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9 November 2022

TO: Ms Shahidabibi Shaikh, MP
Chairperson at Select Committee on Security and Justice
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AND TO: Gurshwyn Dixon, Committee Secretary
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Dear Honourable Ms Shahidabibi Shaikh

NCOP CALL FOR SUBMISSIONS ELECTORAL AMENDMENT BILL [B 1B - 2022] (NATIONAL ASSEMBLY – SEC 75)

1. The Minister of Home Affairs has initiated the Electoral Amendment Bill B1 of 2022, which seeks to accommodate independent candidates in the existing electoral system with minimal changes to the governing legislation.

2. This submission speaks to the invitation by the National Council of Provinces (NCOP), directed to the members of the South African public to comment on the Electoral Amendment Bill [B 1B - 2022] (National Assembly – sec 75), as formally introduced to Parliament on 10 January 2022, and as adopted by the National Assembly on 20 October 2022. This submission represents the opinion of the Organisation Undoing Tax Abuse (OUTA).

OUTA'S INTEREST IN THE BILL

3. This submission is guided by Constitutional Court's declaration that the Electoral Act 73 of 1998 has been found to be unconstitutional. This judgment was made June 2020, in *New Nation Movement NPC v President of the Republic of South Africa*, wherein the Organisation Undoing Tax Abuse (OUTA) was *amicus curiae*[1]. OUTA supported the Applicants' argument that the Constitution requires the adoption of an electoral system, at the national and provincial level, which permits candidates to stand for public office independent of a political party. A constitutionally compliant electoral system, regardless of the form that it takes, must create room for Members to exercise these constitutional rights fully, in their individual and representative capacities.

4. On 28 February 2022, OUTA submitted its written comments on the Bill, followed by the oral presentation to the Portfolio Committee of Home Affairs on 1 March 2022.

[1] CC case no: 110/19; WCHC case number: 17223/18

5. On 16 September 2022, OUTA submitted its commentary in response to the Readvertisement of the Electoral Amendment Bill.

6. Since the submissions and oral presentation, OUTA has remained active in its endeavours to raise awareness on the Electoral Amendment Bill by engaging with the public and other Civil Society Organisations (CSOs).

THE LACK OF PUBLIC PARTICIPATION AND CLASSIFICATION OF THE BILL

7. As indicated in the submission and presentation of commentary on the Electoral Amendment Bill (B1-2022), OUTA remains concerned over the lack of public participation and education campaigns. Several requests from CSOs, which OUTA has endorsed, have been directed to the Portfolio Committee. The requests were to collaborate on the concerns raised and to recommend changes that will be within the interest of the South Africans. The Portfolio Committee has not reciprocated these requests by extending an invitation and have instead decided to ignore these calls.

8. Not attending to these requests for additional input between April and October 2022, have resulted in the Electoral Amendment Bill [B 1B - 2022] – tagged as a Section 75 Bill – that still fails to meet constitutional viability.

9. OUTA is in support of other interested parties' submissions that call for the bill to be reclassified as a Section 76 Bill. The bill is currently classified as a Section 75, which means that it does not affect provinces. However, this is substantially incorrect since the national and provincial elections occur on the same day, completed at the same time by a voter, and the National Assembly and National Council of Provinces constituted by the results of these elections. The Electoral Act of 1998 affects elections on national and provincial levels, and therefore any amendments to the Electoral Act 1998 will impact national and provincial elections.

GENERAL PROBLEMATIC ELEMENTS IDENTIFIED IN THE BILL

10. OUTA has procured legal counsel that the Bill is problematic in several regards[2]:

10.1. **Unequal Proportional Representation:**

The MAC produced a report setting out two options for electoral reform, which permitted independent candidates to run for national and provincial elections. The drafters of the Electoral Amendment Bill have then given effect to the minimalist option set out in the MAC's report which seeks not to disrupt the current system and merely slot in independent candidates to adhere to the judgment. However, the practical impact of such a minimalist

[2] Please also refer to the Memorandum submitted together with the letter.

approach equally yields minimalist results in respect of the independent candidates. The MAC report describes the minimalist option as follows:
"This option entails modifying multi-member electoral system to accommodate independent candidates in the national and provincial elections without many changes in the legislation, including not interfering with the constitutional requirement relating to general proportionality".

It is submitted that the amendment sought is merely to accommodate independent candidates and not to the extent that it renders it possible for such candidates to hold office as they are empowered by section 19 (3)(b). Further the amendment interferes with the constitutional requirement relating to general proportionality. Independents are expected to jump over mathematical quota calculations only to retain a single seat, even if they receive a majority portion of the total votes by the electoral.

10.2. Contesting of seats:

Independent candidates can only contest the 200 regional seats which makes up the other half of the 400-seat National Assembly. They can also only contest seats in one region. This limitation is not extended to political parties who can contest seats across all regions.

10.3. Wasted votes:

Once an independent meets the relevant quota for a seat, they will be elected to the National Assembly. Once an independent candidate has secured a seat, any additional votes they receive will be discarded and a new quota will be used to determine the proportional representation of the political parties and the allocation of seats to them[3]. Such an approach wholly limits proportional representation by the discarding of votes in favour of the independent candidate which is in contrast to the wish of the electorate. Political parties' surplus votes[4] once they reach the relevant quota is not discarded, the equal playing field in rendering free and fair elections is then discarded along with the surplus votes for independents.

10.4. Inequality and impediment to human dignity:

Discarding surplus votes impedes the notion that "every vote counts". It is in direct contravention of the right of citizens' votes to count equally, as well as the proportionality between vote share and seats. It is unconstitutional insofar the right to vote as captured in section 19(3)(a) of the Constitution, which must be interpreted as a right to a vote that counts equally or is of equal value to the votes of others[5][6]. Failure to ensure representation according

[3] See Sections 6 & 7 of Schedule 1A
[4] See Sections 8-14 of Schedule 1A
[5] This is equally supported by international law whereby the principle of equality suffrage is enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights
[6] Herein it must be noted that the possibility of a surplus vote transfer as proposed in the Electoral Laws

to votes cast and proportionality of votes received, not only fails to acknowledge the will of the citizens, but also undermines the value of these votes. This is unconstitutional.

11. In consideration of counsel's advice, in summary:

11.1. In paragraph [112] of the CC Judgment, the court concluded that in so far as it makes it impossible for candidates to stand for political office without being members of political parties, the Electoral Act limits the section 19 (3) (b) right.

11.2. The impugned sections of the Electoral Act were based on party proportional representation system, which cannot survive the constitutional challenge to the Elections Act, in so far as it makes it impossible for candidates to stand for political office without being members of political parties.

11.3. There is a discrepancy in requirements between independent candidates and political parties when contesting elections. If the understanding of Schedule 1A is correct, justification for the continuation of such a system, now giving independent candidate a seat, is not based on the proportion of the votes received. Independents may be recognized as the judgment demanded however, the right to contest elections without proper arrangements[7] for its exercise, renders it empty and useless.

11.4. If Schedule 1A limits the seat of independent candidates to only one, the question is whether the limitation is reasonable and justifiable.

SPECIFIC PROBLEMATIC ELEMENTS IDENTIFIED IN THE BILL

12. OUTA finds the following additional provisions problematic:

12.1. Part 3A, Independent Candidates: Nomination of independent candidate

31A. (1) A person may be nominated to contest an election as an independent candidate— in one or more regions for the National Assembly but may be elected to only one seat in the National Assembly.

The concern here is that should independent candidates contest more than one region for a seat in the NA, the votes cast in the regions not reaching the highest figure, will be discarded. Such an approach wholly limits proportional representation by the discarding of votes in

Second Amendment Bill B34 of 2022 (Private Member's Bill as submitted by Mr MGP Lekota, MP), gives better effect to the principle that each citizen has an equally effective voice in the election of representatives to our legislatures and achieves a higher degree of proportionality between vote share and seats.

[7] Should an independent seek to contest and election, they need to meet two requirements 1) the signature requirement, and 2) the deposit requirement. The failure to comply to both requirements will result in the disqualification from contesting elections. It must be noted in this instance that in local government elections, as well as in national and provincial elections, political parties are required to pay a deposit to contest the elections, but the signature requirement is not applicable. This is highly problematic since it imposes unfair and unequal requirements on an independent candidate which limits their constitutional right. This is in direct contradiction with political parties who do not need to meet the signature requirement, but who also have more organisation and financial support, particularly insofar as the Political Party Funding Act makes provision for funding of political parties but not to independents.

favour of the independent candidate which is in contrast to the wish of the electorate when they cast their votes in other regions.

12.2. Requirements for independent candidates to contest elections

31B. (3) The following must be attached to a nomination when it is submitted:
(a) A completed prescribed form confirming that the independent candidate has submitted, in the prescribed manner, the names, identity numbers and signatures of voters whose names appear on the segment of the voters' roll for that region or province in which the independent candidate is standing for election and who support his or her candidature, totalling at least 20 percent of the quota for a seat that was required for a seat in the previous comparable election;
(b) a deposit equal to a prescribed amount, payable in the prescribed form and manner.

The concern here is regards to the signatures of voters who support the candidate, totalling at least 20% of the quota for a seat. This is a barrier to entry. For example, should the quota be 45,000 seats, the independent candidate will require 8,800 signatures. A political party only requires 1 000 registered voters to sign the Deed of Foundation. This blatantly unfair. Together with this, should the deposit requirement not be clarified, it may be expected of the independent candidate to pay the same amount as a political party, who has greater access to financial resources. These requirements place an unfair burden on the independent candidate.

12.3. Schedule 1A: System of Representation in National Assembly and Provincial Legislatures (Section 57A) National Assembly

12.3.1. Regional seats

(5)(f) Where an independent candidate's award in terms of paragraph (e) exceeds one seat, the candidate is awarded one seat as his or her provisional allocation. The excess seats must be dealt with in terms of item 7.
(5)(g) If the same independent candidate is provisionally allocated a seat in more than one region, the candidate is awarded the seat in the region where he or she received the most votes, as his or her provisional allocation. The excess seats in other regions must be dealt with in terms of item 7
(5)(k) Where an independent candidate is contesting in more than one region, the votes received across regions for that independent candidate may not be aggregated in order to obtain a seat in the National Assembly.

12.3.2. Insufficient names on party lists and independent candidates provisionally allocated more than one seat

(7)(2)(a) If, following the provisional allocation in item 5, an independent candidate stands to be allocated more than one seat in a region, he or she is only allocated one seat and forfeits any additional seats.
(7)(2)(b) If, following the provisional allocation in item 5, an independent candidate stands to be allocated a seat in more than one region, he or she is only allocated a seat in the region where he or she received the most number of votes and shall forfeit any additional seats.

(7)(3) In the event of any forfeiture of seats in terms of subitem (1) and subitem (2) affecting the provisional allocation of seats in respect of any particular region in terms of item 5(e), such allocation must be recalculated as follows (see sections a-f).

The concern here is that should independent candidates contest more than one region for a seat in the NA, the votes cast in the regions not reaching the highest figure, will be discarded. Such an approach wholly limits proportional representation by the discarding of votes in favour of the independent candidate which is in contrast to the wish of the electorate when they cast their votes in other regions. In addition, once a seat is forfeited and a recalculation takes place, based on the proposed recalculation method, the seat is awarded to an eligible independent candidate or party – with the next highest votes – that contested the preceding election. This means that the seat may go to a political party, not with certainty to another independent candidate. This goes against the wishes of the voter who specifically wanted an independent candidate to represent them, not a political party.

RECOMMENDATIONS

13. In recognition of the foregoing considerations, OUTA recommends the following:

13.1. Visibly prioritise education campaigns informing the public of the content, timelines and implications of the amendments to the Electoral Act 73 of 1998;

13.2. Actively engage with civil society organisations to promote awareness of citizens' right to vote, the reasons for voting, and to improve voter turnout and responsiveness;

13.3. Critically review the Bill in light of submitted public commentary and actively make changes based on sound principles and constitutional values;

13.4. Recognise the democratic rights of every citizen whose vote has a right to count, and,

13.5. Respect the right of independent candidates on the basis of equality and fairness in proportional representation on the same constitutional terms afforded to political party candidates.

CONCLUSION

14. Being free of the shackles of association to a political party makes independent candidates directly answerable to their constituencies and not to a political party. The amendment bill as it currently stands negates the possibility of maximum participation of independents in the National Assembly and Provincial Legislatures in line with votes they receive in totality, reflecting true and rational proportionality.

15. Unless independents assimilate to the structures of political parties, denying independents protection in line with the judgment and the Constitution, their ascension to stand for public

is limited as the system continues to favour political parties and ultimately interferes with the constitutional requirement relating to general proportionality.

16. Every adult South African has the right to stand for public office and contest elections as an individual and if elected, to hold the office into which she or he is elected. Together with this, every vote ought to count and not be wasted.

17. It is the right of every citizen to cast a vote for a representative whom they feel they can hold to account. MPs ought to be answerable to their constituency, not their political party. Those members of the public that vote for an independent candidate – because they do not wish to vote for a political party – ought to be accommodated in a fair and equal manner (not by casting their votes away when the quota threshold has been reached).

18. This is an opportune time to realise the desired hybrid electoral system whereby MPs – as public representatives – are elected directly by a constituency and others are named through proportional representation part lists. We request the Committee to consider a mixed constituency and proportional representation (PR) list system at a national and provincial level that includes the right of independent candidates to contest elections on an equal footing with candidates from political parties.

19. We trust these comments and recommendations are received with due consideration, and we look forward to receiving your response.

Yours Sincerely,

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