Chapter 10

Independent Candidates and Electoral Reform in South Africa: Striking a Balance between Sections 18 and 19 of the Constitution

New Nation Movement NPC v President of the Republic of South Africa[1]

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"In sum, choosing to associate is an exercise of the right to freedom of association. Choosing to dissociate from that which you earlier associated with is also an exercise of that right. Choosing not to associate at all too is an exercise of the right. A restraint on any of these choices is a negation of the right. It is axiomatic then that if

> the state compels an individual to associate when she or he does not want to, that limits the right to freedom of association. That must mean the reading of section 19(3)(*b*) contended for by the respondents results in a denial of the right to freedom of association" (*New Nation Movement* par 58–59).

Abstract

The *New Nation Movement NPC v President of the Republic of South Africa* case represents a watershed moment in South African constitutional jurisprudence that fundamentally transformed the country's electoral landscape. In a historic ruling, the Constitutional Court found that the Electoral Act 73 of 1998 was unconstitutional to the extent that it prevented adult citizens from standing as independent candidates in national and provincial elections. This landmark decision hinged on the court's novel interpretation of section 19(3)(*b*) of the Constitution, which guarantees every adult citizen the right "to stand for public office and, if elected, to hold office". The majority judgment held that this right must be read harmoniously with section 18, which protects freedom of association, concluding that compelling individuals to join political parties to contest elections infringes on both these fundamental rights. The court rejected arguments that other constitutional provisions, particularly those referring to a "multi-party system" or proportional representation, necessitated a party-only electoral system, finding instead that independent and party representation could coexist within the constitutional framework. This revolutionary interpretation required Parliament to amend the electoral system within 24 months, leading to significant electoral reforms that were implemented before the 2024 elections. Subsequent cases have built upon and refined this expanded definition of political candidature, addressing challenges in implementing the new electoral provisions. Despite the relatively minimal impact of independent candidates in the 2024 elections, the *New Nation Movement* judgment remains significant for its fundamental reinterpretation of political rights in the South African

Constitution, potentially reshaping the country's democratic landscape by diversifying political representation and enhancing voter choice beyond the traditional party-centric system.

10.1 Introduction

An effective and representative electoral system plays a crucial role in modern democracies, while a representative and responsible government is vital for maintaining the legitimacy of an elected government. Recent electoral reforms in South Africa have introduced independent candidates into the political arena, a significant departure from the traditional party-centric system. These reforms to the South African electoral system were necessitated by the ruling in *New Nation Movement NPC v President of the Republic of South Africa*, where the Constitutional Court ruled that the Electoral Act 73 of 1998 did not allow adult citizens to be elected as independent candidates to parliament or the provincial legislatures, violating section 19 of the Constitution of the Republic of South Africa, 1996. The court ruled that the rights to association and dignity should not be limited to political party members, and that the reference to "multi-party" democracy in section 1(*d*) of the Constitution does not necessarily exclude the participation of independent candidates but rather means that the state should not be a one-party state. The Constitutional Court ordered Parliament to amend the electoral system defects within 24 months, which legislation was approved by the National Assembly in October 2022 and became law in June 2023. The inclusion of independent candidates could promise to diversify political representation and enhance voter choice, but may present challenges in terms of implementation, voter education, and the dynamics of political competition. Furthermore, the new hybrid system does not provide a suitable mechanism to handle surplus votes for independent candidates. This chapter explores the significant impact that the *New Nation Movement* (CC) case has had on the South African electoral system and the impact and development of the principles of this case in subsequent judgments.

The case concerns a constitutional challenge to the Electoral Act[2] brought by several applicants, including New

Nation Movement NPC, Chantal Dawn Revell, GRO[3] and Indigenous First Nation Advocacy SA PBO.[4] The central issue was whether the Electoral Act is unconstitutional because it does not allow adult citizens to be elected to the National Assembly and Provincial Legislatures as independent candidates, but only through membership of political parties.[5] The applicants argued that this requirement violates two constitutional rights: the right to stand for public office under section 19(3)(*b*) of the Constitution of the Republic of South Africa, 1996 and the right to freedom of association under section 18.[6] Section 19(3)(*b*) of the Constitution states that "[e]very adult citizen has the right to stand for public office and, if elected, to hold office". Section 18 of the Constitution provide that "[e]veryone has the right to freedom of association". They contended that the Constitution does not prohibit individual participation in elections alongside the party system and that forcing citizens to join political parties to stand for office infringes on their freedom of association.[7]

The case originated in the Western Cape High Court,[8] where the applicants brought an urgent application in late 2018. The applicants initially sought an urgent order compelling Parliament to remedy the perceived invalidity before the May 2019 elections, but later amended their request to have it resolved "as soon as possible".[9] They argued that the current closed party list system allows political parties, rather than the electorate, to choose representatives and does not ensure individual accountability.[10] The applicants contended that section 19(3)(*b*) of the Constitution should be interpreted to mean that citizens have the right to stand as independent candidates in all levels of government.[11] They relied heavily on a statement from the Constitutional Court's judgment in *My Vote Counts NPC v The Minister of Justice and Correctional Services*[12] to support this interpretation.[13] The statement reads as follows:

> "[Section 19 of the Constitution] addresses the fundamental right every citizen has 'to stand for public office and, if elected, to hold office'. Our constitution does not itself limit the enjoyment of this right to local government elections. The right to stand for public office is tied up to the right to 'vote in elections for any

> legislative body' that is constitutionally established. Meaning, every adult citizen may in terms of the Constitution stand as an independent candidate to be elected to municipalities, Provincial Legislatures or the National Assembly. The enjoyment of this right is not and has not been proscribed by the Constitution. It is just not facilitated by legislation. But that does not mean that the right is not available to be enjoyed by whoever might have lost confidence in political parties. It does, in my view, remain open to be exercised whenever so desired, regardless of whatever logistical constraints might exist."[14]

However, the court noted that prior to the *My Vote Counts* judgment, there had been no suggestion that section 19(3)(*b*) implied a right to run independently for office or that the electoral system might be unconstitutional.[15] The court also pointed out that the Constitution's founding values in section 1(*d*) refer to a "multi-party system of democratic government" and that sections 46(1)(*a*)[16] and 105(*a*)[17] of the Constitution give Parliament the discretion to prescribe electoral systems for the National Assembly and provincial legislatures.[18]

The High Court also considered an earlier Constitutional Court decision, *Ramakatsa v Magashule*,[19] which appeared to contradict the *My Vote Counts* statement by emphasising the centrality of political parties in the electoral system.[20] This left the High Court in the difficult position of having to reconcile two seemingly contradictory *obiter dicta* from the highest court.[21] In *Ramakatsa*, the Constitutional Court of South Africa emphasised the centrality of political parties in the electoral system for several key reasons. Firstly, the court noted that in South Africa's system of democracy, political parties occupy the centre stage and play a vital role in facilitating the exercise of political rights.[22] This is affirmed by section 1 of the Constitution, which establishes a multi-party system of democratic government as one of the founding values of the state.[23] The court highlighted that elections are primarily contested by political parties, which determine the lists of candidates who become elected

to legislative bodies. Even the number of seats in the National Assembly and provincial legislatures are determined based on representations by interested parties, which are typically political parties.[24]

Furthermore, the court noted that South Africa's electoral system for national and provincial legislatures is based on proportional representation, meaning that citizens vote for political parties rather than independent candidates. It is the registered parties that nominate candidates for election on regional and national party lists. The court stated that "[t]he Constitution itself obliges every citizen to exercise the franchise through a political party".[25]

The court also pointed out that the Constitution requires Parliament to enact legislation providing for the funding of political parties represented in national and provincial legislatures, in order to enhance multi-party democracy.[26] This direction of public resources towards political parties emphasises their role as "the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy".[27] By emphasising these factors, the court highlighted the integral role that political parties play in South Africa's constitutional democracy and electoral system. Political parties are seen as the primary means through which citizens exercise their political rights and participate in the democratic process, particularly at the national and provincial levels. This centrality of parties in the system forms an important context for interpreting and applying constitutional provisions related to political rights and participation.

In the High Court, the applicants' case largely rested on the statement from *My Vote Counts*, which the court determined was *obiter dictum* and, therefore, not binding, although still of significant persuasive force.[28] The court noted that even if it were to accept the *My Vote Counts* dictum, there were difficulties in reconciling its statements about the right of independent candidates not being facilitated by legislation but remaining open to be exercised.[29] The court also considered that Parliament was already addressing the issues raised in the application since late 2017, questioning whether it was appropriate for the

court to intervene in the parliamentary process.[30] Finally, the court criticised the applicants' use of terms like "civil war" and "genocide" in their papers, describing such language as reminiscent of humanity at its worst and compounding the problem.[31]

Following the High Court's dismissal, the applicants sought leave to appeal directly to the Constitutional Court.[32] The court had to determine two main issues: whether section 19(3)(*b*) affords citizens the right to contest elections as independents and, if so, whether the Electoral Act's failure to facilitate this renders it unconstitutional.[33] The respondents, including the Minister of Home Affairs and the Electoral Commission, opposed the challenge.[34] They argued that section 19(3)(*b*) does not confer a right on citizens to contest elections as independents and that the Constitution requires a party-based proportional representation system.[35] The Minister contended that there is no conflict between the Electoral Act and the Constitution, and that the Constitution accords Parliament discretion to prescribe an electoral system embracing proportional representation.[36]

The Speaker of the National Assembly, while formally abiding by the court's decision, filed an affidavit disputing the applicants' interpretation of section 19(3)(*b*). The Speaker argued that various constitutional provisions confirm that a system based on proportional representation through political parties was and remains constitutionally mandated.[37] The Speaker's position was that the Constitution of South Africa mandates a system of proportional representation through political parties for elections to the National Assembly and provincial legislatures. The Speaker relied on several provisions of the Constitution to support this argument. These included sections 46(1)(*d*) and 105(1)(*d*), which state that the electoral system for the National Assembly and provincial legislatures must "result, in general, in proportional representation".[38] The Speaker also pointed to sections 57(2)[39] and 236[40] of the Constitution, which make specific provisions for political parties in the National Assembly and require national legislation to provide funding for parties participating in the national and provincial legislatures.[41] Furthermore, the Speaker cited sections

178(1)(*h*)[42] and 193(5),[43] which provide for the representation of political parties in various constitutional bodies and processes.[44] For example, section 178(1)(*h*) requires that six members of the National Assembly, at least three of whom must be from opposition *parties*, serve on the Judicial Service Commission.[45] The Speaker's argument was that these provisions, taken together, demonstrate a constitutional commitment to a party-based system of proportional representation. The implication is that the Constitution envisions political parties as the primary vehicles for representation in the national and provincial legislatures, rather than independent candidates.

However, in the Constitutional Court, the applicants argued for a different reading of the Constitution that would allow for independent candidates to contest elections at these levels. The court had to weigh these competing interpretations considering the constitutional text, its historical context, and the broader principles of South Africa's democratic system. A key applicant, Ms Revell, provided a specific example of how the current system affects her rights. As a representative of the Korana nation, a section of the Khoi and San people, she explained that she is averse to joining a political party. She argued that being forced to do so would make her answerable to a party rather than directly to her nation.[46] This illustrates the applicants' argument that the current system infringes on individuals' freedom of association and their right to stand for public office independently. The applicants emphasised that they were not disputing the right of political parties to contest elections or the multi-party system of democracy. Rather, their complaint was narrowly focused on the Electoral Act's failure to cater for the exercise of the rights in section 19(3) by individuals.[47]

The Constitutional Court was thus tasked with interpreting section 19(3)(*b*) considering other constitutional provisions, considering the historical context of political rights in South Africa, and determining whether the Electoral Act's exclusive focus on party-based representation is constitutionally valid. The court also had to consider whether any limitation on

constitutional rights, if found, could be justified under section 36 of the Constitution.[48]

10.2 Significant aspects of the judgment

10.2.1 The extended definition of who may stand and run for political office in term of section 19(3)(*b*) of the Constitution

The judgment by Madlanga J, representing the majority of the Constitutional Court, addressed the constitutionality of the Electoral Act in relation to independent candidates contesting national and provincial elections. The court granted leave to appeal, finding that the matter raised several novel and far-reaching issues of constitutional importance.[49] First, the case addressed a fundamental question about the interpretation of political rights enshrined in the Constitution, specifically the right "to stand for public office and, if elected, to hold office" under section 19(3)(*b*).[50] This interpretation had not been definitively settled in previous cases. Second, the challenge to the Electoral Act raised significant questions about the nature of South Africa's electoral system and the constitutional requirements for democratic representation.[51] This went to the heart of how citizens can participate in the country's democracy. Third, the case required the court to consider the relationship between various constitutional provisions, including those on political rights, freedom of association, and the electoral system.[52] This complex interpretive exercise had far-reaching implications for understanding the Constitution's overall scheme. Fourth, the outcome of the case had the potential to fundamentally alter the electoral landscape in South Africa by potentially allowing independent candidates to contest national and provincial elections for the first time since the advent of democracy in South Africa.[53] Finally, the court noted that these issues were "without doubt of import",[54] recognising their significance for the country's democratic processes and constitutional order. By characterising the issues as novel and far-reaching, the court justified granting leave to

appeal directly to the Constitutional Court, bypassing the usual appellate hierarchy.[55]

The central question was whether the Electoral Act is unconstitutional to the extent that it prevents citizens from standing as independent candidates for the National Assembly and provincial legislatures.[56] In interpreting section 19(3)(*b*) of the Constitution, which provides that every adult citizen has the right "to stand for public office and, if elected, to hold office", the court held that this right should be read harmoniously with other constitutional provisions, particularly the right to freedom of association in section 18 of the Constitution.[57] The court found that compelling individuals to join political parties to stand for office infringes on their freedom of association and dignity.[58]

The majority rejected arguments that other constitutional provisions, such as those referring to political parties or proportional representation, necessitated a party-only electoral system.[59] It held that the Constitution does not mandate exclusive party representation, and that independent and party representation can coexist.[60] Importantly, the court affirmed that section 19(3)(*b*) confers on adult citizens the right to stand for public office as independents, separate from political party structures.[61] The Electoral Act's failure to provide for this renders it unconstitutional.[62] The court declared the Electoral Act unconstitutional to the extent that it requires candidates to be members of political parties.[63] However, it suspended the declaration of invalidity for 24 months to allow Parliament to remedy the defect.[64] This prospective order avoids invalidating past elections whilst giving Parliament time to amend the electoral system.[65] In conclusion, the majority judgment upheld the right of citizens to stand as independent candidates in national and provincial elections, finding the current electoral system's exclusion of independents to be unconstitutional.

In a separate but concurring judgment by Jafta J, the Justice broadly agreed with the majority's conclusion but emphasised a different path of reasoning, focusing primarily on the interpretation of section 19(3) of the Constitution. Jafta J began by outlining the proper approach to interpreting section 19, emphasising the importance of historical context,

particularly the disenfranchisement of African people under apartheid.[66] He stressed that the language of section 19 must be accorded a "generous and purposive meaning" to give citizens the fullest protection afforded by the section.[67] Additionally, he highlighted the relevance of international law, specifically Article 25 of the International Covenant on Civil and Political Rights, in interpreting section 19.[68] In interpreting section 19(3), Jafta J concluded that it confers rights exclusively on adult citizens as individuals, not political parties.[69] He rejected the High Court's reasoning that section 19(3)(*b*) does not expressly state that standing for office includes standing as an independent candidate, arguing that this approach incorrectly assumes that systems allowing individuals to contest elections cannot coexist with systems catering for political parties.[70]

Jafta J emphasised that section 19(3)(*b*) confers the right to stand for public office on every adult South African individually, just as they hold the right to vote as individuals.[71] He argued that while Parliament has the power to regulate the exercise of this right, it cannot enact legislation that prevents its exercise altogether.[72] Addressing the apparent contradiction between this interpretation and the judgment in *Ramakatsa*, Jafta J argued that the contradiction is "more apparent than real".[73] He explained that *Ramakatsa* was concerned specifically with cases where an adult South African has chosen a political party as the vehicle through which to exercise their right to vote, and did not hold that the right to vote can only be exercised through political parties.[74]

Regarding the Electoral Act, Jafta J found that its failure to cater for adult South Africans wishing to contest elections as individuals renders it inconsistent with the Constitution.[75] He rejected arguments that this inconsistency could be justified or that it should be interpreted harmoniously with section 157(2)(*a*) of the Constitution, which deals with municipal elections.[76] In conclusion, Jafta J supported the order proposed in the majority judgment, finding that the Electoral Act is unconstitutional to the extent that it fails to enable adult South Africans to stand for public office as independent candidates in national and provincial elections.[77]

10.2.2 Froneman J's dissenting judgment – an alternative approach

Justice Froneman's dissenting judgment disagreed with the majority and concurring judgments, arguing that their approach to and interpretation of section 19(3)(*b*) of the Constitution was flawed. He contended that they did not properly consider the constitutionally required electoral framework within which the right "to stand for and, if elected, to hold office" must be exercised.[78] Froneman J emphasised the importance of interpreting constitutional provisions in light of the Constitution as a whole, citing the principle from *Matatiele* that individual constitutional provisions cannot be considered in isolation.[79] He argued that the content of the right in section 19(3)(*b*) should be determined by considering the foundational values and constitutional norms governing the electoral system, rather than focusing on notional abilities or preferences of individual citizens.[80]

Central to Froneman J's reasoning was the interpretation of section 1(*d*) of the Constitution, which establishes a "multi-party system of democratic government" as a foundational value. He argued that this plainly means a "multi-[political] party" system, supported by other constitutional provisions and this Court's jurisprudence.[81] He contended that the Constitution prescribes a representative democracy founded on the principle of elected officials representing groups of people, necessarily implying a system based on political parties.[82] Froneman J argued that in ordinary language, "multi-party" clearly means "multi-[political] party".[83] He supported this by referencing dictionary definitions and common understanding of the term. He pointed to section 236 of the Constitution, which provides for the funding of political parties to "enhance multi-party democracy", as evidence that the Constitution itself understands "multi-party" to mean a system of political parties.[84]

Froneman J cited the Constitutional Court's decision in *Ramakatsa*, which recognised the crucial role of political parties in facilitating political rights.[85] This jurisprudence, he argued, supports the interpretation that the Constitution envisions a party-based system. Froneman J contended that a multi-

party system necessarily implies a representative democracy, where elected officials represent groups of people. He cited section 42(3) of the Constitution, which states that the National Assembly is elected to represent the people, as support for this view.[86] Froneman J argued that if the Constitution intended to prescribe something other than political parties in its fundamental system of democratic government, it would have explicitly stated so. He noted the absence of any constitutional provisions detailing what groupings other than political parties are prescribed.[87] By linking these points, Froneman J sought to establish that the Constitution's reference to a "multi-party system" is not merely a prohibition on one-party rule, but a positive prescription for a system based on political parties as the primary vehicles for democratic representation. This interpretation, he argued, necessarily implies that the right to stand for office under section 19(3)(*b*) should be understood within this party-based framework, rather than as an individual right to stand as an independent candidate.

Froneman J rejected the majority's interpretation that section 19(1) includes a right not to join a political party that informs the interpretation of section 19(3)(*b*). He argued that section 19 deals with distinct, non-overlapping rights, and that choosing not to join a political party does not create a constitutional right to stand for office as an independent.[88] The dissenting judgment emphasised the constitutional requirement for an electoral system that results in proportional representation, arguing that this supports a party-based system.[89] Froneman J contended that the Constitution does not prescribe independent candidacy at national and provincial levels, and at most allows for its possibility through legislation.[90] Froneman J argued that interpreting section 19(3)(*b*) as securing a right for independent candidates makes an "illogical leap" by conflating permissive and prescriptive constitutional norms.[91] He emphasised that those who do not wish to participate through political parties retain other democratic rights, such as freedom of expression and assembly.[92] In conclusion, Froneman J would have dismissed the appeal, finding that the Electoral Act's failure to provide for independent candidates in national and provincial elections is not unconstitutional. He argued

that the choice to allow independent candidates is a matter for legislative design, not constitutional prescription.[93]

No subsequent cases have, however, favoured or elaborated on this interpretation of candidature in South African politics. It is, however, open to the courts to revisit this approach in future, especially after the 2024 elections revealed that independent candidates played little to no role in the national elections.

10.3 Impact of the judgment

10.3.1 Impact regarding the extended definition of who may stand and run for political office in term of section 19(3)(*b*) of the Constitution

The *New Nation Movement* (CC) Court's novel interpretation of section 19(3)(*b*) as including independent candidates as well as political parties (and the country's subsequent drastic electoral reforms) was further developed and built upon in several other cases. The first case that accepted the *New Nation Movement* (CC) case's extended definition of who may run and stand for election was *Independent Candidate Association South Africa NPC v President of the Republic of South Africa*.[94] This case entailed an application for direct access to the Constitutional Court to challenge the constitutionality of certain provisions of the Electoral Amendment Act 1 of 2023, specifically regarding item 1 of Schedule 1A of the Act, which allows independent candidates to contest for seats in the National Assembly.[95] The schedule in question inter alia determines that the 200 seats in the National Assembly should be filled by independent candidates and candidates from regional lists of political parties (called regional seats), while the other 200 seats should be filled by candidates from the national lists of political parties (called compensatory seats).[96] The applicant claimed that by dividing the seats in the national assembly into a 200/200 split, parliament violated the constitution.[97]

After considering the submissions of both parties in detail, the court found that both the applicant's and the respondents' proposed split of the parliamentary seats, namely

the 350/50 split and the 200/200 split respectively, achieved the constitutional requirement of general proportionality,[98] although only the 200/200 split completely avoided the situation of "overhang".[99] An "overhang" occurs "where the election formula requires political parties to be allocated more seats than are actually available in the Legislature. Put differently, overhang occurs where a party wins more regional seats than the compensatory or national party vote entitles it to".[100] As to the interpretation of section 19 of the Constitution, and referring to the *New Nation Movement* (CC) case, the court in *Independent Candidates Association* held that the amended electoral system had to incorporate representation for political parties as well as independent candidates, while also complying with the constitutional requirement of proportionality as enshrined in section 46 of the Constitution.[101] The main contention of the applicant is that, in terms of the 200/200 split, this will require independent candidates "to earn more votes in order to secure a single seat in the National Assembly compared to political parties"[102] and the 200/200 split, therefore, infringes upon sections 19(2) and 19(3) of the Constitution, undermining the fairness of elections and the right to vote and stand for public office.[103] Highlighting various cases relating to the importance of political rights, South Africa's history of political exclusion, and the close link between the right to vote and free and fair elections,[104] the court dismissed the applicant's section 19 challenge, finding that the applicant failed to prove that parliament's measures limited the political rights in question.[105] In relation to this contention, the Constitutional Court held that:

> "As Parliament points out in its submissions, the Electoral Amendment Act entitles every adult citizen to a vote, and they can, in keeping with this Court's ruling in *New Nation II*, vote for either a political party or an independent candidate. The Electoral Amendment Act also allows citizens to stand for political office and to hold office if elected. The contention that a vote for a political party counts double to that of an independent candidate, which as the applicant argues leads to a limitation of the section 19 rights, is, as I have already demonstrated,

> without merit. This argument is based on the assumption that voters will not split their vote, an assumption which I have already shown to be unsustainable."[106]

The second case which built upon the *New Nation Movement* (CC) judgment's extension of political participation to independent candidates was *One Movement South Africa NPC v President of the Republic of South Africa*.[107] In this case, the Constitutional Court had to decide whether the newly enacted Electoral Amendment Act infringed upon independent candidates' right to stand for election to public office, as well as their right to dignity and their right to freedom of association.[108] The applicant argued that the Act violated these rights in two significant ways. The first challenge concerned the "signature requirement". The applicant contended that to qualify for election, both independent candidates and new political parties, meaning, those not presently represented in the National Assembly or any provincial legislature, were obligated to gather signatures from registered voters in the relevant region. This number had to be equivalent to 15% of the quota from the previous election in that region.[109] This stipulation, set out in section 31(B)(3) of the Act, defined a quota as the total votes required for a candidate or party to secure one seat.[110]

The applicant claimed that imposing a 15% signature requirement on independent candidates was excessively burdensome, acting as a prohibitive obstacle to their participation and rendering the provision arbitrary and unjustifiable.[111] Conversely, the Minister defended the requirement, stating that its purpose was to ensure that only candidates with a realistic chance of gaining electoral support could contest elections.[112] The Minister further argued that without such a provision, an excessive number of candidates could contest elections, leading to an unmanageably lengthy and complex ballot paper.[113] A parliamentary representative echoed this sentiment, asserting that the requirement prevented ballots from being flooded with names of candidates who stood no realistic chance of winning.[114] Similarly, the Electoral Commission supported the 15% threshold, maintaining that it

ensured the seriousness of candidates and their likelihood of securing at least one seat.[115]

In the majority judgment, Chief Justice Zondo concluded that the applicant had failed to demonstrate that the 15% signature requirement unfairly disadvantaged independent candidates.[116] It must, however, be noted that Zondo CJ's judgment is not the majority judgment regarding the signature requirement – see the discussion of Kollapen J's judgment below for the majority judgment on the signature requirement. Zondo CJ emphasised that the applicant's principal objection was that section 31(B)(3) applied equally to both independent candidates and new political parties.[117] Zondo CJ held that the applicant's fundamental issue was instead with the size of electoral regions and the parliamentary decision to structure them as constituencies.[118] Zond CJ's judgment explained that larger regions had higher quotas, which in turn, increased the number of required signatures, while smaller regions had lower quotas and thus a reduced signature requirement.[119] However, the applicant had not sought to challenge Parliament's decision to designate provinces as electoral constituencies.[120] Zondo CJ concluded that section 31(B)(3) did not amount to an outright denial of the right to stand for election but was merely a regulatory measure.[121] Drawing on past rulings, the court determined that regulatory provisions do not necessarily constitute limitations of rights.[122] Consequently, Zondo CJ held that the 15% signature requirement did not limit the right to stand for election or the right to human dignity.[123]

The applicant's second challenge pertained to the provisions regulating seat reallocation in cases where independent candidates vacated their seats because of resignation or death[124] or where seats were forfeited under specific conditions.[125] Regarding the recalculation of seats, Zondo CJ handed down the majority judgment. The majority on the recalculation aspect, per Zondo CJ, indicated that forfeiture occurred when:

> "(a) …a party has submitted a national or regional list with fewer names of party candidates than the number of

> seats to be allocated to it, the number of seats for which it has no listed candidates is forfeited; (b) if an independent candidate stands to be allocated more than one seat in a region, any excess seats won by the candidate are forfeited since an individual candidate can, by definition, only hold one seat; [or] (c) if an independent candidate contests the election in more than one region and wins a seat in more than one region, that candidate will be allocated a seat in the region where he or she received the highest proportion of votes and any excess seats are forfeited."[126]

The applicant contended that votes for independent candidates signified more than support for the individual; rather, they constituted a rejection of party politics.[127] However, the majority dismissed this argument, reasoning that a voter could choose an independent candidate for a provincial legislature while still supporting a political party for the National Assembly.[128] The court held that votes for independent candidates whose seats were forfeited were not transferred to political parties but were instead excluded from the calculations.[129] The majority further held that voting for an independent candidate did not necessarily equate to a rejection of party politics.[130] The applicant further criticised the recalculation method, arguing that it unfairly benefited political parties.[131] The respondents, however, defended the provision, asserting that disregarding votes for independent candidates in forfeiture cases preserved inter-party proportional representation.[132] The majority, however, ultimately ruled against the applicant's second argument.[133]

In the first dissenting opinion, Justice Kollapen asserted that section 31(B)(3) was unconstitutional, arguing that it imposed a restriction on the right to stand for public office and related political rights.[134] It is important to note that Maya DCJ, Mhlantla J, Theron J and Rogers J concurred with Kollapen J's judgment on the signature requirement, which makes his judgment the majority judgment regarding the signature requirement. Kollapen J found that the state had not justified the restriction as reasonable and necessary in a democratic

society.[135] Kollapen J criticised the majority's reliance on the New National Party case, arguing that its principles applied only in limited contexts.[136] Kollapen J explored the scope of sections 18(1), 19(1), and 19(3) of the Constitution, emphasising their centrality to democracy.[137] He specifically highlighted the *New Nation Movement* (CC) case's interpretation of sections 19 and 18 of the Constitution and its *collective* and *individual* exercise.[138] Regarding the importance of the signature requirement, Kollapen J noted:

> "Parliament's characterisation of the politics and the economics of contestation suggests that frivolous or meritless contestation has never been a problem with political parties. Political parties, Parliament tells us, make sensible political and economic decisions around whether and when to contest an election. This begs the question: why should the same not be expected of independent candidates? This question goes unheeded and unanswered."[139]

Regarding less restrictive means that could have been used to curtail frivolous contestation of elections, Kollapen J held that alternative measures were not properly considered: "the signature requirement is not the only mechanism for discouraging frivolous contestation. An independent candidate will also be required to lodge a monetary deposit".[140] Kollapen J, in his dissenting judgment, therefore, found that the 15% requirement excessively burdened independent candidates.[141] He concluded that the Act unjustifiably limited political rights of individual candidates.[142] Significantly, Kollapen J's judgment emphasised the importance of the electoral legislation supporting, instead of hindering, the participation of independent candidates in light of the *New Nation Movement* (CC) case:

> "*New Nation Movement* has led to a historic moment in the journey of our young constitutional democracy. For the first time, independent candidates will stand for seats in the national and provincial legislature. Parliament meets

> this historic moment with a first-of-its-kind signature requirement for independent candidates. We must be cautious and guard against such a requirement becoming a barrier to contestation. In effect, the signature requirement renders somewhat hollow the promise that New Nation Movement heralded in unlocking and giving section 19 of the Constitution its full and proper effect."[143]

Justice Theron, in another separate dissenting judgment, agreed with the second judgment regarding the signature requirement.[144] Additionally, Theron J raised concerns about the seat recalculation process, arguing that it disproportionately favoured larger parties over independent candidates and smaller parties, thereby violating section 19 of the Constitution.[145] Ultimately, Theron J concluded that the challenge had not been fully explored at trial and should have engaged in oral argument.[146]

10.4 Conclusion

From the preceding discussion it is clear that *New Nation Movement* (CC) has brought about a significant change in our constitutional system's understanding of political candidature. Including independent candidates in national elections has changed our political landscape significantly, challenging our courts' perception of the interplay between sections 18 and 19 of the Constitution. This broad understanding of political candidature has been confirmed and further developed in two subsequent cases, namely *Independent Candidate Association* (CC) and *One Movement SA*.

In *Independent Candidate Association*, the Constitutional Court confirmed the broad definition of political participation as introduced in the *New Nation Movement* (CC) case, extending the right to run for office to independent candidates alongside political parties, while adding that the legislature and the executive have some leeway in deciding how seats in the legislature should be calculated as long as it does not infringe on the political rights of independent candidates and complies with the Constitution's proportionality requirement in general.

In addition, the *One Movement SA* judgment has further elaborated and contributed to our courts' understanding and application of the new expanded definition of candidature in South African electoral law in two ways. First, the majority (per Kollapen J) held that the signature requirement, as outlined in the Electoral Amendment Act, imposed an unconstitutional burden on independent candidates and should be lowered so that it does not impede the political participation of individual candidates unnecessarily. Second, regarding the reallocation of seats, the majority (per Zondo CJ) held that the reallocation or recalculation of seats after an individual has vacated or lost a seat in the legislature, as outlined in the Electoral Amendment Act, was not unconstitutional as the recalculation of seats should disregard the votes cast for persons (independent candidates) who no longer comply with the requirements of candidature.

It is unfortunate, however, that none of these judgments considered the dissenting judgment of Froneman J in the *New Nation Movement* (CC) case; both cases merely accepted the majority's reasoning that section 19 of the Constitution in fact could (and should) be read to include both political parties' and independent candidates' right to run for election in national and provincial elections. Arguably, Froneman J's reasoning has merit. Following the 2024 national and provincial elections, the participation of independent candidates had almost no impact on the outcome of the elections. This may be because the legislature tried to fit an independent candidate system into a system primary designed for and based on the participation of political parties only. Pretorius, therefore, argues that it may not be possible to apply the new electoral provisions together with the current constitutional provisions as it stands – proper application would require a number of constitutional amendments.[147] He refers, inter alia, to provisions relating to the composition and functioning of the legislatures, the probable exclusion of independent candidates from participating in some of the parliamentary committees, and their exclusion from involvement in making some important appointments.[148] Furthermore, Pretorius points out that "no independent member of a provincial legislature would be eligible to be appointed as a delegate to the National Council of Provinces (unless

nominated by a political party)", which means that independent candidates cannot play any role in the Council.[149] Consequently, it remains uncertain whether this trend will change in future, or whether this change to the electoral system will continue to play a minimal role in our elections. It, therefore, remains to be seen what courts will make of the new electoral provisions and their application after the somewhat underwhelming result of the 2024 elections regarding the participation of independent candidates and whether these provisions will become merely theoretical, without any real impact.

Endnotes

1 2020 6 SA 257 (CC) (*New Nation Movement* (CC)); this chapter is partly based on a paper entitled, Laubscher "Independent candidates and electoral reform in South Africa – one step forward, and two steps back?", presented at the International Society of Public Law Conference (ICON-S) on "The Future of Public Law: Resilience, Sustainability and Artificial Intelligence" held in Madrid, Spain on 8-10 July 2024. Also see Zongwe "New Nation Movement NPC and Others v President of the Republic of South Africa and Others 2020 (6) SA 257 (CC)" 2021 *SAIPAR Case Review* Article 6 (issue does not have page numbers), available at: https://scholarship.law.cornell.edu/scr/vol4/iss1/6 (06-12-2025); also see Wolf "Practical implications for the electoral system: *New Nation Movement NPC v President of the Republic of South Africa*" 2021 *SALJ* 58–87.
2 73 of 1998.
3 The judgment does not provide any specific information about who or what GRO is. It is simply listed as one of the applicants in the case. Beyond being named as the third applicant, no further details about GRO's identity or nature are given in the judgment.
4 *New Nation Movement* (CC) (n 1) par 3-4.
5 *New Nation Movement* (CC) (n 1) par 2.
6 *New Nation Movement* (CC) (n 1) par 4.
7 *New Nation Movement* (CC) (n 1) par 139-140.
8 *New Nation Movement PPC v President of the Republic of South Africa* 2019 5 SA 533 (WCC) (*New Nation Movement* (HC)).
9 *New Nation Movement* (HC) (n 8) par 2.
10 *New Nation Movement* (HC) (n 8) par 5.
11 *New Nation Movement* (HC) (n 8) par 11.
12 2018 5 SA 380 (CC) (*My Vote Counts*).
13 *New Nation Movement* (HC) (n 8) par 11-12.
14 *My Vote Counts* (n 12) par 29; quoted in *New Nation Movement* (HC) (n 8) par 24.
15 *New Nation Movement* (HC) (n 8) par 12.
16 The section provides that "[t]he National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that is prescribed by national legislation".
17 The section provides that "[a] provincial legislature consists of women and men elected as members in terms of an electoral system that is prescribed by national legislation".
18 *New Nation Movement* (HC) (n 8) par 14.
19 2013 2 BCLR 202 (CC) (*Ramakatsa*).
20 *New Nation Movement* (HC) (n 8) par 26.
21 *New Nation Movement* (HC) (n 8) par 23.
22 *Ramakatsa* (n 19) par 65.
23 *Ramakatsa* (n 19) par 66.
24 *Ramakatsa* (n 19) par 67.
25 *Ramakatsa* (n 19) par 68.
26 *Ramakatsa* (n 19) par 67.
27 *Ramakatsa* (n 19) par 67.
28 *New Nation Movement* (HC) (n 8) par 22-23.

29 *New Nation Movement* (HC) (n 8) par 28–29.
30 *New Nation Movement* (HC) (n 8) par 31.
31 *New Nation Movement* (HC) (n 8) par 33.
32 *New Nation Movement* (CC) (n 1) par 1.
33 *New Nation Movement* (CC) (n 1) par 138.
34 *New Nation Movement* (CC) (n 1) par 3.
35 *New Nation Movement* (CC) (n 1) par 132–133.
36 *New Nation Movement* (CC) (n 1) par 133.
37 *New Nation Movement* (CC) (n 1) par 135, 81–82.
38 *New Nation Movement* (CC) (n 1) par 14.
39 The section reads as follows: "The rules and orders of the National Assembly must provide for (*a*) the establishment, composition, powers, functions, procedures and duration of its committees; (*b*) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy; (*c*) financial and administrative assistance to each party represented in the Assembly *in proportion to its representation*, to enable the party and its leader to perform their functions in the Assembly effectively; and (*d*) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition" (emphasis added).
40 The section reads as follows: "To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis."
41 *New Nation Movement* (CC) (n 1) par 82.
42 The section reads as follows: "There is a Judicial Service Commission consisting of six persons designated by the National Assembly from amongst its members, at least three of whom must be members of opposition *parties* represented in the Assembly" (emphasis added).
43 The section reads as follows: "The National Assembly must recommend persons (*a*) nominated by a committee of the Assembly proportionally composed of members of *all parties* represented in the Assembly; and (*b*) approved by the Assembly by a resolution adopted with a supporting vote (i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission" (emphasis added).
44 *New Nation Movement* (CC) (n 1) par 83.
45 Emphasis added.
46 *New Nation Movement* (CC) (n 1) par 52.
47 *New Nation Movement* (CC) (n 1) par 139–140.
48 *New Nation Movement* (CC) (n 1) par 113–120.
49 *New Nation Movement* (CC) (n 1) par 11–13.
50 *New Nation Movement* (CC) (n 1) par 10.
51 *New Nation Movement* (CC) (n 1) par 2, 11.
52 *New Nation Movement* (CC) (n 1) par 18–22.
53 *New Nation Movement* (CC) (n 1) par 2, 11.
54 *New Nation Movement* (CC) (n 1) par 11.

55 *New Nation Movement* (CC) (n 1) par 12–13.
56 *New Nation Movement* (CC) (n 1) par 2.
57 *New Nation Movement* (CC) (n 1) par 18–22.
58 *New Nation Movement* (CC) (n 1) par 49–62.
59 *New Nation Movement* (CC) (n 1) par 65.
60 *New Nation Movement* (CC) (n 1) par 78–80.
61 *New Nation Movement* (CC) (n 1) par 162–163.
62 *New Nation Movement* (CC) (n 1) par 112–120.
63 *New Nation Movement* (CC) (n 1) par 121–122.
64 *New Nation Movement* (CC) (n 1) par 125–126.
65 *New Nation Movement* (CC) (n 1) par 124–125.
66 *New Nation Movement* (CC) (n 1) par 141–143.
67 *New Nation Movement* (CC) (n 1) par 144.
68 *New Nation Movement* (CC) (n 1) par 145–146.
69 *New Nation Movement* (CC) (n 1) par 148–155.
70 *New Nation Movement* (CC) (n 1) par 156–158.
71 *New Nation Movement* (CC) (n 1) par 162.
72 *New Nation Movement* (CC) (n 1) par 160.
73 *New Nation Movement* (CC) (n 1) par 193.
74 *New Nation Movement* (CC) (n 1) par 193–194.
75 *New Nation Movement* (CC) (n 1) par 179–180.
76 *New Nation Movement* (CC) (n 1) par 182–191.
77 *New Nation Movement* (CC) (n 1) par 195.
78 *New Nation Movement* (CC) (n 1) par 196.
79 *New Nation Movement* (CC) (n 1) par 197; see *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1)* 2006 5 SA 47 (CC).
80 *New Nation Movement* (CC) (n 1) par 198.
81 *New Nation Movement* (CC) (n 1) par 200–204.
82 *New Nation Movement* (CC) (n 1) par 202–203.
83 *New Nation Movement* (CC) (n 1) par 201.
84 *New Nation Movement* (CC) (n 1) par 201.
85 *New Nation Movement* (CC) (n 1) par 202.
86 *New Nation Movement* (CC) (n 1) par 203.
87 *New Nation Movement* (CC) (n 1) par 204.
88 *New Nation Movement* (CC) (n 1) par 213–219.
89 *New Nation Movement* (CC) (n 1) par 220–224.
90 *New Nation Movement* (CC) (n 1) par 225–230.
91 *New Nation Movement* (CC) (n 1) par 231.
92 *New Nation Movement* (CC) (n 1) par 232.
93 *New Nation Movement* (CC) (n 1) par 230–233.
94 2024 2 SA 104 (CC); also see Laubscher "Overview of constitutional court judgments on the bill of rights – 2023" 2024 *TSAR* 323 332–335.
95 *Independent Candidates Association* (n 94) par 1.
96 *Independent Candidates Association* (n 94) par 1.
97 *Independent Candidates Association* (n 94) par 1.
98 *Independent Candidates Association* (n 94) par 63–68.
99 *Independent Candidates Association* (n 94) par 82–83.
100 *Independent Candidates Association* (n 94) par 62; also see par 69 which explains an "overhang" as follows: "when more seats are required to be allocated to restore proportionality as between

represented parties after the allocation of regional (or constituency) votes, than are available in the Legislature. Overhang occurs when a party wins more regional seats than it is overall entitled to when the compensatory tier outcome is calculated."

101 *Independent Candidates Association* (n 94) par 12.
102 *Independent Candidates Association* (n 94) par 34.
103 *Independent Candidates Association* (n 94) par 128.
104 *Independent Candidates Association* (n 94) par 140–154; see *New Nation Movement* (CC) (n 1); *Kham v Electoral Commission* 2016 2 SA 338 (CC); *New National Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC); and *August v Electoral Commission* 1999 3 SA 1 (CC).
105 *Independent Candidates Association* (n 94) par 155.
106 *Independent Candidates Association* (n 94) par 150–151.
107 2024 2 SA 148 (CC); see Laubscher (n 94) 323 335–338.
108 *One Movement SA* (n 107) par 5.
109 *One Movement SA* (n 107) par 25.
110 *One Movement SA* (n 107) par 24.
111 *One Movement SA* (n 107) par 25.
112 *One Movement SA* (n 107) par 31.
113 *One Movement SA* (n 107) par 35.
114 *One Movement SA* (n 107) par 37.
115 *One Movement SA* (n 107) par 41–58.
116 *One Movement SA* (n 107) par 79.
117 *One Movement SA* (n 107) par 78.
118 *One Movement SA* (n 107) par 59.
119 *One Movement SA* (n 107) par 60.
120 *One Movement SA* (n 107) par 68.
121 *One Movement SA* (n 107) par 124.
122 *One Movement SA* (n 107) par 107–125; see *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC); *Mlungwana v S* 2019 1 BCLR 88 (CC); and *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC).
123 *One Movement SA* (n 107) par 171.
124 *One Movement SA* (n 107) par 21.
125 *One Movement SA* (n 107) par 190.
126 *One Movement SA* (n 107) par 191.
127 *One Movement SA* (n 107) par 198.
128 *One Movement SA* (n 107) par 198.
129 *One Movement SA* (n 107) par 199.
130 *One Movement SA* (n 107) par 198.
131 *One Movement SA* (n 107) par 200.
132 *One Movement SA* (n 107) par 201.
133 *One Movement SA* (n 107) par 211.
134 *One Movement SA* (n 107) par 215.
135 *One Movement SA* (n 107) par 215.
136 *One Movement SA* (n 107) par 253.
137 *One Movement SA* (n 107) par 269–281.
138 *One Movement SA* (n 107) par 278.
139 *One Movement SA* (n 107) par 311.
140 *One Movement SA* (n 107) par 341.
141 *One Movement SA* (n 107) par 288.

142 *One Movement SA* (n 107) par 342.
143 *One Movement SA* (n 107) par 343.
144 *One Movement SA* (n 107) par 357.
145 *One Movement SA* (n 107) par 367–370.
146 *One Movement SA* (n 107) par 385.
147 Pretorius "Independent candidacy and electoral reform: *New Nation Movement NPC v President of the Republic of South Africa*" 2022 *PER/PELJ* 1 27, available at http://dx.doi.org/10.17159/1727- 3781/2022/v25i0a12746 (06-12-2025).
148 Pretorius (n 147) 27.
149 Pretorius (n 147) 27.