 June 2020. The Minister also advised the Portfolio Committee that Cabinet had tasked the Department of Home Affairs to draft a document delineating all the implications of the judgment and to establish a Committee of Ministers to advise Cabinet on proposals to amend the current legislation.
20. The Minister confirmed that he received a letter on from Parliament's Legal Services advising him that as the legislative amendment necessitated by this Court's finding required significant policy considerations, that his

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Department was requested to urgently confirm the policy and legislative development plan to address the matter so that the Portfolio Committee could plan accordingly. The Minister confirmed to the Portfolio Committee that he had already requested his legal advisers to start the process. The letter from Parliament's Legal Services Office dated 25 June 2020 is annexed hereto as "NM2".

21. The Portfolio Committee requested that an integrated roadmap be compiled setting out the roles and cooperation between the Executive's Ministerial Committee and the Electoral Commission to ensure that the Court's ruling and timeframes were complied with.
22. The Portfolio Committee stated that it intended to grant every political party, civil society organisation or member of the public who wished to do so, an opportunity to make their views known. The Portfolio Committee resolved that work on the programme should start immediately after the recess period which was about to commence shortly thereafter.

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**Joint meeting of the Portfolio Committee on Home Affairs and the NCOP  
Select Committee on Justice and Security of 18 August 2020**

23. A virtual joint meeting of the Portfolio Committee and the NCOP Select Committee on Justice and Security (responsible for matters relating to the Department of Home Affairs and hereafter referred to as "**the Select Committee**") took place on 18 August 2020 to obtain a progress report on the developments since the last meeting. The minutes of the joint meeting dated 18 August 2020 is attached hereto as "**NM3**", and the video recording of the meeting is available online at <https://www.youtube.com/watch?v=ggeBUSgazdo>.
24. Parliament's content adviser, Mr Adam Salmon, briefed members of Parliament on the interactions that had taken place between Parliament, the Executive and the Electoral Commission in the previous weeks. He also advised that a technical task team was preparing draft legislation that would be introduced in Parliament.
25. A timeline with four scenarios for the amendment of the Electoral Act was sketched out based on inputs by the Electoral Commission. The four scenarios considered were as follows:

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- 25.1. The most time-consuming scenario would occur where the proposed legislation required the creation of a constituency-based system via the introduction of a section 76 Bill. To afford Parliament sufficient time to process the Bill, it would require that the 2024 election be held on the last constitutionally permissible date, namely on 14 August 2024.
- 25.2. The second most time consuming scenario would be where a constituency-based system was created by the introduction of a section 75 Bill in the National Assembly. While this Bill would require slightly less time to process than a section 76 Bill, it would still require almost the full amount of time available to Parliament.
- 25.3. A Bill which did not create a constituency-based system would be more time-efficient to process as it would not require the demarcation of constituencies. While a section 76 Bill would require more time than a section 75 Bill to process, the length of time necessary would largely be dependent on the substance of these Bill and the demand for public involvement.
26. The roadmap envisaged that where the Bill required the creation of a constituency-based system, to meet the requisite timeframes, it would have

to be introduced in the National Assembly at the latest by 31 January 2021.  
In the event that the Bill did not propose a constituency-based system, such a Bill would have to be introduced for the latest by 10 March 2021.

The four scenarios considered by the Portfolio Committee is annexed hereto as "**NM4**".

27. In the legislative process, after Cabinet approval is obtained, the Minister would need to ensure that the following occurs before introducing a Bill in Parliament:

27.1. first, the electoral task team would need to consider the policy aspects that needed to be included in the Bill;

27.2. second, a legal drafting unit would produce a draft Bill;

27.3. third, after the draft Bill is drafted, a socio-economic impact assessment needs to be undertaken;

27.4. fourth, the Department would need to consult with interested parties, including other government structures and organs of state;

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- 27.5. fifth, a preliminary legal opinion would need to be obtained from the Office of the Chief State Law Advisors that the Bill would pass constitutional muster;
- 27.6. sixth, the Department would need to consider the inputs and opinion from the Office of the Chief State Law Advisor and update the draft Bill accordingly if required;
- 27.7. seventh, a Cabinet Memorandum would be sent to the Minister for the submission of the Bill to Cabinet for approval and to publish the draft Bill for public comments;
- 27.8. eighth, the Cabinet Committee deliberations would take place and make recommendations to the full Cabinet for approval;
- 27.9. ninth, the Bill would need to be published in the Government Gazette for public comments;
- 27.10. tenth, the Department would need to consider comments from the public and update the draft Bill accordingly;

- 27.11. eleventh, a further legal opinion from the Office of the Chief State Law Advisor would need to be obtained;
- 27.12. twelfth, the Department would need to again consider inputs from the Chief State Law Advisor and update the draft Bill accordingly;
- 27.13. thirteenth, the Minister would need to submit a memorandum to Cabinet seeking approval to introduce the draft Bill in Parliament;
- 27.14. fourteenth, Cabinet would need to approve the publication of the draft Bill for public comments;
- 27.15. fifteenth, after further discussions and deliberations, the Cabinet Committee of Ministers would make a recommendation to Cabinet on whether the Bill ought to be introduced in Parliament; and
- 27.16. sixteenth, after the Minister complied with rule 159(1) of the Joint Rules of Parliament and rule 271 of the Rules of the National Assembly on the introduction of Bills, the Bill may be introduced in Parliament;

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28. The proposed roadmap further indicated that a multiparty stakeholder policy workshop on a draft Bill was envisaged to take place on 3 November 2020.
29. The Minister advised the Portfolio Committee that he had noted the urgency of introducing the Bill timeously and that he would attempt to expedite the passage of the Bill through Cabinet as far as possible. At the time, the Minister expressed the view, that it would not be possible to effect an amendment to the electoral system without amending the Constitution itself.

#### **Portfolio Committee meeting of 6 October 2020**

30. The Portfolio Committee scheduled a further meeting that would take place with the Minister on 6 October 2020.
31. On 1 October 2020, the Minister wrote to the Chairperson of the Portfolio Committee to advise that he was unable to attend the meeting scheduled for 6 October 2020 as:

*“there has been no change from the brief I made to the committee in the previous meeting. I am still waiting for an appropriate slot in the cabinet committee to present the draft, which will subsequently go to cabinet.”*

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The letter from the Minister to the Chairperson of the Portfolio Committee dated 1 October 2020 is annexed hereto as **"NM5"**.

**The 28 January 2021 request to the Minister enquiring when the Bill would be introduced.**

32. On 28 January 2021, Parliament's Chief Legal Adviser wrote to the Director General of Home Affairs to reiterate that Parliament was obliged to pass an amendment to the Electoral Act by 10 June 2022 and requested the DG to:

*"urgently confirm the Department's progress in addressing this Constitutional Court judgment and the date by when legislation addressing the judgment will be introduced into Parliament."*

The letter from Parliament's Chief Legal Adviser to the Director General of Home Affairs is annexed hereto as **"NM6"**.

#### **Portfolio Committee meeting of 9 February 2021**

33. On 29 January 2021, the Chairperson of the Portfolio Committee again wrote to the Minister to invite him to a meeting to update the Committee *"on progress made in the development of the policy and the development*

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*of legislation to amend the Electoral Act to allow independent candidates to participate in the National and Provincial [elections]*". The letter from the Chairperson to the Minister dated 29 January 2021 is annexed to this affidavit as "**NM7**".

34. At the meeting on 9 February 2021, the Minister provided a progress update on the development of the policy aspects relating to the amendment of the Electoral Act in order to allow independent candidates to participate in national and provincial elections. The minutes of the Portfolio Committee of 9 February 2021 is annexed to this affidavit as "**NM8**". The video recording of the meeting is available at [https://www.youtube.com/watch?v=IQAsH42IF\\_0](https://www.youtube.com/watch?v=IQAsH42IF_0).
35. In his presentation to the Portfolio Committee, the Minister advised that in order to prepare the Bill:
- 35.1. The Department had undertaken a comparative study of the following systems:
- 35.1.1. the single-member constituency system using the first-past-the-post method, where the systems of four countries were studied;

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- 35.1.2. the mixed-member proportional representation system, where two countries were studied;
  - 35.1.3. the closed party list system, where one country was studied;
  - 35.1.4. the preferential list system and the proportional representative single transferable vote system, which is a variant of the proportional representation system, and where three countries were studied; and
  - 35.1.5. various electoral systems used on the African Continent, where five countries were studied.
- 35.2. The above systems were examined so that the Department, when drafting the Bill, could ensure that there were no unforeseen amendments that needed to be made to give effect to this Court's judgment.
- 35.3. The Department advised that the following additional Acts would also need to be amended:

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35.3.1. *Public Funding of Represented Political Parties Act* 103 of 1997;

35.3.2. *Electoral Commission Act* 51 of 1996;

35.3.3. *Local Government Municipal Demarcation Act* 27 of 1998; and the

35.3.4. *Political Party Funding Act* 6 of 2018.

35.4. The policy on the legislative amendment was presented to the technical team of the Justice, Crime Prevention and Security Cluster ("JCPS") on 25 November 2020 and the refined policy was due to be presented to a special sitting of Ministers of the JCPS by the end of that week.

35.5. In the two weeks thereafter, the policy would be presented to a Joint Cabinet Committee meeting chaired either by the President or Deputy President, where after it would be approved by the full Cabinet by the second week of March 2021 before it was introduced in Parliament.

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The Minister's presentation to the Portfolio Committee on 9 February 2021 is annexed hereto as "NM9".

36. At the meeting, Mr Lekota, MP from COPE, briefed the Portfolio Committee on the Private Member's Bill that he introduced in the National Assembly, namely the *Electoral Laws Second Amendment Bill* [B34-2020]. Mr Lekota advised that his Bill provided for, *inter alia*:
- 36.1. the creation of a hybrid system providing proportional representation plus 52 multi-member constituencies;
  - 36.2. the retention of the single transferable vote mechanism to ensure proportional representation, substituting the 'closed list' system with an 'open list' representation allowing voters the right to vote for a candidate on a political party's list rather than only the party; and
  - 36.3. a requirement that each independent candidate would publish how she or he would advance the Bill of Rights, if elected.

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37. The Portfolio Committee requested the Executive to reflect on the proposed private members Bill and amendment of the Electoral Act and to table its proposals.
38. The Chairperson of the Portfolio Committee was also mandated to elicit my predecessor's support as the Speaker to convene a stakeholder engagement forum on the amendment of the electoral system. I am advised that the Speakership was in agreement that such an engagement was necessary given the importance of the Bill and the significance of the amendment to our electoral system.

**The establishment of the Ministerial Advisory Committee and its interaction with the Portfolio Committee and Select Committee at the Joint Electoral Reform Workshop**

39. On 1 March 2021, the Minister informed the Chairperson of the Portfolio Committee that Cabinet established the Ministerial Advisory Committee on Electoral System Reform ("**MAC**") to advise Cabinet on the various options to give effect to the decision of the Constitutional Court. The Minister advised that the MAC is comprised of academics, IEC Commissioners and its CEO, and is chaired by a former member of Cabinet, Mr Valli Moosa. Other members included:

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- 39.1. Adv. Pansy Tlakula;
- 39.2. Dr Sithembile Mbete;
- 39.3. Mr Normal du Plessis;
- 39.4. Dr. Michael Sutcliffe;
- 39.5. Adv. Vincent Maleka SC;
- 39.6. Professor Daryl Glaser and
- 39.7. Dr. Nomsa Masuku.

The Minister's letter to the Chairperson of the Portfolio Committee dated 1 March 2021 is attached hereto as "NM10".

- 40. On 16 March 2021, the Portfolio Committee and the Select Committee convened a Joint Electoral Reform Workshop which was attended by the Minister and Deputy Minister of Home Affairs, as well as the Chair of the MAC, Mr Moosa. At the workshop, submissions were received from various stakeholders and experts on electoral matters and issues were debated by the political parties represented in Parliament.

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41. At the Joint Electoral Reform Workshop, the Electoral Commission noted that time was of the essence and if Parliament chose a system that included constituencies, it had to pass the Bill by 30 October 2021 to allow the Electoral Commission sufficient time to adjust the voting district boundaries and to modify its operations. However, should Parliament choose not to introduce a constituency system, the IEC advised that more of the 24-month period afforded to it by this Court could be utilised in processing the Bill. The report of the Joint Electoral Reform Workshop of 16 March 2021 is annexed hereto as “**NM11**” and a recording of the meeting is accessible online at <https://www.youtube.com/watch?v=0QwiEfWQAkA>.

**Further interactions between Parliament and the Minister from August to November 2021**

42. When the Executive did not introduce a Bill in terms of the proposed roadmap, on 31 August 2021, Parliament's Chief Legal Adviser again wrote to the Director General of the Department to make enquiries and requested an urgent update on the progress made to date. The letter from the Chief Legal Adviser of Parliament to the Director General of Home Affairs dated 31 August 2021 is annexed hereto as “**NM12**”.

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43. As no response was received, Parliament's Chief Legal Adviser again wrote to the Director General of the Department on 9 September 2021 to make further urgent enquiries requesting an urgent update on the progress made to date. The letter from the Chief Legal Adviser of Parliament to the Director General of Home Affairs dated 9 September 2021 is annexed here to as "**NM13**".
44. On 17 October 2021, the Chairperson of the Portfolio Committee invited the Minister to attend a meeting of the Portfolio Committee scheduled for 5 November 2021 to provide an update on the progress made by the Department. The letter from the Chairperson of the Portfolio Committee to the Minister dated 17 October 2021 is annexed hereto as "**NM14**".
45. On 25 October 2021, the Chief of Staff in the Ministry of Home Affairs advised the Portfolio Committee that:

*"The Minister of Home Affairs is currently seized with the matter and fully understands the urgency thereof.*

*The status quo is that Cabinet has not seen or deliberated on the matter for it to be introduced by Parliament. The Portfolio Committee will recall that Minister appointed a Ministerial Advisory Committee in February 2021. The work of the Advisory Committee was completed. What is left is for Minister to take the report to Cabinet.*

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*The Cabinet Committee meeting is to deal with the matter is scheduled for 16 November 2021 and full Cabinet meeting is on 24 November 2021. It therefore is not possible for Minister to provide any update to the Portfolio Committee before 24 November 2021*

*A letter to the Chairperson of the Portfolio Committee on Home Affairs from Minister, explaining the difficulty in giving the update on 5 November will be emailed to you on 26 October 2021."*

The letter from the Chief of Staff to the Portfolio Committee dated 25 October 2021 is annexed hereto as **"NM15"**.

46. As no updated was provided to Parliament, on 10 November 2021, Parliament's Chief Legal Adviser again wrote to the Director General of Home Affairs and advised as follows:

- "3. ...We are concerned that further delays in the introduction of this Bill may result in Parliament not being afforded sufficient time to process the Bill.
4. Furthermore, the Speaker of the National Assembly has received letters from an attorney's office (see attached) indicating a possible opposition to any application for an extension of the deadline set by the Constitutional Court and also possibly approaching the courts to institute an application for a finding of contempt of the Constitutional Court's order.
5. Kindly urgently confirm the Department's progress in addressing this Constitutional Court judgment and the date by when legislation addressing the judgment will be introduced into Parliament.

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6. *Furthermore, kindly indicate whether the Department is considering an application for the extension of the date by which the defect must be corrected. We are of the view that the Department is in a better position to, in such application, advise the Constitutional Court of all steps taken to date to address the Constitutional Court judgment, since it was delivered.” (original emphasis)*

The letter from Parliament’s Chief Legal Adviser to the Director General dated 10 November 2021 is attached hereto as “**NM16**”.

47. As a Bill was still not introduced in Parliament, on 19 November 2021, in my capacity as the head of the Assembly, I wrote to the Deputy President, in his capacity as the Leader of Government Business, to impress upon him the urgency with which the Executive needed to table a Bill amending the Electoral Act. In my letter to the Deputy President I , *inter alia*, stated:

*“Parliament is aware of the work undertaken by the Executive concerning the development of the necessary amendments. To date, however, Parliament has not received an indication of when any legislation to remedy the defect will be introduced. This is of concern given the deadline and that Parliament will require sufficient time to deliberate and consult once a bill is introduced. In this regard, I would request that the Executive prioritize the matter and provide a date by when legislation will be introduced to allow Parliament to plan accordingly.” (emphasis added)*

My letter dated 19 November 2021 to the Deputy President is annexed hereto as as “**NM17**”.

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48. At the time I also received letters threatening to bring a contempt of court application against Parliament for not complying with this Court's order. In this regard I attach letters from the New Nation Movement as "**NM18**" and **NM19**".
49. On 21 November 2021, the Chairperson of the Portfolio Committee met with committee staff and Parliament's Legal Services to make contingency plans given the possibility that there was insufficient time to process the Bill in accordance with the timeframe set by this Court. At that meeting it was agreed that under the circumstances, Parliament had no choice but to wait for the Executive to introduce the Bill but that the Minister should be invited to the next Portfolio Committee taking place on 7 December 2021 to account to the Portfolio Committee on the progress made on the Bill and to establish when the Bill would be introduced.
50. On 23 November 2021, the Director General of Home Affairs, advised Parliament's Legal Services that a 20-page Draft Electoral Amendment Bill had been drafted by a team of advocates appointed by the Minister and that this draft Bill will be presented to Cabinet on 24 November 2021 and if approved, will be further consulted on before being introduced in Parliament. The letter from the Director General of Home Affairs to

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Parliament's Legal Services dated 24 November 2021 is annexed hereto as "**NM20**".

51. On 29 November 2021, the Minister wrote to me to advise that at the Cabinet meeting of 24 November 2021:

*"Cabinet considered and approved the following documents for submission to Parliament for further processing and public consultations due to the looming Constitutional Court deadline:*

*8.1 Report by the Ministerial Advisory Committee.*

*8.2 Memorandum on the draft Electoral Amendment Bill prepared by Adv. Steven Bundlender SC; and*

*8.3 The draft Electoral Amendment Bill".*

The letter from the Minister to me dated 29 November 2021 and the attached documents are annexed hereto as "**NM21**".

#### **Portfolio Committee meeting on 7 December 2021**

52. The Chairperson of the Portfolio Committee invited the Minister to provide a briefing to the Portfolio Committee on the MAC Report on Electoral Reform and on the progress made in finalising the Bill.

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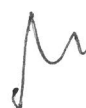
53. On 7 December 2021, the Minister advised the Portfolio Committee that the MAC had developed two models for an electoral system that allowed citizens to stand for political office independently of political parties.
54. The Minister advised that the MAC explored a variety of options and heard from a range of public stakeholders in the course of its deliberations but ultimately it was not able to reach consensus on the electoral system to be chosen. The MAC had however narrowed down the choices to two options, formulated as a Minority and Majority Report:
- 54.1. the Minority Report proposed a slightly modified multi-member constituency which would accommodate independents, but which required relatively minimal changes to the electoral system. It did so by inserting independents into the existing electoral system and enabling them to compete with political parties for votes;
- 54.2. the Majority Report proposed introducing single-member constituencies, with proportionality secured via party lists. In this case independents would stand as individuals in constituencies and compete together with associates for the party-list votes.



55. The Minister advised the Portfolio Committee that the Executive favoured the system proposed in the Minority Report and that a Bill would be introduced in accordance with this view. The Minister also presented a memorandum drawn up by the drafters of the Bill which:

- 55.1. outlined the impact that various systems had on representation and how 'wasted votes' could be minimised;
- 55.2. suggested that the Bill should follow the precedent set in the Kenya Elections Act 42 of 2011 which restricted the ability of members of political parties to run as independent candidates as it avoided the issues of running as an independent candidate following internal issues within political parties;
- 55.3. advised that the precise threshold of supporter numbers and monetary deposits would have to be carefully chosen to strike the appropriate balance between facilitating participation of serious independent candidates while limiting the number of independent candidates who could contest the election and avoid practical difficulties.

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The memorandum by the drafters of the Bill was attached to the Minister's letter dated 29 November 2021, and was previously annexed as "NM21".

56. The Portfolio Committee was advised by the Minister that Parliament was still waiting on the State Law Advisor to provide a legal opinion confirming that the proposed Bill was in order and constitutionally compliant so that the Minister could introduce the Bill in Parliament. The Committee concluded that once the Bill was introduced, a roadmap would be developed expeditiously to delineate how the Committee would conduct public hearings while still attempting to meet the deadline set by the Constitutional Court. The minutes of the Portfolio Committee meeting of 7 December 2021 was not available, but the recording of the meeting is accessible online at <https://www.youtube.com/watch?v=p-rKbLMGXpQ>.
57. While there was indeed a delay before the Minister could introduce the Bill in Parliament, Parliament understands that the Minister clearly could not proceed to introduce a Bill which was not sanctioned by Cabinet. The Rules of Parliament itself precluded the Minister from doing so. In this regard, rule 159(1) of the Joint Rules of Parliament provides that:

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*"A Cabinet member ... who intends introducing a Bill in the Assembly or who initiates the introduction of a Bill in the Council, must as soon as possible after the Bill has been approved by Cabinet, submit to the Speaker and the Chairperson of the Council –*

- (a) *the draft of the proposed Bill as approved by Cabinet, whether or not the draft has been legally or technically formalised as a proper draft Bill; and*
- (b) *a memorandum explaining the objects of the proposed legislation."* (emphasis added)

58. This is confirmed in Rule 271 of the National Assembly Rules which provides that:

*"A Cabinet member or Deputy Minister intending to introduce a Bill in the Assembly must, as is set out in Joint Rule 159, before the Bill is introduced submit to the Speaker —*

- (a) *the draft of the proposed Bill as approved by Cabinet, whether or not the draft has been legally or technically formalised as a proper draft Bill; and*
- (b) *a memorandum explaining the objects of the proposed legislation."*

59. It is for the Executive to explain to this Court of any delays or obstacles faced when drafting the Bill and taking it through the various Cabinet processes before it was approved to be introduced in the Assembly.

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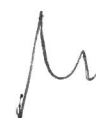
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**THE INTRODUCTION OF THE ELECTORAL AMENDMENT BILL [B1-2022]  
AND THE PROGRESS MADE BY PARLIAMENT THUS FAR**

**The introduction of the Bill as a section 76 Bill**

60. The Bill was introduced by the Minister as a section 76 Bill in the National Assembly on 10 January 2022. The Bill is annexed hereto as "**NM22**".
61. In the Memorandum to the Bill, the State Law Advisors and the Department expressed the view that the Bill is a section 76 Bill as it in a substantial manner affects the interests, concerns and capacities of the province in that:
- 61.1. clause 31A(1) provides for the nomination of independent candidates and provides that a person may be nominated to contest an election as an independent candidate in a region for the National Assembly or for a provincial legislature if that person is ordinarily resident in the region or province concerned; and registered as a voter on the segment of the voters' roll for the region or province concerned.

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- 61.2. Clause 31B(1) provides that a person may contest an election as an independent candidate only if that person is nominated on a prescribed form and that form is submitted to the Commission by a specific date and is accompanied by, among other requirements, a completed prescribed form, with at least the prescribed minimum number of signatures of voters whose names appear on the segment of the voters' roll for the region or province in which the candidate is standing for election.
62. Immediately when a Bill is introduced, it is submitted to the Joint Tagging Mechanism for tagging to confirm whether it is a section 74, section 75 or a section 76 Bill.
63. After studying the Bill and based on legal advice, the Joint Tagging Mechanism, which is comprised of the Speaker, the Chairperson, the Deputy Speaker and Deputy Chairperson of the NCOP, determined that the Bill was actually a section 75 Bill.
64. The Joint Tagging Mechanism subsequently tagged the Bill as a section 75 Bill given that it does not regulate any of the matters listed in schedule 4 to the Constitution. A copy of the legal advice provided to the JTM on the

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proposed classification of the Bill as a section 75 Bill, is attached hereto as “**NM23**”.

65. At a minimum, when a Bill is introduced in the Assembly, to fulfil its constitutional obligations to facilitate public involvement, the Assembly would need at least eight weeks to process and pass this Bill. After the Assembly passed the Bill, it would need to be referred to the NCOP which would require a further minimum of six weeks to process the Bill. Should the NCOP make any amendments to the Bill, the Bill would need to be referred back to the National Assembly for its consideration.
66. The above period is often lengthier as it is also subject to compliance with the directions by this Court in *Doctors for Life International v the Speaker of the National Assembly and Others* and in *South African Veterinary Association v Speaker of the National Assembly and Others*.
67. In *Doctors for Life International*, this Court pointed out that the nature and importance of the Bill, the impact of the Bill and the degree of public interest, are relevant factors which determine the degree and extent of public involvement required and whether or not Parliament acted reasonably to facilitate such public involvement. The above periods may therefore need to be extended in the Assembly and the NCOP given the

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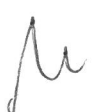


degree of public participation required. This can only be gauged once public submissions have been received and considered.

68. The minimum timeframes referred to above are also subject to the further variability in terms of the recent judgment of this Court in *South African Veterinary Association v Speaker of the National Assembly and Others* which held that where further amendments are proposed in the public participation process, sections 59(1) and 72(1)(a) of the Constitution require that the proposed changes again be made subject to further public participation. Should this occur in *casu*, it will considerably extend the length of the legislative process. Given that since this judgment, Parliament has not had much experience with a situation where there is a court-imposed timeframe looming, Parliament is at present unable to accurately gauge the length of the time needed, but it will ensure that the Bill is passed before 10 December 2022.

#### **The Portfolio Committee meeting of 8 February 2022**

69. The Minister also advised the Portfolio Committee that the Bill could not be introduced until the Office of the Chief State Law Advisor certified that the Bill was constitutionally compliant and could be introduced in the Assembly. The Minister confirmed that once this was done, the Bill was certified and



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published in the Government Gazette on 31 December 2021 and thereafter introduced in the National Assembly on 10 January 2022.

70. The Minister made a detailed presentation on the Bill as introduced. This presentation is attached hereto as "**NM24**".
71. At this meeting, members expressed concern that Parliament only had four-months to complete its deliberations on the Bill and it was still required to facilitate public involvement. As such, the Committee resolved that the Constitutional Court be approached for an extension that would allow Parliament sufficient time to consider this critical Bill in a manner consistent with the Constitution.
72. Parliament's Legal Services advised the Committee that it was instructive to determine whether the remaining time was sufficient to engage in a meaningful public participation process and that should an extension be required, an application must be made expeditiously.
73. It was resolved that the Portfolio Committee would interact with parliamentary staff to develop a programme of action to ensure that adequate public involvement in the Bill would take place. The Portfolio Committee minutes of 8 February 2020 was not available at the time of

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filing this application, but the recording of the meeting is accessible online at <https://www.youtube.com/watch?v=6RXxn4bhNts>.

## **CURRENT PROGRESS ON THE BILL**

### **The facilitation of public participation and deliberations by the Portfolio Committee**

74. The Bill is currently before the Portfolio Committee for consideration. The PC has already held extensive public engagements on the Bill and interested parties were invited to make submissions on the Bill.


75. Immediately upon the Bill being referred to it, the Portfolio Committee published its call for written and oral submissions on the Bill. In this regard on 1 and 2 March 2022, the Portfolio Committee heard oral submissions from 20 civic organisations and individuals. This included:

75.1. One South Africa Movement;

75.2. the Africa School of Governance;

75.3. the Congress of South African Trade Unions;

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- 75.4. Organisation Undoing Tax Abuse;
- 75.5. Mr Zolani Zonyane;
- 75.6. the Citizen Parliament First Nation;
- 75.7. the New Nation Movement;
- 75.8. the Abatsha Force of Change;
- 75.9. the Indigenous First Nations Advocacy of South Africa;
- 75.10. Council for the Advancement of the South African Constitution  
("CASAC");
- 75.11. the Inclusive Society Institute;
- 75.12. the Independent Candidate Association of South Africa;
- 75.13. the 70s Group; and
- 75.14. the South African Council of Churches.

76. Many of these organisations and individuals called on the Portfolio Committee to seek an extension from the Constitutional Court so that effect could be given to section 59 of the Constitution and consideration of whether it was possible to implement broader electoral change. While the minutes of these meetings are not available, recordings are accessible online at <https://www.youtube.com/watch?v=H5DIbaOF50s> and <https://www.youtube.com/watch?v=KMLXsmet5KU>.

77. CASAC, the first *amicus curiae*, subsequently wrote to the Portfolio Committee to express its concerns on the lack of public participation on the Bill. In this regard, CASAC accused the Portfolio Committee of:

*"limit[ing] engagement on the amendments to the Electoral Act" and that "in view of the hurried nature of the 'nationwide public hearings' we do not believe that the public have been adequately notified of these hearings, and nor have they been given sufficient time and information to make meaningful submissions".*

The letter from CASAC to the Portfolio Committee is attached as "NM25".

78. The Committee thereafter held further extensive public hearings across the country. In terms of the Portfolio Committee's programme for the first term of 2022, which is attached hereto as "NM26", the Portfolio Committee split

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up into two groups to ensure maximum reach for public involvement on the Bill. In this regard:

- 78.1. Group A, which consisted of 5 members of the Portfolio Committee conducted public hearings in the provinces of Limpopo, Mpumalanga, Gauteng, North West and the parts of the Western Cape;
  - 78.2. Group B which consisted of 6 members of the Portfolio Committee, conducted public hearings in Kwazulu-Natal, Northern Cape, the Free State, Eastern Cape and the remainder of the Western Cape.
79. Group A members conducted public hearings in:
- 79.1. Thohoyandou, Nkowankowa, and Groblersdal in Limpopo from 6 to 9 March 2022;
  - 79.2. Mbombela, Ermelo and Middleburg in Mpumalanga from 10 to 13 March 2022;

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- 79.3.     Randfontein, Germiston and Hammanskraal in Gauteng from 14 to 16 March 2022;
  - 79.4.     Mahikeng, Schweizer-Reneke and Potchefstroom in the North West from 17 to 19 March 2022; and
  - 79.5.     Mossell Bay in the Western Cape on 23 March
80.     Group B members conducted public hearings in:
- 80.1.     Richards Bay, Ladysmith and Pietermaritzburg in Kwazulu Natal from 6 to 9 March 2022
  - 80.2.     Upington, Kuruman and Kimberley in the Northern Cape from 10 to 13 March 2022;
  - 80.3.     Qonce, Gqeberha and Cradock in the Eastern Cape from 17 to 19 March 2022; and
  - 80.4.     Khayelitsha and Citrusdal in the Western Cape from 22 to 23 March 2022.

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81. The public hearings in the various provinces drew an overall attendance of 3396 individuals (recorded on attendance registers). This included both individuals and those representing communities and organisations. A total of 622 individuals were given opportunities to address the two groups of the Portfolio Committee.
82. The Portfolio Committee also received additional written submissions in support of the oral submissions made from interested parties. A comprehensive report on the public involvement will be available as of 3 May 2022 as indicated below. The Portfolio Committee's schedule on the Bill for the second term is as follows:
- 82.1. on 22 April 2022, the Department of Home Affairs and the Electoral Commission will respond to the draft public participation report on the Bill;
- 82.2. on 29 April 2022, Parliament's Legal Services will provide comments on any constitutional or legal issues, including on public participation on the Bill;
- 82.3. on 3 May 2022, the Portfolio Committee will consider the adoption of the public participation report on the Bill, consider and

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adopt the Motion of Desirability on the Bill, and thereafter conduct deliberations on the Bill;

82.4. on 10 May 2022, the Portfolio Committee will conduct further deliberations on the Bill;

82.5. on 13 May 2022, the Portfolio Committee will conduct clause by clause deliberations on the Bill;

82.6. on 17 May 2022 the Portfolio Committee will consider and adopt the A-list and the amended B version of the Bill

82.7. on 18 May 2022, the Portfolio Committee will adopt a report on the Bill and thereafter table its report with the National Assembly.

83. Once the Portfolio Committee has finalised its deliberations on the Bill, it will report thereon to the Assembly. The Bill will also be debated in a Second Reading debate and once adopted by the House, it will be transmitted to the NCOP, which will follow a similar process.

84. Given that the Bill impacts on our citizens, it is evident that the NCOP is obliged to undertake substantive public hearings in the various provinces.

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Again, the degree of public interest will be a major factor in determining the length of time needed to process the Bill.

85. Thereafter the Select Committee will report to the NCOP and the NCOP will thereafter adopt the Bill
86. Should the NCOP pass the Bill with amendments, the Bill would need to be referred back to the National Assembly which would need to consider the proposals by the NCOP and would need to pass the Bill again, with or without the amendments proposed by the NCOP.

#### CONDONATION

87. When the Executive did not introduce a Bill amending the Electoral Act timeously and in accordance with the proposed road map, on 10 November 2021 Parliament's Legal Services wrote to the Department to request it to make application to this court for an extension of the suspension of invalidity of the Electoral Act. In this regard Parliament advised the Director General to:

*"... kindly indicate whether the Department is considering an application for the extension of the date by which the defect must be corrected. We are of the view that the Department is in a better position to, in such application, advise the Constitutional Court of all*

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*steps taken to date to address the Constitutional Court judgment, since it was delivered."*

The letter to the Department was previously attached as "NM16".

88. As the Executive did not respond or make an application for an extension of the period of suspension of the invalidity of the Electoral Act, on 23 February 2021, Parliament instructed the State Attorney to brief the same counsel that represented it in the New Nation Movement matter, to make the application on Parliament's behalf.
89. On 15 March 2022, Advocate Wim Trengrove SC indicated that he was unavailable to take on the brief. Due to the new processes introduced by the Office of the State Attorney in order to comply with National Treasury Regulations, the State Attorney was unable to appoint another Senior Counsel expeditiously.
90. I am advised that in *Minister of Justice and Correctional Services v Ramuhovhi and Others* (CCT 194/16) this Court held that in an application for the extension of the suspension period, failing to approach Court timeously and "*a mere six weeks before the expiry of the suspension... is not desirable*".

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91. As this application is made just over eight weeks before the suspension of invalidity of the Electoral Act lapses, I am advised that it is prudent to seek condonation of this Court for the filing of this application.
92. It is respectfully submitted that Parliament intended no disrespect by filing this application when it did. I furthermore submit that no prejudice is caused to any of the parties in the matter or the electorate.

### CONCLUSION

93. I am of the view that this affidavit has fully explained the position of Parliament and why we were unable to process the Bill to meet the deadline set by this Court.
94. I have set out the complex nature of the amendment to the electoral system and have unequivocally demonstrated that Parliament had acted in an exemplary manner. In less than a fortnight, the Portfolio Committee had called for a briefing on the matter and worked out a roadmap to ensure that the Bill would be passed as expeditiously as possible.

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95. When the Bill was not introduced timeously, the Portfolio Committee and I, as well as parliamentary officials did our utmost to call upon the Executive to expedite the introduction of the Bill in Parliament.
96. I am certain that the Minister will elaborate further on the difficulties he faced in getting the Bill approved by Cabinet before it could be introduced in Parliament.
97. It is submitted that, given that there is no prejudice to any parties in this matter, the Court will favourably consider the request to grant Parliament the six-month extension required so that the NCOP can adequately conduct public hearings and deliberate meaningfully on the Bill. The extension is required simply to ensure that the suspension of the invalidity is extended to allow sufficient time for Parliament to process the Bill.
98. To the extent that Parliament may have caused any inconvenience to this Court, I also offer my apologies on behalf of Parliament and request that any lateness in the filing of this application be condoned.

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99. It is therefore submitted that it would be just and equitable for this Court to grant Parliament until 10 December 2022 to pass the amendment to the Electoral Act.

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**DEPONENT**

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at ORTIA on this 21 day of **April 2022** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

*[Signature]* 7072796-1  
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**COMMISSIONER OF OATHS**

