

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case no: **110/19**
WCHC case number: **17223/18**

In the application of:

ORGANISATION UNDOING TAX ABUSE

Applicant for leave to
intervene as *amicus curiae*

In re:

NEW NATION MOVEMENT NPC

First Applicant

CHANTAL DAWN REVELL

Second Applicant

GRO

Third Applicant

**INDIGENOUS FIRST NATION ADVOCAY SA PBO
(IFNASA)**

Fourth Applicant

and

**THE PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

THE INDEPENDENT ELECTORAL COMMISSION

Third Respondent

THE SPEAKER OF THE NATIONAL ASSEMBLY

Fourth Respondent

NATIONAL COUNCIL OF PROVINCES

Fifth Respondent

and

**COUNCIL FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN CONSTITUTION**

Amicus curiae

FOUNDING AFFIDAVIT:

APPLICATION TO INTERVENE AS AMICUS CURIAE

I, the undersigned,

STEFANIE FICK

do hereby make oath and say that:

1 INTRODUCTION

1.1 I am the Chief Legal Officer and Executive Director of the Organisation Undoing Tax Abuse (“**OUTA**”), a non-profit company with registration number 2012/064213/08. I am duly authorised to bring this application on behalf of OUTA. I attach a resolution of the OUTA Executive Committee to this effect marked “**OUTA1**”.

1.2 The facts herein contained are within my personal knowledge, unless otherwise indicated by the context, and are to the best of my belief true and correct.

1.3 Any legal submissions that I make are based on advice of OUTA’s legal representatives.

1.4 OUTA’s wishes to intervene in this matter as an *amicus curiae* with the view to making written and oral submissions to this Court, the latter on the day of hearing of the matter. OUTA also seeks to adduce evidence by placing two reports before this Court. This affidavit is filed in support of the OUTA’s application for admission and its application to adduce evidence.

2 OUTA’S BACKGROUND AND INTEREST IN THE MATTER

2.1 OUTA is a Non-Profit Company (“**NPC**”) incorporated in terms of the Companies Act, 2008. OUTA has been approved as a public benefit organisation (“**PBO**”) under section 30 of the Income Tax Act,

1962. OUTA's NPC and PBO certificates are annexed hereto as, "**OUTA2**". OUTA is funded by ordinary South Africans, as well as small and medium-sized local businesses who believe in and support its civil activism.

2.2 OUTA was established on 12 March 2012 under the name "The Opposition to Urban Tolling Alliance". Its original purpose was to represent the interests of bodies and groups in taking lawful steps to intervene in, and oppose, Gauteng's e-toll scheme.

2.3 In 2016, OUTA changed its name to "Organisation Undoing Tax Abuse", and expanded its objectives. Its core aim is now to ensure that tax revenue is expended in a frugal and lawful manner, unimpeded by the inappropriate use of state authority and power. Promoting public accountability and transparency is central to this aim.

2.4 OUTA is mandated, through its Memorandum of Incorporation ("**MOI**"), to challenge any policies, laws or conduct that offends the Constitution. OUTA's MOI is annexed hereto and marked, "**OUTA3**".

2.5 Since 2017, OUTA has engaged in a range of activities and interventions to promote public accountability. These include:

2.5.1 monitoring deliberations in Parliament, and its portfolio and select committees, and engaging with its members, to ensure that issues of accountability and oversight are considered and acted upon;

- 2.5.2 keeping abreast of new legislation and providing comments on draft legislation that is relevant to OUTA's mandate of creating accountability, transparency, rational policy and good governance in the areas of transport, energy, water and sanitation, environmental issues;
- 2.5.3 making submissions to various Commission of Inquiry, Ministries, regulators and the South African Human Rights Commission on issues relating to accountability, transparency and good governance in the areas of transport, energy, water and sanitation, environmental issues;
- 2.5.4 investigating allegations of corruption within the public sector and collecting evidence and laying criminal charges against state officials who have been involved in corruption, fraud and misappropriation of public funds;
- 2.5.5 gathering evidence and laying complaints against private professionals who have been involved with corruption with various oversight bodies including the Companies and Intellectual Property Commission, the South African Institute of Chartered Accountants, the Independent Regulatory Board for Auditors, Parliament's Ethics Committee and the Council for Debt collectors; and

- 2.5.6 advocating for public participation in government processes and engaging with local communities to encourage active citizenry.
- 2.6 OUTA's interest in this litigation aligns with that strategic objective. It submits that to be constitutionally compliant, the electoral system must promote transparency and public accountability of the Legislature, and of each member of parliament who serves as part of it.
- 2.7 OUTA's focus and experience mean that it is well placed to make submissions in this matter. I respectfully submit that it is appropriately admitted as an *amicus curiae*.

3 CONSENT TO INTERVENE

- 3.1 In terms of Rule 10(1) of this Court's Rules, OUTA's attorneys addressed a letter to all the parties on 19 July 2019, requesting their written consent to its intervention as an *amicus curiae* in the matter. They were afforded until Thursday 25 July 2019 to provide such consent. I annex a copy of the letter as "**OUTA4**".
- 3.2 The Second to Fourth Applicants have provided their consent, which I annex hereto as "**OUTA5**". The First Applicant provided their consent and shortly thereafter withdrew such consent and noted that they will abide by the court's decision in this regard. I annex this correspondence hereto as "**OUTA6**". We have not received any response from the Respondents.

3.3 Leave is therefore being sought from the Chief Justice, in terms of Rule 10(4), to admit OUTA as an *amicus curiae*, and to afford it an opportunity to make written and oral argument, upon such terms and conditions and with such rights and privileges as he decides are appropriate.

4 POSITION ADOPTED BY OUTA

4.1 OUTA supports the Applicants' argument that the Constitution requires the adoption of an electoral system, at the national and provincial level, that permits candidates to stand for public office independent of a political party.

4.2 It is OUTA's submission that:

4.2.1 Members of the Provincial and National Legislatures ("**Members**") are bearers of the rights to freedom of association, conscience, expression and political choice. They exercise these rights – and, in particular, the right to make political choices – in the discharge of their parliamentary functions, both in their own right but also on behalf of the electorate that they represent.

4.2.2 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. Our current electoral system does not fully realise their right to do so because it provides for the

election only of Members who are primarily representative of, and beholden to, the political party to which they belong.

4.2.3 In addition, the Constitution entrenches the values of transparency and accountability. These constitutional values are only properly given effect to through an electoral system that permits some candidates to be directly elected, independently of any political party

4.3 Consequently, if it is to be admitted as an *amicus curiae* in the matter, OUTA will advance argument addressing the following:

4.3.1 The content and scope of the right to freedom of opinion and political choice, and the right to freedom of association, under domestic and comparable foreign law;

4.3.2 The source and content of the constitutional values of transparency and accountability; and

4.3.3 Their respective links to the constitutional requirement for independent candidacy in the electoral system.

4.4 Having perused the Applicants' and Respondents' written arguments, it is clear that OUTA'S proposed submissions will cover different topics to those addressed by the parties. OUTA respectfully submits that its submissions will also be directly relevant to the issues before this Court and useful in the determination of the matter.

5 APPLICATION TO ADDUCE EVIDENCE

- 5.1 OUTA also seeks leave to lodge documents in terms of Rule 31 to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear in the record.
- 5.2 In particular, OUTA seeks leave to lodge the Report of the Electoral Task Team of January 2003 (the “Van Zyl Slabbert Report”) and the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change dated November 2017. These Reports are attached hereto as Annexures “**OUTA7**” and “**OUTA8**”, respectively.
- 5.3 These Reports are referred to by the parties in their submissions. The Van Zyl Slabbert Report is cited in footnote 3 of the New Nation Movement’s written submissions and paragraphs 30 to 33 of the Second to Fourth Appellants’ written submissions. The High Level Panel’s report is also cited in paragraph 36 of the latter’s written submissions.
- 5.4 The content of the reports are common cause and are not controversial. The Electoral Task Team was established to “draft the new electoral legislation required by the Constitution” in order to prepare for the National and Provincial elections of 2004 or any earlier election. The Van Zyl Slabbert report summarises the contributions made in the public participation process and records the specific proposals made by the Task Team regarding the preferable electoral system. The High Level Panel Report contains the Panel’s assessment of the content and implementation of legislation passed since 1994 (including that governing

elections) in relation to its effectiveness and possible unintended consequences.

5.5 In the circumstances, it is in the interests of justice that these Reports be placed in evidence before the Court.

6 **CONDONATION**

6.1 The Respondents filed their most recent written argument on 8 July 2019, as per the court directive dated 2 May 2019. In terms of Rule 10(5) of this Court's Rules, the prescribed 5-day time period for an *amicus curiae* to file written submissions expired on 15 July 2019.

6.2 This application will be filed on 29 July 2019, being 10 days after the prescribed period. OUTA apologises for the delay and seeks condonation for it. The reasons for the application being made at this stage is as follows:

6.2.1 On Friday 5 July 2019, OUTA's Executive Committee took the decision that OUTA should seek to intervene as *amicus curiae* in the matter because, in its view, OUTA has useful submissions that could assist the court in making its findings.

6.2.2 OUTA's attorneys of record are acting on a pro bono basis, and had to secure approval from their Management Committee before accepting any significant public interest litigation mandate. Approval was first sought on 8 July 2019 and was received on 9 July 2019.

- 6.2.3 Counsel, who are also acting on a pro bono basis, were secured on 11 July 2019, briefed on 12 July 2019 and a consult was scheduled for the first available date between all parties being 18 July 2019.
- 6.2.4 As pointed out at paragraph 3.1 above, correspondence requesting the parties' consent to OUTA's intervention as *amicus curiae* was sent on 19 July 2019, and the parties were afforded 5 days within which to answer. Their responses are consequently due by 25 July 2019.
- 6.2.5 OUTA's resolution confirming their ability to enter these proceedings was received on 26 July 2019.
- 6.2.6 This application will be served as soon as possible thereafter.
- 6.3 I attach the confirmatory affidavit of Laura Ashley Macfarlane, an associate at OUTA's attorneys of record, who can confirm the above version of events.
- 6.4 I submit that OUTA has acted as expeditiously as possible, and request that the Court condones its non-compliance with the time periods imposed by Rule 10.
- 6.5 OUTA is aware that the Council for the Advancement of the South African Constitution has been admitted as *amicus curiae* in this matter and has been directed to file submission by no later than 2 August 2019. Should this Court admit OUTA as an *amicus*

curiae OUTA will be able to file its submissions, by no later than 2 August 2019 as well.

7 PRAYER

7.1 For the reasons set out above, OUTA seeks to leave to be admitted as an *amicus curiae* and to make both written and oral representations in respect of the matter.

STEFANIE FICK

I certify that the deponent has acknowledged that she knows and understands the contents of this declaration and informed me that she does not have any objection to taking the oath and that she considers it to be binding on her conscience and that the deponent uttered the following words “I swear that the contents of this declaration are true, so help me God”. I certify further that the provisions of Regulation R1258 of the 21st July 1972 (as amended) have been complied with.

Signed and sworn to before me at **RANDBURG** on this the ____ day of July 2019.

COMMISSIONER OF OATHS