



CONSTITUTIONAL COURT OF SOUTH AFRICA

New Nation Movement NPC and Others v President of the Republic of South Africa and Others

CCT 110/19

Date of Hearing: 15 August 2019

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 15 August 2019 at 10h00 the Constitutional Court will hear an application for leave to appeal directly to it against the judgment and order of the High Court of South Africa, Western Cape Division, Cape Town (High Court). The High Court dismissed an application by the applicants to have the Electoral Act 73 of 1998 declared constitutionally invalid to the extent that it does not provide for individual candidates to stand for election, and if elected, hold office in the national and provincial legislatures.

The matter was first heard by the Constitutional Court on an urgent basis on 2 May 2019. The Court declined to hear the matter on an urgent basis and postponed it for hearing on 15 August 2019.

Before the Constitutional Court, the applicants will argue that the Electoral Act is unconstitutional because it does not allow independent candidates to stand for, and hold office in the national and provincial legislatures, despite the Constitution's text and purpose giving citizens the right to do so. They will submit that the Electoral Act is unconstitutional because section 19(3)(b) of the Constitution gives citizens the right to participate in elections as independent candidates and says nothing about political parties. By forcing an independent candidate to become a member of a political party before being elected into provincial and national office, the Electoral Act is attaching unconstitutional strings to the right in the Constitution.

The applicants will further argue that it is no answer to would-be candidates to form their own parties if they do not wish to join an existing one. This is so because this skips over the fundamental and necessary question whether one has a right to contest an election as an

independent candidate. If one has such a right, they cannot be forced to form their own political party as a consolation. The applicants will also argue that an exclusive political party system was never meant to be permanent, and this factor has been overlooked.

On the other hand, the second respondent, the Minister of Home Affairs, will argue that nowhere does the Constitution expressly state that independent candidates must be allowed to stand for election at every level of government. Instead, the Constitution envisages a multi-party system of elections. The Minister will further argue that on a purposive approach, section 19(3)(b) was not meant to accommodate independent candidates on a constituency-based system. The Minister will further argue that the applicants are not barred from joining or forming their own political parties in exercising their rights under the Constitution. If requiring them to join a party is a limitation, then such a limitation is justifiable.

The third respondent, the Independent Electoral Commission of South Africa, echoes the Minister's argument. It further argues that, while it may be constitutionally permissible for Parliament to make it possible for independent candidates to stand for provincial or national office, it is not constitutionally obligatory for Parliament to do so. Furthermore, the question as to which electoral system is best for South Africa is political, not legal. Therefore, that question is best left to Parliament, not the courts. If courts are the right platform to answer this question, the applicants must go further than demonstrating that the current electoral system gives rise to negative consequences. They must demonstrate that the Constitution forbids the current electoral system.

The President of the Republic of South Africa and the Speaker of the National Assembly have filed notices to abide the decision of the Court. The Council for the Advancement of the South African Constitution (CASAC) has been admitted as *amicus curiae* (friend of the Court). CASAC will argue that Parliament has a responsibility to consider the recommendations of its High Level Panel which recommended, amongst others, that "Parliament should amend the Electoral Act to provide for an electoral system that makes Members of Parliament accountable to defined constituencies on a proportional representation and constituency system for national elections".

The Organisation Undoing Tax Abuse (OUTA) has applied to be admitted as a second *amicus curiae*. A decision on OUTA's application will be made after the hearing. However, OUTA has been allowed to make oral submissions on the day of the hearing. OUTA will argue that an electoral system that forces citizens to join or form a political party in order to stand for office necessarily circumscribes the right to freedom of association. OUTA will also argue on the source and content of the constitutional values of transparency and accountability and their respective links to the constitutional requirement for independent candidacy in the electoral system.