CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 110/19

In the matter between:

NEW NATION MOVEMENT NPC	First Applicant
CHANTAL DAWN REVELL	Second Applicant
GRO	Third Applicant
INDIGENOUS FIRST NATION ADVOCACY SA PBO	Fourth Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
ELECTORAL COMMISSION	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
NATIONAL COUNCIL OF PROVINCES	Fifth Respondent

and

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First Amicus Curiae
ORGANISATION UNDOING TAX ABUSE	Second Amicus Curiae

Neutral citation:	*New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11
Coram:	Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ
Judgments:	Madlanga J (majority): [1] to [128] Jafta J (concurring): [129] to [195] Froneman J (dissenting): [196] to [233]
Heard on:	15 August 2019
Decided on:	11 June 2020

ORDER

On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court of South Africa, Western Cape Division, Cape Town is set aside.
4. It is declared that the Electoral Act 73 of 1998 is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties.
5. The declaration of unconstitutionality referred to in paragraph 4 is prospective with effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.
6. The Minister of Home Affairs must pay the applicants' costs in the High Court and this Court, such costs to include the costs of two counsel.

JUDGMENT

MADLANGA J (Cameron J, Jafta J, Khampepe J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

Introduction

[1] This is an application lodged on an urgent basis on 18 April 2019. The applicants were seeking leave to appeal directly to this Court against a judgment of the High Court of South Africa, Western Cape Division, Cape Town. This Court heard argument only on the question of urgency on 2 May 2019. On that day it concluded that the matter lacked urgency and postponed it for hearing in the ordinary course on 15 August 2019.[1]

[2] What is now before us is the application for leave to appeal. It concerns the question whether, to the extent that it allows individuals to be elected to the National Assembly and Provincial Legislatures *only* through membership of political parties, the Electoral Act[2] is constitutional. Put differently, does this channelling to membership of political parties infringe certain rights enjoyed under the Bill of Rights by individuals or, more specifically, would-be independent candidates? More on those rights shortly. In addition to this broad challenge, the applicants seek the invalidation of section 57A of, and Schedule 1A to, the Electoral Act. Section 57A provides that Schedule 1A applies in general to National Assembly and Provincial Legislature elections. Schedule 1A provides for a party proportional representation system which is achieved through party lists.

[1] *New Nation Movement NPC v President of the Republic of South Africa* [2019] ZACC 27; 2019 (9) BCLR 1104 (CC).

[2] 73 of 1998.

Background

[3] The four applicants before us, New Nation Movement NPC, Ms Chantal Dawn Revell, GRO and Indigenous First Nation Advocacy SA PBO,[3] and another entity[4] instituted an urgent application at the High Court in late 2018.[5] Of the four respondents they cited initially,[6] only two opposed the application. The two were the Minister of Home Affairs and the Electoral Commission. The President and the Speaker elected to abide the Court's decision both before the High Court and this Court. The Speaker initially only filed explanatory affidavits in which she addressed a variety of issues. Later, and in response to directions issued after this latest hearing in this Court, she filed written submissions.

[4] At issue in the urgent application was the question identified above. An argument advanced by all four applicants was that the Electoral Act is unconstitutional for unjustifiably limiting the right to stand for public office and, if elected, to hold office conferred by section 19(3)(b) of the Constitution.[7] In addition, some applicants submitted that the Electoral Act infringes their right to freedom of association protected by section 18 of the Constitution.[8]

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[3] The first to fourth applicants, respectively.

[4] This other entity was the Mediation Foundation for Peace and Justice NPC. It is not litigating in this Court.

[5] *New Nation Movement PPC and Others v President of the Republic of South Africa and Others* 2019 (5) SA 533 (WCC) (High Court judgment).

[6] The first to fourth respondents were, respectively, the President of the Republic of South Africa, Minister of Home Affairs, Electoral Commission and Speaker of the National Assembly. It appears that later the Chairperson of the National Council of Provinces was joined as the fifth respondent.

[7] Section 19(3)(b) provides:

> "Every adult citizen has the right—
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> . . .
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> (b) to stand for public office and, if elected, to hold office."

[8] The section provides that "[e]veryone has the right to freedom of association".

[5] The High Court dismissed the application. In doing so it focused only on the section 19(3)(b) challenge. It reasoned that nowhere does section 19(3)(b) of the Constitution expressly provide "that standing for [public] office must include standing . . . 'as an independent candidate' as opposed to a member of a political party".[9] It also held that other provisions of the Constitution point away from the interpretation contended for by the applicants. In this regard, it specifically referred to sections 1(d), 46(1)(a) and 105(1)(a) of the Constitution. It held that – by referring to a "multi-party system" in section 1(d) – the Constitution entrenches a party system. It also held that sections 46(1)(a) and 105(1)(a) accord Parliament a discretion to prescribe – through national legislation – an electoral system that is to apply to the National Assembly and Provincial Legislatures.[10] According to the High Court, that this must be so, makes practical sense because a right to vote without a framework on the nuts and bolts on its exercise is "empty and useless".[11] I read the High Court judgment to then say the nuts and bolts require that one must stand for public office through political parties. And they make no provision for independent candidates.[12] Whether there should be a framework that caters for the participation of independent candidates is best left to Parliament, something that Parliament is currently seized with.[13]

[6] Based on sections 46(1)(a) and 105(1)(a), the High Court held that, at best for the applicants, the Constitution does not prohibit a system that makes it possible for independents to stand for public office. But it does not require that system. Therefore,

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[9] High Court judgment above n 5 at para 13.

[10] These two sections apply to the National Assembly and Provincial Legislatures, respectively.

[11] High Court judgment above n 5 at para 30, quoting this Court in *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) (*New National Party*) at para 11, where this Court stated that—

> "the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless."

[12] High Court judgment id.

[13] Id.

"[o]nce Parliament has made [its] choice, [as it has done in the Electoral Act], that choice is not unconstitutional".[14]

[7] The High Court proceeded to deal with relevant jurisprudence. It held that its approach found support in *Majola*, a judgment of the then South Gauteng High Court.[15] It placed strong reliance on a statement of the law in *Ramakatsa*.[16] There this Court held that "*[t]he Constitution itself obliges every citizen to exercise the franchise through a political party*".[17] (Emphasis in the High Court judgment.) The High Court made the observation that the view expressed by Mogoeng CJ in *My Vote Counts II*, to the effect that in terms of the Constitution every adult citizen may stand as an independent candidate for election to any legislative sphere,[18] was "quite patently obiter".[19]

Some interlocutory matters

[8] Before us, the Council for the Advancement of the South African Constitution (CASAC) and the Organisation Undoing Tax Abuse (OUTA) applied to be admitted as *amici curiae* (friends of the Court). CASAC was admitted. OUTA's application, which was late, was left for determination after the hearing. As part of its application, OUTA also sought the admission as evidence of reports by the Electoral Task Team of January 2003 (Van Zyl Slabbert Report) and the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change (Motlanthe Report). This application was instituted 14 days before the hearing.

[9] Although the explanation on why OUTA brought its application late borders on being thin, I lean towards admission. I do so especially because of the value of its

[14] Id at paras 14-9.

[15] *Emperor Thembu (The Second) Votani Majola v State President of the Republic of South Africa* 2012 JDR 2214 (GSJ).

[16] *Ramakatsa v Magashule* [2012] ZACC 31; 2012 JDR 2203 (CC); 2013 (2) BCLR 202 (CC).

[17] High Court judgment above n 5 at para 26, quoting *Ramakatsa* id at para 68.

[18] *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC) at para 29.

[19] High Court judgment above n 5 at para 23. This is in reference to *My Vote Counts II* id at para 29.

submissions. Therefore, OUTA is admitted as a second *amicus*. OUTA's application for the admission of the Van Zyl Slabbert and Motlanthe reports as evidence is dismissed. Collectively, the reports before us total 120 pages. All that OUTA relies on in the reports amounts to no more than a paltry five pages. There was absolutely no reason why this Court and, indeed, the parties should be burdened with these documents, let alone so close to the hearing.

Jurisdiction and leave to appeal

[10] At the centre of this matter are two issues. The first is whether – in making accessing political office possible only through membership of political parties – the Electoral Act unjustifiably limits the right to freedom of association guaranteed in section 18 of the Constitution. The second involves a determination of the content of the right enshrined in section 19(3)(b) of the Constitution and whether the Electoral Act unjustifiably limits that right. Obviously, both questions do engage this Court's constitutional jurisdiction.

[11] As the discussion that follows will soon show, there are reasonable prospects of success. Also, as our earlier judgment on the question of urgency observed, this matter raises novel and far-reaching issues.[20] Both issues are without doubt of import.

[12] And, in the circumstances of this case, it makes no difference that leave is being sought to appeal directly to this Court. Having postponed the matter in April 2019 and not dismissed it outright on the basis that a direct appeal was not warranted, it would be most unjust of us to send the parties back at this late stage to follow the usual appellate hierarchy. The matter now cries out for a saving in time and costs.

[13] It is in the interests of justice to grant leave to appeal directly to this Court.

[20] *New Nation Movement NPC* above n 1 at para 1.

The two issues

[14] The two issues identified above have been pleaded as being discrete. It seems to me that in the context of this matter the freedom of association challenge is inextricably linked to what the content of the section 19(3)(b) right really is. That is so because the applicants' plea is not only about adult citizens not being coerced to be members of political parties. It is about not being so coerced so that they may exercise the section 19(3)(b) right. And they can exercise that right in this fashion only if it is guaranteed by section 19(3)(b). Thus on its own, the freedom of association challenge begs the question. One cannot avoid determining the content of the section 19(3)(b) right. That is the end of the freedom of association challenge as a standalone challenge. But – as we will see later – that does not mean freedom of association becomes irrelevant to the exercise of determining the content of section 19(3)(b).

[15] Before I proceed to deal with the interpretative exercise, let me mention that a lot was said about which electoral system is better, which system better affords the electorate accountability, etc. That is territory this judgment will not venture into. The pros and cons of this or the other system are best left to Parliament which – in terms of sections 46(1)(a) and 105(1)(a) of the Constitution – has the mandate to prescribe an electoral system. This Court's concern is whether the chosen system is compliant with the Constitution.[21]

Content of section 19(3)(b)

Subsections 19(1) and 19(3)(b)

[16] Section 19(3)(b) is part of closely related rights that the Constitution deliberately groups together as "political rights". They are so interconnected that they have to be read together. For effect, let me quote section 19 in full:

[21] This Court in *United Democratic Movement v President of the Republic of South Africa* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) (*UDM I*) at para 11 explained that "what has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional".

"(1) Every citizen is free to make political choices, which includes the right—

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right—

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office."

[17] I want to lay emphasis on subsection (1). It affords every citizen the freedom to make political choices. The fact that what are itemised in the subsection as being the choices a citizen is free to make[22] all relate to political parties does not mean those choices concern political parties only. If that were the case, instead of saying these rights or freedoms "include", the subsection would simply have said the rights "are". The present formulation means the rights are more than what is itemised.[23] As the first applicant submits, paragraphs (a) to (c) of section 19(1) "are mere examples of 'political choices'; they do not cover the field of what [section 19(1)] protects". A conscious choice not to form or join a political party is as much a political choice as is the choice to form or join a political party; and it must equally be deserving of protection.

[18] Once an adult citizen is forced to exercise the section 19(3)(b) right through a political party, that divests her or him of the very choice guaranteed by section 19(1) not to form or join a political party. That cannot be. We must strive for a reading that does not truncate the full effect of any of the rights afforded by section 19. The respondents' reading of section 19(3)(b) results in a diminution of the political choices

[22] These are said to "include" the right to: form a political party; participate in the activities of, or recruit members for, a political party; and campaign for a political party or cause.

[23] Ordinarily, "the terms 'including' or 'includes' are not terms of exhaustive definition but terms of extension". See *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 25; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) at para 455.

afforded by section 19(1). Effectively that gives rise to a conflict between the two subsections. As Ngcobo J tells us in *Doctors for Life*, this must be avoided:

> "[W]here there are provisions in the Constitution that appear to be in conflict with each other, the proper approach is to examine them to ascertain whether they can reasonably be reconciled. And they must be construed in a manner that gives full effect to each. Provisions in the Constitution should not be construed in a manner that results in them being in conflict with each other. Rather, they should be construed in a manner that harmonises them. In *S v Rens*, this Court held that '[i]t was not to be assumed that provisions in the same constitution are contradictory' and that '[t]he two provisions ought, if possible, to be construed in such a way as to harmonise with one another'."[24]

[19] I cannot but incline towards the applicants' reading of section 19(3)(b). On that reading there is consonance between the two subsections. At best for the respondents, section 19(3)(b) appears to be neutral. On its face, it does not say that when an adult citizen wants to exercise the right "to stand for public office and, if elected, to hold office", she or he must do so through a political party. It is exactly because of that appearance of neutrality that we must avoid the conflict that otherwise results.

Relevance of section 18 to the content of section 19(3)(b)

[20] If the content of section 19(3)(b) entails that an adult citizen desirous of standing for and holding political office may not be able to do so without forming or joining a political party, that pits section 19(3)(b) against section 18. That immediately becomes a weighty consideration in determining the content of the section 19(3)(b) right. Therein lies the relevance of the right to freedom of association in this discourse. The

[24] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 48. The Court had made this same point earlier in *UDM I* above n 21 at para 83 and in *Matatiele Municipality v President of the RSA (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele*) at para 36. See also *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 61.

Doctors for Life[25] and *UDM I*[26] principle calls for a harmonious reading of sections 18 and 19(3)(b).

[21] If the respondents' reading of section 19(3)(b) does not, in fact, lead to a denial of the right to freedom of association, one cannot really speak of a conflict between sections 18 and 19(3)(b). The question is: does it lead to that denial? That question must be answered. An appearance of a denial cannot be enough; *certainly not in the circumstances of this case, which involves complex issues of interpretation*.

[22] Section 18 of the Constitution provides that "[e]veryone has the right to freedom of association". In its traditional sense this right is associated more with the positive than the negative element. The positive element is about the right of an individual to be free to form an association with whomsoever she or he wishes for whatever purpose. Of course, the purpose must be one that is worthy of protection under section 18.[27] The

[25] *Doctors for Life* id.

[26] *UDM I* above n 21.

[27] There is a debate between Woolman, on the one hand, and Haysom, on the other, on whether – from the onset – there is no question of the limitation of the right where the purpose of the association is criminality or to directly threaten the constitutional order. Woolman says there is not and that at the outset the association is unconstitutional. He makes his point in two works, Woolman "Freedom of association" in Woolman et al (eds) in *Constitutional Law of South Africa* Service 2 (2014) at 45-6 and Woolman "Association" in Currie and de Waal *The Bill of Rights Handbook* 6 ed (Juta & Co, Cape Town 2018) at 401-2. He takes the view that the objects of these two types of associations justify their "categorical exclusion" from the protection of the right. And it is plain that this is not a conclusion the author reaches at the section 36(1) justification exercise because Woolman's point is made under the title "Determining the Content of the Right" at 44-5 and under the title "Content of the Right" in Currie and de Waal at 397-401. What the author says in Currie and de Waal at 402 puts it beyond question that, according to him, the two instances are not protected from the onset. There he says:

> "[W]e could reject a wholesale categorical exclusion for criminal associations. Under this last and least desirable option, we would then be faced with the choice of excluding criminal associations from the ambit of the freedom on an ad hoc basis or affording all criminal associations prima facie protection and then deciding whether restrictions on the association's freedom are justified under the limitation clause."

Indeed, that the discussion headed "Limitations on the Right" in Woolman et al at 47-9 and in Currie and de Waal at 402 comes later puts it beyond question that Woolman's view is that, right from the onset, these two instances do not receive even "prima facie protection" that may be subject to the justification exercise. So, the author says the proscription of associations that fall under these disputed categories does not limit the right at all. Article 9(2) of the German Basic Law makes express provision for the line adopted by Woolman. This article reads:

> "Associations whose aims or activities contravene the criminal laws or that are directed against the constitutional order or the concept of international understanding shall be prohibited."

negative element is about the freedom not to associate at all, if that be the individual's choice.[28]

[23] Starting with the positive element, its significance is highlighted by Alexis de Tocqueville who – more than one and half centuries ago – said:

> "The most natural privilege of [a person], next to the right of acting for [her- or] himself, is that of combining [her or] his exertions with those of [her or] his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society."[29]

[24] Haysom says "[f]reedom of association . . . is constitutive of or foundational to democratic society itself".[30]

[25] Even without resorting to any philosophical underpinnings, it is axiomatic that generally we are stronger when we have the support of others; *umntu ngumntu ngabantu*.[31] How many others depends on the nature and purpose of the association. For succour, solace, emotional support and sharing joy, pain and confidences, one may need no more than association with one person, an intimate partner or friend; or one

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Haysom, on the other hand, is of the view that the better approach is one that is more expansive at the limitation stage, but possibly restrictive with regard to these two instances when it comes to the section 36(1) justification exercise. See Haysom "Freedom of Association" in Cheadle et al in *South African Constitutional Law: The Bill of Rights* Service 27 (2019).

Happily, this matter does not call for the taking of a view either way on this. Suffice it to say Woolman's view appears to accord with what I would call the threshold approach of the Supreme Court of Canada in *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211.

[28] For more detail on it, see later.

[29] See De Tocqueville *Democracy in America* (Vintage Books, New York 1954) at 196, quoted in Cheadle et al above n 27 who, in turn, cite it from Beaudoin and Ratushny (eds) *The Canadian Charter of Rights and Freedoms* (Carswell, Toronto) 1989 at 235.

[30] Haysom above n 27.

[31] IsiXhosa for: "One becomes a fulfilled human being because of others." Literally, "A person is a person because of other people." Similarly, isiZulu says, "*Umuntu ngumuntu ngabantu*."

may need a small group of people, like one's family. Why the circle of association is small is understandable. That is dictated by the nature of the underlying reason for the association. And personal relationships of this nature are less likely to attract justifiable state interference.[32]

[26] The less individualised the need for associating, the larger the group with which one may have to associate. That may be the case with those who choose to associate for the purpose of, for example, pursuing religious or political objectives. Of course, that the circle is made bigger does not mean the state has a free hand in curtailing people's choices on who to associate with and what to associate for. The protection of the right is about giving associations, whatever their size, room to achieve the objectives for which they exist.

[27] Haysom captures the need for the protection of freedom of association thus:

> "These are a wide range of reasons why freedom of association is so highly prized, vigorously protected and widely acclaimed as a cornerstone of a democratic society. These reasons belong to one or other of two perspectives: a perspective which emphasises the need to associate in order to realise fully one's humanity – to interact, combine, make common purpose and enjoy life with other persons sharing one's cultural, personal, political or economic interests. The second perspective emphasises the necessity to a functioning democracy of such a freedom, for a proper and coherent expression and interplay of collective interests. Both perspectives are, however, grounded on the same understanding that a person alone is an atomised, powerless, lonely being without a foundation for developing an identity or the capacity to influence or change his or her physical environment or social world."[33]

[32] Compare *Roberts v United States Jaycees* 468 US 609 (1984) at 618. *Minister of Justice and Constitutional Development v Prince* [2018] ZACC 30; 2018 (6) SA 393 (CC); 2018 (10) BCLR 1220 (CC) at para 44 quotes *Bernstein v Bester N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) on the same point.

[33] Haysom above n 27.

[28] Based on this, but – for the moment – leaving aside the question of the threshold,[34] associations that fall within the positive element are protected by the right to freedom of association. Woolman says "[t]he eclectic grounds for associational freedom should strongly suggest that there are very few kinds of association which enjoy no constitutional protection".[35]

[29] Moving on, does an individual's choice not to associate at all also enjoy protection under section 18 of the Constitution? Put differently, does section 18 protect the "negative right" not to be compelled to associate? Let me answer this question by taking a brief historical journey that extends beyond our jurisdiction. And I do so with section 39(1)(b) of the Constitution in mind. In terms of section 39(1)(b) it is obligatory for a court interpreting the Bill of Rights to consider international law. The historical discourse will entail a consideration of decisions of international courts on regional Conventions or Charters.[36]

[30] The question whether freedom of association protects the negative element of the right came before the European Court of Human Rights (ECHR) in a matter decided in 1981, the matter of *Young*.[37] The case concerned former employees of the British Railways Board, the three applicants. The Board concluded a "closed shop" agreement with three unions.[38] The consequence was that it became a condition of continued

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[34] Id.

[35] Currie and de Waal above n 27 at 401-2.

[36] According to *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 35, international law includes international agreements, customary international law, "decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights". Of course, in that case this Court was dealing with section 35(1) of the interim Constitution. But that matters not because the substance of that section does not differ from that of section 39(1)(b) of the Constitution.

[37] *Young, James and Webster v The United Kingdom*, 13 August 1981, Series A no. 44.

[38] The judgment describes a closed shop thus:

> "In essence, a closed shop is an undertaking or workplace in which, as a result of an agreement or arrangement between one or more trade unions and one or more employers or employers'

employment for employees to become members of one of the three unions. The imposition of a condition of this nature was sanctioned by statute.[39] In terms of the statute, dismissal for failure to comply with the condition would be unfair if an employee genuinely objected, on grounds of religious belief, to being a member of any union whatsoever, or, on any reasonable grounds, to being a member of a particular union.[40] The applicants did not join any of the three unions. As a result, they were dismissed. They contended that the statutorily sanctioned coercion to join specified unions infringed their right to freedom of association in contravention of Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).[41] This was because the right protected by Article 11 included the negative right not to be compelled to join an association or union.

[31] In response, the government of the United Kingdom argued that this right had been deliberately excluded from protection. In support, the government relied on a statement in the *travaux préparatoires* (preparatory works).[42] The statement said "[o]n

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> associations, employees of a certain class are in practice required to be or become members of a specified union. The employer is not under any legal obligation to consult or obtain the consent of individual employees directly before such an agreement or arrangement is put into effect. Closed shop agreements and arrangements vary considerably in both their form and their content; one distinction that is often drawn is that between the 'pre-entry' shop (the employee must join the union before engaged) and the 'post-entry' shop (he must join within a reasonable time after being engaged), the latter being more common."

[39] The relevant statute was the Trade Union and Labour Relations Act 1974.

[40] *Young* above n 37 at para 21.

[41] Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (which is now titled European Convention on Human Rights, 4 November 1950) provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article (art. 11) shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

[42] This refers to materials and documents used in crafting a document like a treaty. These may be used as a tool of interpretation. In *Makwanyane* above n 36 at para 17, this Court said "[t]he Multi-Party Negotiating Process

account of the difficulties raised by the 'closed-shop system' in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which 'no one may be compelled to belong to an association' which features in [Article 20 para 2 of] the United Nations Universal Declaration".[43]

[32] The Court held:

> "The Court does not consider it necessary to answer this question on this occasion. The Court recalls, however, that the right to form and to join trade unions is a special aspect of freedom of association . . . it adds that the notion of a freedom implies some measure of freedom of choice as to its exercise. Assuming for the sake of argument that, for the reasons given in the above-cited passage from the *travaux préparatoires*, a general rule such as that in Article 20 para 2 of the Universal Declaration of Human Rights was deliberately omitted from, and so cannot be regarded as itself enshrined in, the Convention, it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 . . . and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee . . ."[44]

[33] It is significant that – despite proceeding from an apparent assumption that Article 11 did not encompass a right of the nature of that protected in paragraph 2 of

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was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the *travaux préparatoires*, relied upon by the international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded."

[43] This extract from the *travaux préparatoires* is quoted in *Young* above n 37 at para 51. Article 20 of the Universal Declaration of Human Rights (UDHR), which is referred to in the extract, provides:

> "(1) Everyone has the right to freedom of peaceful assembly and association.
>
> (2) No one may be compelled to belong to an association."

[44] *Young* above n 37 at para 52.

Article 20 of the UDHR[45] – the ECHR still held that it could not be that Article 11 was permitting every kind of compulsion in the field of trade union membership.[46] The upshot of this is that, albeit with a great degree of circumspection, the ECHR effectively recognised the existence of the negative right in the context of compulsion of a particular type; presumably heightened compulsion.

[34] A later Article 11 challenge to come before the ECHR was *Sigurjónsson*.[47] In this matter as well, the negative right not to be coerced to associate was at issue. In Iceland a licence to operate a taxicab was granted subject to membership of a taxi association. The applicant, Mr Sigurdur A Sigurjónsson, an Icelandic national and taxi operator, applied for and was granted a licence to operate a taxicab. In fulfilment of the condition, Mr Sigurjónsson joined a taxi association and paid membership dues under protest. This was the association that operated in his area. In terms of the law, he had to be a member of that association. In a letter to the association, which was also transmitted to the relevant Ministry, he stated that: under applicable law he had no choice but to join the taxi association; membership of the association was contrary to his interests and wishes; the taxi association's articles of association contained provisions that were at odds with his political opinions; in addition, the association used funds from members to work against his interests; the legislation that coerced membership of a taxi association was incompatible with the European Convention; and,

[45] This being the paragraph that reads: "No one may be compelled to belong to an association."

[46] The ECHR explains its approach and assumption in the later judgment of *Sigurdur A Sigurjónsson v Iceland*, 30 June 1993, Series A no. 264 (*Sigurjónsson*) at para 35. It says:

> "As to the question of the general scope of the right in issue, the Court notes, in the first place, that although the [*Young*] judgment took account of the *travaux préparatoires*, it did not attach decisive importance to them; rather it used them as a working hypothesis (. . . 'Assuming for the sake of argument . . .' and 'Assuming that Article 11 . . . does not guarantee the negative aspect of that freedom on the same footing as the positive aspect . . .')."

[47] Id.

as the coercion constituted an infringement of Article 11 of the European Convention, he would pursue the matter with the "Convention institutions".[48]

[35] Adopting the stance that the European Convention is a living document "which must be interpreted in the light of present-day conditions",[49] the ECHR first engaged in a discussion of developments that had taken place within the various member states since *Young*.[50] It established that, predominantly, member states had moved away from the position expressed in the *travaux préparatoires* relied on in *Young*. Based on those developments, it accepted – *categorically* this time – that the protection of the right to freedom of association includes a negative right. In its own words:

> "Accordingly, Article 11 . . . must be viewed as encompassing a negative right of association. It is not necessary for the Court to determine in this instance whether this right is to be considered on an equal footing with the positive right.
>
> . . .
>
> The applicant has since been compelled to remain a member of [the taxi association] and would otherwise . . . run the risk of losing his licence . . . . Such a form of compulsion, in the circumstances of the case, strikes at the very substance of the right guaranteed by Article 11 . . . and itself amounts to an interference with that right . . . "[51]

[36] The Court also held that the correlative[52] was that – in the case of Mr Sigurjónsson whose personal political opinions were at odds with those of the taxi association – Article 11 fell to "be considered in the light of Articles 9 and 10, . . . the

[48] Id at para 17. The Convention institutions referred to were the European Commission of Human Rights and ECHR.

[49] Id at para 35.

[50] *Young* above n 37.

[51] *Sigurjónsson* above n 46 at paras 35-6.

[52] On the concept of correlativity, see Woolman in Currie and de Waal above n 27 at 397-8 and Woolman et al above n 27 at 43-4. The ECHR did not use this term. It is my take that this is what was happening.

protection of personal opinion being also one of the purposes of the freedom of association guaranteed by Article 11".[53]

[37] Understandably, in the later case of *Chassagnou*[54] the ECHR proceeded from the premise that it was settled law that coercion to associate constituted an infringement of the right to freedom of association.[55] At issue in that case as well was the negative right.[56]

[38] Coming closer home, also of relevance is *Tanganyika Law Society*,[57] a judgment of the African Court on Human and Peoples' Rights (ACHPR). That case concerned a challenge to a 1992 amendment to the Tanzanian Constitution. The amendment required that a candidate for presidential, parliamentary and local government elections be a member of, and sponsored by, a political party. Having failed before the Tanzanian domestic court system, Reverend Mtikila, the applicant in the second of the two consolidated applications, challenged this amendment before the ACHPR. The basis was that it violated rights of aspirant candidates protected under various international human rights instruments. Of relevance here, the challenge was founded on Article 10 of the African Charter on Human and Peoples' Rights (African Charter).[58] This Article provides:

[53] *Sigurjónsson* above n 46 at para 37.

[54] *Chassagnou v France* [GC], nos. 25088/94; 28331/95 and 28443/95, ECHR 1999-III.

[55] Id at para 103.

[56] Farmers with relatively small holdings were forced by law to become members of municipal hunting associations and to transfer hunting rights over their land to these hunting associations and their members. The ECHR held that the right to associate included the right not to belong to an association and that the state could not compel a person to join an association fundamentally at odds with that person's convictions.

[57] *Tanganyika Law Society v United Republic of Tanzania; Mtikila v United Republic of Tanzania* no 009/2011, ACHPR 2011.

[58] African Charter on Human and Peoples' Rights, 27 June 1981.

> "1. Every individual shall have the right to free association provided [she or] he abides by the law.
>
> 2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association."[59]

[39] The applicants in the first consolidated application[60] – apparently acting in the public interest – made common cause with Reverend Mtikila.

[40] The ACHPR held unanimously on this issue:

> "It is the view of the Court that freedom of association is negated if an individual is forced to associate with others. Freedom of association is also negated if other people are forced to join up with the individual. In other words freedom of association implies freedom to associate and freedom not to associate."[61]

[41] I am quite alive to the fact that, unlike section 18 of our Constitution or Article 11 of the European Convention, paragraph 2 of Article 10 of the African Charter specifically provides for the negative right: "no one may be compelled to join an association". What I make of this is discussed shortly.

[42] Article 11 of the European Convention compares better with section 18 of the Constitution. That is so because, like section 18, it does not have an express proscription of coerced association. For that reason, the ECHR decisions in *Young*,[62]

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[59] According to the ACHPR, the relevant cross-reference in Article 29 is 29(4) "which imposes a duty on the individual to 'preserve and strengthen social and national solidarity, particularly when the latter is threatened'". (*Tanganyika Law Society* above n 57 at para 112).

[60] The Tanganyika Law Society and the Legal and Human Rights Centre.

[61] *Tanganyika Law Society* above n 57 at para 113.

[62] *Young* above n 37.

Sigurjónsson[63] and *Chassagnou*[64] on that Article particularly offer useful guidance on interpreting section 18. I can conceive of no cogent reason why we too should not come to the conclusion that section 18, in fact, protects the negative right not to be compelled to associate.[65] We do not have the apparent hurdle of the *travaux préparatoires* that appears to have informed the circumspect approach of the ECHR in *Young*. If the ECHR could reach the conclusion that it did notwithstanding that evidentiary material which seemed to point in the opposite direction, it follows more strongly that we too must come to the same conclusion.

[43] On the other hand, paragraph 2 of Article 10 of the African Charter specifically provides that "no one may be compelled to join an association".[66] Does that mean the decision of the ACHPR in *Tanganyika Law Society* does not assist us? Of course, it does assist. When the Court says "freedom of association is negated if an individual is forced to associate with others", that means exactly that. When the Court says "[f]reedom of association is also negated if other people are forced to join up with the individual", that too means exactly that. You associate or do not associate as you wish. It is a free exercise of choice. It makes sense that that must be so either way. Crucially, the ACHPR said "freedom of association *implies* freedom to associate and freedom not to associate". (Emphasis added.) In context, this is plainly an implication the ACHPR sees from the notion of "freedom of association" without recourse to paragraph 2 of Article 10.

[44] It seems to me – perhaps with the benefit of hindsight provided by the ECHR interpretation – that paragraph 2 of Article 10 of the African Charter and the equivalent paragraph 2 of Article 20 of the UDHR specifically proscribe coerced association *ex*

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[63] *Sigurjónsson* above n 46.

[64] *Chassagnou* above n 54.

[65] I am not unmindful of the ECHR's unique reliance on what individual states had done post *Young*.

[66] This is comparable to paragraph 2 of Article 20 of the UDHR. Article 20 provides:

> "(1) Everyone has the right to freedom of peaceful assembly and association.
>
> (2) No one may be compelled to belong to an association."

abundante cautela (out of extreme caution). Indeed, when one looks at how the ACHPR reasoned, it says little about the specified proscription.

[45] In terms of section 39(1)(c) of the Constitution foreign law may be considered in interpreting the Bill of Rights. The legal position of at least two foreign jurisdictions also seems to point in the same direction as the international law I have dealt with. Article 9(1) of the German Basic Law provides that "[a]ll Germans shall have the right to form societies and other associations". Van Wyk et al, relying on German case law say:

> "The freedom not to associate is also protected by [Article 9(1) of the German Basic Law]. The dominant opinion regards this freedom not to associate as the logical and necessary correlative of the freedom to associate – i.e. if the individual is denied the freedom to dissociate, his or her positive freedom to join or establish an association is also infringed. The freedom not to associate includes the right not to establish the association, to stay out of existing associations, to dissolve an association, and to resign from an association."[67]

[46] Section 2(d) of the Canadian Charter of Rights and Freedoms guarantees to everyone "freedom of association".[68] In *Lavigne* the Canadian Supreme Court also recognised the protection – by this section – of the right not to associate.[69] Of

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[67] Van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (Juta, Cape Town 1994) at 366. The German cases relied on by the authors are 4 BV erfGE 7 26; 10 BV erfGE 89 102; 38 BV erfGE 281 297; 50 BV erfGE 290 354; 31 BV erfGE 297 302.

[68] In full, section 2 of the Canadian Charter of Rights and Freedoms reads:

> "Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association."

[69] *Lavigne* above n 27.

importance, both Article 9(1) of the German Basic Law and section 2(d) of the Canadian Charter of Rights and Freedoms do not have equivalents of paragraph 2 of Article 10 of the African Charter and paragraph 2 of Article 20 of the UDHR. That makes the German and Canadian positions of particular relevance.

[47] It is unsurprising that the Court in *Tloubatla* also came to the conclusion that section 18 of our Constitution protects the right to refrain from associating.[70] Van Dijkhorst J held:

> "[T]here is no reason in my view to restrict the meaning of our clause on the freedom of association merely to the positive. The Constitution was intended to grant freedoms, not restrict them.
>
> I hold therefore that section 18 of the Constitution also protects the right to refrain from association."[71]

[48] A point was made by the respondents that it is inexpensive and not difficult to form a political party. The subtext was that, if the applicants are unwilling to join existing political parties, they have no reason not to form political parties of their own. It may be inexpensive and not difficult to form a political party. That is not the issue. There are other and perhaps more important issues. This matter is about choices; not choices about mundane daily preferences. Rather, choices that implicate the very notion of freedom which the right to freedom of association is about. If it is an individual's fundamental right to be free to associate with whomsoever she or he wishes, surely it must equally be one's fundamental right to be free not to associate with anybody whatsoever.

[49] Although for some there may be advantages in being a member of a political party, undeniably political party membership also comes with impediments that may be unacceptable to others. It may be too trammelling to those who are averse to control.

[70] *The Law Society of the Transvaal v Tloubatla* 1999 JDR 0309 (T).

[71] Id at 15.

It may be overly restrictive to the free spirited. It may be censoring to those who are loath to be straight-jacketed by predetermined party positions. In a sense, it just may – at times – detract from the element of self; the idea of a free self; one's idea of freedom.

[50] We are here not concerned with idle or unmeritorious preferences that may not be worthy of constitutional protection. This brings me to the *Lavigne* threshold. La Forest J held:

> "Realistically, . . . the organisation of our society compels us to be associated with others in many activities and interests that justify state regulation of these associations. Thus I doubt that section 2(d) can entitle us to be free of all legal obligations that flow from membership in a family. And the same can be said of the workplace. In short, there are certain associations which are accepted because they are integral to the very structure of society. Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of the nation state will be constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common interest. However, as will be seen, state compulsion in these areas may require assessment against the nature of the underlying associational activity the state has chosen to regulate."[72]

[51] It is important to note that at this point the Court was dealing with whether there was a limitation of the right to freedom of association, not justification under section 1 of the Canadian Charter of Rights and Freedoms.[73]

[52] Being coerced to form or join a political party is an issue that may fundamentally touch one's inner core; a matter that goes to one's conscience. And freedom of

[72] *Lavigne* above n 27 at 321.

[73] Section 1 is the Canadian equivalent of section 36 of the South African Constitution.

conscience is protected by section 15(1) of the Constitution.[74] It is so that individual members of a legislature remain "free to follow the dictates of personal conscience".[75] But they do so at their own peril because "if [they] wish to be re-elected they need to bear in mind party discipline".[76] A classic Hobson's choice for somebody who does not want to be shackled by party politics and constraints. Ms Revell, the second applicant, is such a person. We cannot make light of her choice. In the interpretative exercise, her personal situation is merely illustrative.

[53] We cannot dismissively say if you stand for political office through a political party, it makes no difference; you still do stand for political office. It may make all the difference to some. And it does to Ms Revell. She explains that, as a representative and leader of the Korana nation, a section of the Khoi and San people, she is averse to forming or joining a political party. Hers is not a for-the-sake-of-it objection. I understand her point perfectly. I read it to mean that, as a leader of a nation, she does not want to be constrained by that kind of partisanship that comes with being a member of a political party. That partisanship makes you ultimately answerable to the party. Being free of those shackles will make Ms Revell directly answerable to her nation, not to a political party. That is the choice she is making. In my book, it is a valid choice. Surely, her example is not isolated. There must be many and varied other examples. Subject to the *Lavigne* threshold, we cannot make light of them.

[54] This must not be taken to mean the state is entitled to ride roughshod over associational choices that are not sound. Even if not well founded, choices by an individual may well define her or him. Unless the state can justify interference, even

[74] Section 15(1) provides that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion".

[75] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification judgment*) at para 186.

[76] Id at para 185.

such choices are deserving of protection under section 18. Indeed, I read Woolman to make a similar point.[77] Many of the life practices we follow have nothing to do with well thought-out choices. Some are "arational" choices dictated by the world we live in.[78] One may be a member of a certain religion not because she or he has made a conscious decision in that regard, but purely because that is the religion she or he grew up in. Likewise, one may follow certain cultural practices and thereby commune with certain groups of people in furtherance of their culture. And that may be for no reason other than that that's what she or he was socialised into. So, some of our associational relations may not have been chosen. "They just are."[79] But they may be deserving of protection.

[55] All this must also apply to arational choices not to associate. Again, that is subject to constitutionally compliant curtailment by the state.

[56] *UDM II*[80] shows us that Ms Revell's concerns are not idle. At issue was whether – at a motion of no confidence against former President Jacob Zuma – individual members of the National Assembly could vote in accordance with their conscience as opposed to the position of their political parties. This Court held:

> "As is the case with general elections where a secret ballot is deemed necessary to enhance the freeness and fairness of the elections, so it is with the election of the President by the National Assembly. This allows Members to exercise their vote freely and effectively, in accordance with the conscience of each, without undue influence, intimidation or fear of disapproval by others.

[77] Woolman in Currie and de Waal above n 27 at 398-9 and in Woolman et al above n 27 at 9-14.

[78] Compare Woolman id.

[79] Id.

[80] *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC).

> The frustration or disappointment of the losing presidential hopeful and his or her supporters could conceivably have a wide range of prejudicial consequences for Members who are known to have contributed to the loss. To allow Members of the National Assembly to vote with their conscience and choose who they truly believe to be the best presidential material for our country, without any fear of reprisals, a secret ballot has been identified as the best voting mechanism."[81]

[57] If all members of the National Assembly were free to vote as they pleased regardless of how politically sensitive an issue might be and without any risk of reprisals from their political parties, litigation on this issue would not have been necessary. It is exactly because the opposite prevails that the litigation was instituted. This would not have been an issue at all for someone not subject to encumbrances of party politics; someone not owing her or his membership of the National Assembly to a political party. Ms Revell typifies that kind of person. What this demonstrates is that the question of the exercise of the free will of members of the legislatures does arise; the question of voting in accordance with one's conscience. Is this an insignificant matter? Definitely not.

[58] 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.

[59] 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.

[81] Id at paras 73-4.

[60] Also, this reading creates tension between the section 19(3)(b) right and the section 10 right to dignity. Woolman says "associational freedom prevents the state and other powerful social actors from determining the most basic contours of our lives through coercion".[82] Coercion implicates the right to dignity. Who one associates with or whether one associates at all are so close to the inner self that it is an affront to who one truly is and, indeed, an assault on one's dignity, to be told who to associate with or to associate when you do not want to. And why coercion of this nature impinges on dignity is because dignity underlies all other fundamental rights. In *Dawood* O'Regan J explains thus:

> "The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights."[83]

[61] This is not about those who are comfortable with being members of political parties. It is about those who are not. It does not matter how few they might be. Rights-protection is about all those the Bill of Rights seeks to protect. It is not only about the protection of majorities. In fact, in some instances the interests of minorities may cry out for singular protection.[84] I am not here talking about possible pleas by

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[82] Woolman in Currie and de Waal above n 27 at 397.

[83] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

[84] See *Gauteng Provincial Legislature: In re Dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at para 66, where this Court said:

> "[T]here has been increasing recognition of the general importance of pluralism and diversity, and acknowledgement of what has been called 'the right to be different', which by its very nature is a right claimed by those who do not wish to be assimilated into the dominant culture or forced to live their lives according to the dominant norms."

minorities pegged on the Bill of Rights, but whose sole object is to preserve ill-gotten privilege. I am talking about minority interests that are worthy of protection.

[62] In sum, this discourse is a serious matter implicating no fewer than three fundamental rights: the right to freedom of association; freedom of conscience; and the right to dignity. On the respondents' interpretation, all three of them are pitted against the section 19(3)(b) right.

[63] The Constitution is one composite whole. As such, it could not have been framed to be contradictory. That is exactly why this Court has held that "[i]t is not to be assumed that provisions in the same Constitution are contradictory".[85] To the extent that there may be tensions between its provisions, everything possible must be done to harmonise them. On their own and without regard to other constitutional provisions, the sections that are the source of freedom of association and rights that are cognate to it, namely freedom of conscience and the right to dignity, on the one hand, and the section 19(3)(b) right, on the other, can be read harmoniously. The respondents' reading of section 19(3)(b) forces us to read in that one must stand for and hold political office "through a political party". With the potential infringement of the section 18 right and the correlative rights, that reading-in is contraindicated. This calls for a reading of section 19(3)(b) that is consonant with section 18 and the other related rights. All these are weighty factors in the interpretative exercise.

[64] But that cannot be the end of the matter. It was suggested by the respondents that a party proportional representation system is indicated by a number of other provisions in the Constitution, including Schedule 6 to it. Is that indeed so? Or, is a reading of section 19(3)(b) that does not lead to a denial of the right to freedom of

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See also *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at para 43, where Moseneke DCJ says:

> "Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen."

[85] *S v Rens* [1995] ZACC 15; 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC) at para 17.

association consonant with these other provisions? If I am to answer the latter question in the affirmative, I must be satisfied that these provisions do not stand in the way of that answer. I next deal with the provisions.

Schedule 6

[65] For present purposes, it is items 6(3)(a) and 11(1)(a) of Schedule 6 to the Constitution that we need look at. Schedule 6 is headed "Transitional Arrangements". And the wording of that heading is significant. Item 6(3)(a) provides that despite the repeal of the interim Constitution,[86] "Schedule 2 to that Constitution, as amended by Annexure A to [Schedule 6], applies . . . to the *first* election of the National Assembly under the [final] Constitution". (Emphasis added.) Item 11(1)(a) is worded similarly, the only difference being reference to "first election of a provincial legislature" instead of "first election of the National Assembly". In terms of item 1 of Schedule 2 to the interim Constitution, registered political parties nominated candidates for election to the National Assembly.[87] The provincial equivalent was item 11. It too provided that political parties nominated candidates for Provincial Legislatures. That meant no independent candidates could stand for election to these institutions. The system was exclusively based on party lists that contained the names of nominated candidates.[88]

[66] With the apparent object of ensuring broad based representation, the Schedule insisted that half the number of members of the National Assembly be drawn from

[86] To avoid any possible confusion, where "Constitution" is not qualified, that refers to the final or current Constitution. The earlier Constitution is qualified by "interim".

[87] This item reads:

> "Parties registered in terms of the Electoral Act, 1993, and contesting an election of the National Assembly, shall nominate candidates for such election on lists of candidates prepared in accordance with this Schedule and the Electoral Act, 1993."

[88] See, for example, the reference to (a) "[p]arties . . . shall nominate candidates for such election on lists of candidates" in item 1 and (b) "lists submitted by the respective parties" in item 2(a) and (b); and the reference to "provincial lists" in item 11 which – when cross-referenced to item 12 – is a provincial party list.

regional lists[89] and the other half from national lists, or from regional lists where national lists were not submitted.[90] At both national and provincial levels, the Schedule stipulated a detailed and intricate proportional representation system on the allocation of seats.[91]

[67] Despite the repeal of the interim Constitution by section 242 of the Constitution, the effect of items 6(3)(a) and 11(1)(a) of the Constitution was to import the electoral system created by Schedule 2 to the interim Constitution into the Constitution. This was subject to amendments to that Schedule contained in Annexure A to Schedule 6 to the Constitution. Regardless of the substance of the changes to Schedule 2 to the interim Constitution, Annexure A to Schedule 6 retained nomination through party lists and the party proportional representation system. Still there was no room for independent candidates at both national and provincial level. But then items 6(3)(a) and 11(1)(a) of Schedule 6 to the Constitution say, in so many words, that that imported electoral system was to apply to the *first* National Assembly and Provincial Legislature elections under the Constitution. Logically, that terminal point applied equally to Annexure A to Schedule 6 insofar as that Annexure gave content to the electoral system envisaged in items 6(3)(a) and 11(1)(a); the party proportional representation system provided for in Annexure A had no independent existence outside of these items. In *UDM I* this Court held that "Annexure A is a transitional provision which has no life beyond the transitional period that it regulates".[92]

[89] Item 2(a) of Schedule 2 to the interim Constitution.

[90] Item 2(b) of Schedule 2 to the interim Constitution.

[91] Items 5 and 6, in the case of the National Assembly, and items 13 and 14, in the case of Provincial Legislatures. The upshot was that "[s]eats were allocated to the various parties proportional to the votes cast. Those seats were filled by representatives on the party lists, seats being allocated in accordance with the order in which the party's candidates were named on the list." (*UDM I* above n 21 at para 37).

[92] *UDM I* above n 21 at para 88.

[68] Thus any continued employment of an exclusive party proportional representation system can no longer be sourced from items 6(3)(a) and 11(1)(a); not when the *first* election under the Constitution has long come and gone. What this Court said in *UDM I* is instructive. It said the party proportional representation system was "to remain in place until the second election which [was] to be regulated by the legislation envisaged in sections 46(1)(a) and 105(1)(a) of the Constitution".[93] The "second" election referred to in the quote was the second in a democratic South Africa. But that was the first election under the Constitution, the preceding election having been conducted under the interim Constitution.

[69] Whatever the motivation, the exclusive party proportional representation system first stipulated *expressly* in Schedule 2 to the interim Constitution and later – *also expressly* – in items 6(3)(a) and 11(1)(a) to the Constitution was to apply only up to a specified point. If a party proportional representation system was to apply beyond that point, it would have to be in terms of constitutionally compliant legislation envisaged in sections 46(1)(a)[94] and 105(1)(a)[95] of the Constitution. As we know, a system of party proportional representation continues under the Electoral Act. Its compliance with the Constitution is what we must determine through a process of interpretation. The fact that the Constitution no longer makes express provision for an exclusive party proportional representation system when it previously did must add something to that process. If it does not, why else would the Constitution have jettisoned the express insistence on exclusive party lists in the first two elections? A fully functional edifice that provided for exclusive party proportional representation was in place and worked perfectly for the first two democratic elections. Why dismantle it, if exclusive party proportional representation is what the Constitution requires? I think what this is indicating is that section 19(3)(b), read with section 18 and the other cognate rights, must be given its full effect. And I have indicated above what that effect must be.

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[93] Id at para 86.

[94] Section 46(1)(a) 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".

[95] Section 105(1)(a) 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".

Section 1(d)

[70] Section 1 of the Constitution contains the founding values of the Republic of South Africa. Section 1(d) provides for some. And they are universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. The High Court held that the founding values stipulated in section 1(d) and the provisions of sections 46(1)(a) and 105(1)(a) do not support the applicants' case. Before us the respondents supported this approach and added that sections 1(d), 46(1)(a) and 105(1)(a) read together with sections 46(1)(d), 47(3)(c), 105(1)(d) and 106(3)(c), in fact, detract from the applicants' case. For now, I focus only on section 1(d).

[71] The first applicant submitted that there is no basis for reading section 1(d) as an indication that the Constitution requires an exclusively party based proportional representation system. All that this founding value does, continued the submission, is to stipulate that the Republic must never be a one-party state. That in no way excludes the participation of independent candidates in the regular elections envisaged in section 1(d). I agree. Indeed, here is what this Court held in *UDM I*:

> "[A] multi-party system of democratic government clearly excludes a one-party state, or a system of government in which a limited number of parties are entitled to compete for office.
>
> . . .
>
> A multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid."[96]

[96] *UDM I* above n 21 at paras 24 and 26.

[72] What this makes obligatory is allowing different political groups to organise and participate in elections, including fielding candidates. It in no way says only those political groups must do so. It says nothing about the exclusivity of multi-party representation.

[73] This approach is not unmindful of the special place enjoyed by section 1 of the Constitution, which contains the founding values of the Republic. In recognition of this special place, section 74(1) of the Constitution pitches the threshold for amending section 1 and section 74(1) itself at 75 per cent of members of the National Assembly and a supporting vote of at least six provinces. That is more than the two thirds majority for other constitutional amendments which must also be accompanied by a supporting vote of at least six provinces.[97] That said, I repeat that nothing in the founding values contained in section 1(d) detracts from my approach.

Sections 46(1)(a) and 105(1)(a)

[74] These sections respectively provide that the National Assembly and Provincial Legislatures consist of women and men elected in terms of an electoral system prescribed by national legislation. In support of what the High Court held, the Minister and the Electoral Commission submitted that the Electoral Act is the national legislation envisaged in these sections. I understand this to mean there is no cause for complaint; the Constitution says national legislation must prescribe, and national legislation has prescribed. The Electoral Commission added that, if Parliament could not even prescribe an exclusive party proportional representation system, it would be left with very little under the power conferred on it by sections 46(1)(a) and 105(1)(a).

[75] The first applicant argued that it can never be that the envisaged legislation could not be subject to constitutional curbs. What Parliament prescribes still has to be constitutionally valid. Yet again, I agree. For as long as section 2 of the Constitution, our supremacy clause, provides that the Constitution is the supreme law of the Republic

[97] See section 74(2) and (3) of the Constitution.

and that law or conduct inconsistent with it is invalid, Parliament cannot have *carte blanche*. Pronouncing in a different, but relevant context, this Court said in *New National Party*:

> "It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves . . . . But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.
>
> A second constraint is that the electoral scheme must not infringe any of the fundamental rights enshrined in chapter 2 of the Constitution."[98]

[76] The question is whether the choice made in the Electoral Act is constitutional. That is a question I am yet to determine.

Sections 47(3)(c) and 106(3)(c)

[77] The two sections respectively provide that a person loses membership of the National Assembly or Provincial Legislature if she or he ceases to be a member of the party that nominated her or him for membership. According to the respondents, that supports the view that membership of these legislative institutions is exclusively party based. The first applicant countered this by submitting that this means no more than that it is the membership of members nominated by parties that is lost in this manner. That says nothing about loss of membership of members who were not sponsored by parties. Nor is it in any way indicative of their exclusion from membership. I agree.

[98] *New National Party* above n 11 at paras 19-20.

Sections 46(1)(d) and 105(1)(d)

[78] Sections 46(1)(d) and 105(1)(d) respectively provide that the National Assembly and Provincial Legislatures consist of women and men elected in terms of an electoral system that "results, in general, in proportional representation". The respondents argued that this refers to an exclusive party proportional representation system. OUTA argued, correctly in my view, that proportionality does not equal exclusive party proportional representation. The idea of proportional representation is not inconsonant with independent candidate representation. These sections make no reference to party proportional representation, let alone exclusive party proportional representation. The focus of the sections is on the "result": whoever the participants may be, the system must be one that "results, in general, in proportional representation".

[79] OUTA further argued that proportionality may come in different forms. And it may even find application in a combination of party representation and independents. I do not see why that cannot be so. Indeed, it is quite plain from the provisions of section 157(3) of the Constitution that proportional representation is quite possible where there is a combination of representation through party lists and representation by individuals who need not be attached to political parties. Here is why I say so. In respect of the election of members of a Municipal Council, section 157(2) empowers Parliament to pass legislation that prescribes a system: where members are exclusively elected through party lists (section 157(2)(a)); or where membership is drawn from a combination of party lists and ward representation (section 157(2)(b)). Read in the context of section 157(2)(a), which is specific on exclusive party representation, ward representation under section 157(2)(b) certainly does admit of independent candidate representation. That is so because in respect of ward representation the section is silent on party participation. It matters not that in ward representation some – even most – individual candidates may, in fact, be sponsored by political parties.

[80] Section 157(3) then requires that an electoral system under section 157(2) (meaning either exclusively party based or comprising a combination of party lists and ward representation) "must result, in general, in proportional representation". This is

the clearest possible statement that dispels the notion that proportional representation is consonant only with representation through political parties. So, the reference in sections 46(1)(d) and 105(1)(d) to "results, in general, in proportional representation" does not assist the interpretation advanced by the respondents.

Sections 57(2), 178(1)(h), 193(5) and 236

[81] Although the Speaker claimed not to oppose the merits of the constitutional challenge, in her affidavit she advanced arguments whose tenor suggested that the applicants' interpretation was untenable. She submitted that certain provisions of the Constitution "confirm that a system based on proportional representation [presumably party proportional representation], was, and remains, constitutionally mandated". In this regard, she called in aid the sections relied upon by the Minister and Electoral Commission.

[82] In addition, she relied on sections 57(2) and 236 of the Constitution. Section 57(2) provides that the rules and orders of the National Assembly must make provision for: the participation of minority parties in committees of the National Assembly;[99] the financial and administrative assistance of all parties represented in the National Assembly; and the recognition of the leader of the largest opposition party in the National Assembly as the Leader of the Opposition. Section 236 stipulates that, in order to enhance multi-party democracy, national legislation must provide for the funding of political parties participating in the National Assembly and Provincial Legislatures. The substance of the Speaker's submissions is that if the participation of independents in these institutions was envisaged, the Constitution would have required that there be provision for: their participation in the institutions' committees; and their financial and administrative assistance. She adds that section 236 would have required that the envisaged national legislation cater for them as well.

[99] Section 116(2)(b), which applies to Provincial Legislatures, is to similar effect. Obviously, instead of referring to the "National Assembly", it refers to a Provincial Legislature.

[83] The Electoral Commission supports these submissions and adds sections 178(1)(h) and 193(5) of the Constitution to the equation. Section 178(1)(h) provides that the Judicial Service Commission must consist of six people designated by the National Assembly from amongst its members, at least three of whom must be members of opposition parties.[100] In terms of section 193(4) the President appoints the Public Protector, the Auditor-General and members of the South African Human Rights Commission, the Commission for Gender Equality and the Electoral Commission. The people to be appointed to these positions must be recommended to the President by the National Assembly.[101] In terms of section 193(5) the National Assembly recommends people nominated by its committee. This section also provides that the committee must proportionally be composed of members of all parties represented in the National Assembly.

[84] Based on all these sections – that is, including those relied upon by the Speaker – the Electoral Commission submits that if sections 18 and 19 truly conferred the right contended for by the applicants, the Constitution would have catered for independent members of Legislatures. That it does not do so "speaks volumes".

[85] Ours is a constitutional order that puts a premium on the founding values contained in section 1 of the Constitution.[102] One of those founding values implicitly denounces one party governance for South Africa and expressly decrees that the Republic is founded on the value of a multi-party system of democratic government. It is in this context that sections 57(2), 178(1)(h), 193(5) and 236 must be viewed. With that context in mind, their particular focus on political parties is understandable. This focus seeks to ensure that this founding value is attained. It is about strengthening multi-party democracy. I do not see it as negating the possibility of the participation of independents in the National Assembly and Provincial Legislatures.

[100] That, of course, is in addition to other members whose membership is stipulated by the Constitution or members who are nominated (and then appointed by the President) or designated by a variety of bodies or functionaries in terms of paragraphs (a)-(g) and (i)-(k) of section 178(1) of the Constitution.

[101] This too is in terms of section 193(4).

[102] I explain this more fully above in [73].

[86] The Constitution deliberately did not make proportional representation, including party proportional representation, a founding value. If it had made party proportional representation a founding value, we would not be having this interpretative debate. Add to this the fact that – although the interim Constitution and the Constitution already had in place a system of electing political office bearers in accordance with party lists – our constitutional order kept that system alive only up to the first election under the Constitution.[103] Why was that system not kept in place indefinitely? It ought not to have been part of transitional arrangements under the Constitution. It ought to have been retained so that – instead of being required to create an electoral system – all that the Legislature would be left to do would be to provide nuts and bolts on how that existing system would work.

[87] So, the reliance on sections 57(2), 178(1)(h), 193(5) and 236 is not enough to detract from the applicants' case.

Section 157(2)(a)

[88] A section that appears to offer support for the respondents' interpretation better than the rest is section 157(2)(a) of the Constitution.[104] The question is: is that apparent support sustainable? The respondents did not rely on this section in the context of what I am about to address. As a result, after the oral hearing, supplementary directions were issued calling upon the parties and *amici* to address the question—

[103] See the discussion in [65] to [69] above.

[104] Section 157(2) of the Constitution provides:

> "The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system—
>
> (a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or
>
> (b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll."

> "whether, if the applicants' challenge were to be upheld, that would not mean there is, within the Constitution, an internal contradiction between the existence of the right asserted by the applicants under sections 18 and 19(3)(b) of the Constitution, on the one hand, and the power conferred by section 157(2)(a) of the Constitution on Parliament to enact legislation that prescribes a system of proportional representation that is exclusively based on party lists, on the other."

[89] Section 157(2) stipulates that membership of a Municipal Council must be in accordance with national legislation which must prescribe the two *alternative* systems contained in paragraphs (a) and (b) of the section. For present purposes, only the system which may be prescribed in terms of paragraph (a) is of relevance. That system may exclusively be a party proportional representation system. I say so because the system to be introduced by the envisaged legislation must provide "for the election of members from lists of party candidates drawn up in a party's order of preference". There is simply no room for the system to provide for the participation of individual candidates. Here lies what may be seen as a contradiction. If making it impossible for adult citizens to stand for and, if elected, to hold office as individuals is unconstitutional under section 19(3)(b), that appears to contradict section 157(2)(a) which expressly sanctions election to public office exclusively through party representation. Put differently, why is a system that provides for exclusive party representation unconstitutional under section 19(3)(b) but constitutional under section 157(2)(a)?

[90] In response to the supplementary directions, the first applicant submitted that section 157(2)(a) "does *not* say the system must be for political parties *only*". (Emphasis in original.) That is not correct. The section does say so. It says the paragraph (a) alternative system of proportional representation must be based on a municipality's segment of the common voters roll. It then stipulates – *conjunctively* – the system must provide for the election of members *from lists of party candidates drawn up in a party's order of preference*.

[91] The second to fourth applicants supported OUTA's submissions.

[92] The Electoral Commission submitted that the system dealt with by section 157(2)(a) is expressly one which "provides for the election of members from *lists of party candidates* drawn up in *a party's order of preference*". (Emphasis added by the Electoral Commission.) This submission is correct. And part of it is a direct quote from section 157(2)(a). The Electoral Commission argues further that section 157(2)(a) is destructive of the applicants' reliance on sections 18 and 19. These two sections, continues the submission, are silent on whether there is a right to run for office as an independent candidate. According to the Electoral Commission, that leaves the Court with two competing interpretations, namely—

(a) despite the silence, sections 18 and 19 *require* an electoral system that affords independent candidates an opportunity to run for public office; and

(b) the sections do not deal with that issue at all: "[t]hey leave the issue of the electoral system and whether it includes independent candidates to the operational provisions of the Constitution".

[93] The Electoral Commission then submits that the applicants' contention that sections 18 and 19(3)(b) afford independent candidates an opportunity to run for public office creates a fundamental, irreconcilable contradiction with section 157(2)(a). On the respondents' interpretation that contradiction is avoided. For that reason alone, contends the Electoral Commission, the applicants' interpretation must be rejected. The Speaker – despite having filed a notice to abide – filed written submissions in response to the supplementary directions.[105] She made submissions that were to similar effect. She urged us to interpret sections 19(3)(b) and 157(2)(a) harmoniously, which is achievable through the respondents' interpretation.

[94] CASAC submitted that the Constitution permits – but does not require – Parliament to provide for the election of independent candidates. The applicants' contention to the contrary cannot be reconciled with section 157(2)(a), which allows an

[105] As I indicated earlier, she also filed an affidavit in which she raised some arguments.

exclusively party based electoral system. The submission continues that this is so because – on the applicants' argument – this exclusively party based system would infringe the rights protected under sections 18 and 19(3)(b).

[95] The Minister's supplementary submissions only highlighted that section 157(2) provides for two alternative systems, one exclusively party based and the other a combination of ward representation and members drawn from party lists.

[96] OUTA argued that section 157(2)(a) does not create an internal contradiction between its provisions and those of sections 18 and 19. Rather, section 157(2)(a) imposes a requirement that entails a "discrete and narrow limitation" on the rights protected by sections 18 and 19. It then made the point that this is not an isolated occurrence in the Constitution. As examples of narrow and discrete limitations OUTA mentioned: the limitation of rights guaranteed in the Bill of Rights in terms of section 36 of the Constitution;[106] the powers of national government to intervene in provincial administration,[107] and of provincial governments to intervene in municipal matters;[108] and the derogation of constitutional rights in terms of legislation enacted pursuant to a declaration of a state of emergency. In this context, OUTA is using "limitation" in the sense of intra-constitutional curbs on the full effect of certain provisions of the Constitution.

[97] OUTA then submitted that section 157(2)(a) similarly "creates a narrow limitation". And it does so "only in the local government sphere, on the political rights entrenched in sections 18 and 19". I am attracted to this argument. What gives it even greater force and takes me beyond mere attraction is some crucial background material. At the stage of negotiating for the attainment of democracy, there were issues that uniquely affected municipalities. As a result, negotiations in respect of municipalities

[106] Section 36 is quoted later.

[107] Section 100 of the Constitution.

[108] Section 139 of the Constitution.

were conducted separately from the rest of the negotiation process. Enough with the paraphrase:

> "Our history has produced a rigid pattern of racial division in society. Black residential areas were, and still are, characterised by a lack of amenities, physical infrastructure and services. Where these exist, they are of inferior quality compared to those enjoyed in historically white residential areas. Local government was equally divided along racial lines. In recognition of this history, the negotiations relating to the transformation of local government were conducted separately from the negotiations regarding the transition of power at the national and provincial levels."[109]

[98] It makes sense that – for whatever reason – the framers of the Constitution (which post-dates the mentioned negotiations) may have seen a need to introduce in the Constitution a discrete, internal limit applicable only to the system of election of members of Municipal Councils. The problems uniquely attendant to municipalities – involving as they did – the intractable problem of racially based spatial distribution of the South African population could not have ended overnight.

[99] Viewed with this background in mind, section 157(2)(a) does not contradict section 19(3)(b). In that context, section 19 which is the primary source of people's political rights continues to be the fundamental norm on them; not section 157(2)(a), which is tailor-made for municipal elections. The normative force of section 19 continues to apply in every instance where the Constitution has not specified a system of representation different to what section 19 requires. Therefore, in the election of members of the National Assembly and Provincial Legislatures, the normative system the Bill of Rights itself creates in section 19 must apply; it must not be derailed or diverted by provisions *specially* created for municipalities under section 157(2)(a) because of their unique setting.

[109] *Executive Council, Western Cape v Minister for Provincial Affairs and Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of South Africa* [1999] ZACC 13; 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) at para 44.

[100] In sum, I am unpersuaded that, because of the constitutional provisions I have dealt with in paragraphs [65]-[99], it is not obligatory to afford independent candidates an opportunity to stand for and, if elected, to hold office. Therefore, Mogoeng CJ was correct in *My Vote Counts II* when he said:

> "[Section 19(3)(b)] addresses the fundamental right every adult 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."[110]

It will be recalled that the High Court held that this was obiter. And before us arguments and counter-arguments were advanced on that. It is unnecessary to enter that debate for that matters not in the circumstances.

Unconstitutionality of previous elections

[101] The Electoral Commission submitted that the success of the applicants' argument would mean the first two democratic elections[111] took place in a manner that breached fundamental rights protected by the Bill of Rights. According to the Electoral Commission, that would be absurd. It substantiated this by contending that what the applicants want us to hold means the framers of the Constitution created a fundamental contradiction within the Constitution: whilst the Constitution guaranteed independents

[110] *My Vote Counts II* above n 18 at para 29.

[111] That is, the elections conducted under the interim Constitution and the first elections held under the Constitution.

the right to stand for public office,[112] at the same time it denied them that right.[113] The denial of the right consisted in the fact that under the two Schedules[114] provision was for the conduct of the first two elections only in terms of a party proportional representation system.

[102] I disagree. First, items 6(3)(a) and 11(1)(a) of Schedule 6 to the Constitution make plain that the exclusive party proportional representation system was never meant to last forever. The items are contained in "transitional arrangements" under the Constitution. That immediately tells us that what these items provide for was part of a passing constitutional phase. Second and relatedly, the items say, in so many words, Schedule 2 to the interim Constitution, as amended by Annexure A to Schedule 6 to the Constitution, was to apply to the *first* elections of the National Assembly and Provincial Legislatures under the Constitution.

[103] Thus what tension or "contradiction" came about as a result must be understood in the context of that short-lived transitional arrangement. That tension or contradiction lasted only up to the first elections under the Constitution. On the other hand, each right in the Bill of Rights was meant to last for as long as there had not been a constitutional amendment affecting it. Therefore, the Constitution must be read to have chosen to sanction the disharmony, but only for a short while. Post that short while, nothing would stand in the way of the exercise of such rights as may have been affected by the tension.

[104] Earlier I alluded to the fact that it is not unheard of that there will at times be disharmony in constitutional provisions. What courts are called upon to do in those circumstances is to interpret the provisions as harmoniously as possible.[115] To me, for

[112] That guarantee – according to the applicants – being in the Bill of Rights.

[113] The denial being in Schedule 2 to the interim Constitution and Schedule 6 (read with Annexure A to it) to the Constitution.

[114] Id.

[115] See *Doctors for Life* above n 24 at para 48 and *UDM I* above n 21 at para 12.

the time that Schedule 2 to the interim Constitution, as amended by Annexure A to Schedule 6 to the Constitution required a party proportional representation system, a harmonious approach was to recognise the existence of the right contended for by the applicants. That right existed from the time the Constitution took effect. Although it was initially not exercisable, there was a sunset to that bar.

[105] Thus the constitutional curb to the exercise of the right contended for by the applicants is gone. Now there is no reason not to afford individual adult citizens the opportunity to exercise the right that has always been there, but initially dormant and not exercisable because of the curb.

General observations on interpretation

[106] The opposite conclusion cannot be made lightly in the face of the rights at stake here. The rights at stake are political rights. Although the focus is on section 19(3)(b), I earlier said freedom to make political choices under section 19(1) is also implicated. What commends the applicants' interpretation is the fact that compulsion to form or join political parties has an impact on the exercise of these important political rights. The importance of these rights cannot be overstated in the South African context where – for centuries – those rights were enjoyed only by the white minority. Accordingly, the rights at stake here fall to be interpreted generously, rather than restrictively. In *August* Sachs J held:

> "The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a

> single interactive polity. . . . Legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement."[116]

[107] In *Ramakatsa* as well, this Court held that "the text of a section in the Bill of Rights must be read generously and purposively in order to give the right-holders the full protection afforded by the guaranteed right".[117]

[108] It is so that the views expressed in *August* related to legislation. But there is no reason why they must not apply to the interpretation of the Constitution. And although their focus was on the exercise of the franchise by voters, they must also apply to the right to stand for public office and, if elected, to hold office. That is so because the exercise of the franchise is not an end in itself. It is about voting people into public office. In *My Vote Counts II* this Court said "[t]he right to stand for public office is tied up to the right to 'vote in elections for any legislative body'".[118] How intertwined the exercise of the franchise and being voted into decision making at the level of governance is made clear in *Ramakatsa*. Moseneke DCJ and Jafta J had this to say:

> "The scope and content of the rights entrenched by [section 19] may be ascertained by means of an interpretation process which must be informed by context that is both historical and constitutional. During the apartheid order, the majority of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Nor could they vote for those who were eligible to be members of Parliament. Differently put, they were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them."[119]

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[116] *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 17.

[117] *Ramakatsa* above n 16 at para 70.

[118] *My Vote Counts II* above n 18 at para 29.

[119] *Ramakatsa* above n 16 at para 64.

[109] A generous interpretation is called for also because of the far-reaching implications of reading section 19(3)(b) in the manner advocated by the respondents. As I have shown, compelling people to act in a particular way may[120] impinge on the right to human dignity protected by section 10 of the Bill of Rights.[121] In this instance compulsion is forcing people to form or join political parties against their will. So important is the right to human dignity to our constitutional order that it features as a founding value in section 1(a) of the Constitution.[122] I have explained that the founding values enjoy pride of place in the Constitution. In fact, the right is so important that it permeates all other rights in the Bill of Rights. Chaskalson, extra-curially, makes this point thus:

> "As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony."[123]

[110] And in *Makwanyane* O'Regan J said:

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]."[124]

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[120] I say may advisedly because constitutionally compliant regulation which the state is entitled to do may, and often does, compel people to act in a particular manner.

[121] Section 10 provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

[122] Section 1(a) provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms . . ."

[123] Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" (2000) 16 *SAJHR* 193 at 204.

[124] *Makwanyane* above n 36 at para 328.

[111] I have had the pleasure of reading the judgment penned by my colleague, Jafta J. It deals extensively with the content of the section 19(3)(b) right. I agree with it.

Conclusion on limitation

[112] This discourse leads me to the conclusion that – insofar 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.

Justification

[113] The question is whether the limitation is reasonable and justifiable as envisaged in section 36(1) of the Constitution.[125]

[114] In its affidavit filed in the High Court the Electoral Commission addressed only some issues because it did not "seek to enter into the merits of a debate with the applicants on whether the [Electoral Act] is unconstitutional".[126] It did not deal with justification. Likewise, the affidavit filed in this Court did not deal with justification.

[115] The Speaker's answering affidavit in the High Court opens by saying she does not oppose "the merits of this application". She goes further and says she does not enter

[125] Section 36(1) provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[126] The affidavit dealt only with: urgency; compliance with rule 16A of the Uniform Rules of Court; the impossibility of implementation of the relief sought by the applicants before the 2019 national and provincial elections; applicants' reliance on *My Vote Counts II;* and an appropriate costs order.

the debate whether the impugned sections of the Electoral Act are unconstitutional. According to her, those two matters fall under the "authority" of the Minister who is the member of the Executive responsible for the administration of the Electoral Act. In sum, the Speaker did not address justification.[127] As we will soon see, the Minister's affidavits did not address justification.

[116] Before the High Court the Acting Director-General of the Department of Home Affairs deposed to two affidavits on behalf of the Minister. In the first affidavit, he said he required more time to address the merits of the constitutional challenge. He later deposed to a supplementary affidavit. Presumably by then he had had the time he required. Both affidavits make no attempt to deal with the question of justification. Although ordinarily it would have been late to address this question for the first time before this Court, the answering affidavit filed here also makes no attempt to justify the limitation.

[117] What the Minister does is to raise justification in his written submissions filed in this Court. On the nature of the limitation, he argues that the Electoral Act has not wholly prevented the exercise of the right. That is so because all it does is to require that the right be exercised in a particular way. That makes sense in the case of an individual who has no particular preference between standing as an independent or as a member of a political party. But it says little about somebody like Ms Revell who has a principled aversion to being a member of a political party. In her case, the bar is not partial at all.

[127] The Speaker's affidavit deals, in the main, with: the urgency of the application; the motivation for the adoption of the party proportional representation system; the polycentric nature of choosing or amending an electoral system; the lack of a pronouncement in the Van Zyl Slabbert and Motlanthe reports that the current electoral system is unconstitutional; the import of the "many" constitutional provisions that refer to political parties and an electoral system based on proportional representation; the pros and cons of a constituency based system that was proposed in a Bill introduced in the National Assembly by a member of the opposition; the adoption of a motion by the National Assembly that the system proposed in the Bill "was not desirable at that time"; what Parliament has been doing in recent (and perhaps not-so-recent) times with regard to a possible overhaul of our electoral system; and proposals on appropriate relief in the event of a declaration of constitutional invalidity.

[118] The rest of the Minister's submissions compare the pros and cons "in the current system" and in the system proposed by the Bill introduced by a member of the opposition. That says nothing about why the exclusion of independent candidates by the Electoral Act is justified. And comparison with the Bill proposed by the member of the opposition is misplaced. This, because it is not as though that proposal is the only possibility.

[119] The state respondents on whom the onus rested have thus failed to proffer justification for the limitation. In *Makwanyane* this Court held that "[i]t is for the Legislature, or the party relying on the legislation, to establish . . . justification, and not for the party challenging it to show that it was not justified".[128] And Somyalo AJ pronounced himself thus in *Moise* with regard to the lack of evidence from the state: "[t]he absence of evidence or argument in support of the limitation has a profound bearing on the weighing up exercise".[129] Although the absence of evidence on justification does not exempt this Court from the obligation to conduct the justification analysis,[130] I can conceive of no reason to hold that the limitation is justified.

[120] Thus insofar as the Electoral Act makes it impossible for candidates to stand for political office without being members of political parties, it is unconstitutional.

Remedy

[121] A declaration of constitutional invalidity must follow as a matter of course.[131] An attempt was made to argue that – in the circumstances of this case – the separation of powers doctrine dictates that the declaration must not be made. The reason given was that the consideration of a suitable electoral system is an ongoing parliamentary

[128] *Makwanyane* above n 36 at para 102.

[129] *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at para 20.

[130] *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 20.

[131] Section 172(1)(a) of the Constitution provides that "[w]hen deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

process. Therefore, it would be an improper intrusion for the judicial branch of state to interfere in that process. The short answer is that there is no ongoing Parliamentary process. And we do not know if there will be one. In one of her affidavits, the Speaker states:

> "Once a resolution has been duly taken which revives the recommendation by the [Motlanthe Report] to enquire into amending the Electoral Act, I will inform the Court accordingly whether the Assembly is seized with the matter."

The use of words such as "once' and "whether" is all too clear.

[122] So, nothing stands in the way of what section 172(1)(a) of the Constitution enjoins us to do; that is, "to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". Indeed, in *Mazibuko* this Court held that there can be no merit in delaying a challenge to the constitutional validity of a statute on the basis of the purported imminence of reforming legislation.[132] So, it is perfectly in order to make the declaration.[133]

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[132] *Mazibuko N.O. v Sisulu N.O.* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at paras 70-1. In that matter Moseneke DCJ stated:

> "I am . . . unable to agree with the contention of the Speaker that because the parties are in the process of remedying the alleged lacuna in the rules the direct access application should be dismissed. First, the differences between the applicant and Chief Whip make it most improbable that the lacuna will be corrected. Second, once we have found, as we have, that the rules regulating the business of the programme committee are unconstitutional, we must so declare. An order of constitutional invalidity is not discretionary. Once the Court has concluded that any law or conduct is inconsistent with the Constitution, it must declare it invalid.
>
> I also do not agree with the submission that a declaration of invalidity would trench upon the separation of powers doctrine. An order of constitutional invalidity would not be invasive because it is declaratory in kind. The Court would not be formulating rules for the Assembly. The Court would be properly requiring the Assembly to remedy the constitutional defect that threatens the right of members of the Assembly."

[133] This pronouncement by no means addresses a possible argument that may be raised on whether it would be in the interests of justice for this Court to grant leave to appeal where it is imminent that reforming legislation that appears to address an applicant's concerns will be passed.

[123] The question is what more, if anything, this Court must order. Must we exercise our just and equitable power under section 172(1)(b) of the Constitution?[134] If so, what exactly must we do?

[124] In accordance with the principle of objective invalidity, a declaration of invalidity that is not coupled with a limit to its retrospective effect would invalidate all elections that followed the first election under the Constitution.[135] We cannot allow that to happen as we cannot undo what has taken place pursuant to those elections.[136] The declaration of invalidity must be with effect from the date of this judgment.

[125] The Speaker asked that if there be a declaration of invalidity, it must be suspended for a minimum of 36 months. She made the point that choosing a new electoral system will be quite complex. In addition, it will involve extensive consultation. That is not an unreasonable request. But that is not all that we must look at. The new electoral system must be in place well ahead of the next elections. That will give the Electoral Commission enough time to set up systems for the election to be conducted smoothly. Likewise, those desirous of contesting the elections can only start campaigning once those systems are in place. With all that in mind, a reasonable period of suspension seems to be 24 months. And that is what will be allowed.

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[134] Section 172(1)(b) provides that when deciding a constitutional matter within its power, a court—

> "may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[135] In *Mvumvu v Minister for Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at para 44 Jafta J held:

> "In terms of the doctrine of objective constitutional invalidity, unless ordered otherwise by the court the invalidity operates retrospectively to the date on which the Constitution came into force. But if the legislation in question was enacted after that date, as was the present Act, the retrospective operation of invalidity goes back to the date on which the legislation came into force."

[136] Compare *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 107.

Costs

[126] The applicants are entitled to their costs, including the costs of two counsel. The question is: who must pay those costs? Without doubt, the Minister is liable to pay. The first applicant insisted that the Electoral Commission also be ordered to pay. It argued that, although the Electoral Commission claimed to be "agnostic" on the constitutional challenge, it did not content itself with merely rendering assistance to the Court. Instead, it mounted full, robust opposition to the challenge.

[127] Without suggesting that there will not be instances where a costs award against the Electoral Commission will be warranted, that is not an order we should grant readily. After all, it is this Court that has previously held that "it is undesirable that matters involving the conduct of elections should be decided without the benefit of the views of the [Electoral] Commission".[137] I choose to exercise caution, lest the Electoral Commission be discouraged from rendering necessary assistance in future. Its stance may have been robust, but I do not think it got to a point where it must be mulcted in costs.

Order

[128] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court of South Africa, Western Cape Division, Cape Town is set aside.
4. It is declared that the Electoral Act 73 of 1998 is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties.

[137] *Electoral Commission v Inkatha Freedom Party* [2011] ZACC 16; 2011 JDR 0421 (CC); 2011 (9) BCLR 943 (CC) at para 34.

5. The declaration of unconstitutionality referred to in paragraph 4 is prospective with effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.
6. The Minister of Home Affairs must pay the applicants' costs in the High Court and this Court, such costs to include the costs of two counsel.

JAFTA J (Cameron J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

Introduction

[129] I have had the pleasure of reading the judgment prepared by my colleague Madlanga J (first judgment). I agree with the outcome it proposes and endorse the reasoning furnished. But I have decided to write separately to underscore the other path that leads to the same outcome. That is a challenge based on section 19(3) of the Constitution.[138]

[130] In the High Court the attack on the validity of the Electoral Act[139] was based on two provisions of the Constitution. Those were section 18 which guarantees the right to freedom of association and section 19 which enshrines the right to vote, stand for and hold public office, if elected.

[131] The New Nation Movement pleaded these causes of action in these terms:

> "As currently formulated the Electoral Act 73 of 1998 provides for representation in the National Assembly and the provincial legislature only through political party list. This is clearly inconsistent with the Constitution because it violates the fundamental rights of each and every South African citizen to stand for public office as enshrined in

[138] The full text of section 19 is quoted below at [147].

[139] 73 of 1998.

> section 19(3)(b) of the Constitution. It is also inconsistent with the fundamental right to freedom of association (section 18 of the Constitution) in that it forces candidates for political office to join political parties so that they can be placed on party lists in order to become eligible for election to public office. The current system of voting in the provincial and national election is also inconsistent with the founding constitutional value of accountability in that it does not allow citizens to nominate and vote for their own candidates from their own constituencies, so that such candidates can represent them directly at both the provincial and national levels of government.
>
> The current system does not truly give effect to the will of the people. This is because the voting public is not able to choose specific candidates to represent their interests. Instead they must rely on the choice made by the political parties. Those chosen then become obligated to the leadership of their party and not the people."

[132] The respondents disputed the claim that the Electoral Act was inconsistent with the Constitution. While conceding that the Act did not cater for individuals to contest elections as such at both national and provincial spheres, the Minister of Home Affairs (Minister) asserted that section 19(3) of the Constitution does not confer a right on citizens to contest elections as individuals.

[133] In an affidavit filed on behalf of the Minister, this defence was formulated in these words:

> "Whilst the current electoral system does not make provision for the independent candidates to be elected to the National Assembly and Provincial Legislature, but the second respondent contends that the current system does not violate South African citizens' rights spelled out in section 19(3)(b) of the Constitution on the following basis:
>
> 1. That the constitutional invalidity arises where it can be demonstrated on objective grounds that there is a conflict between a statutory provision and the Constitution. There is no conflict between a statutory provision (Electoral Act) and the Constitution.
> 2. The provisions of sections 46(1)(d) and 105 of the Constitution accorded the National Assembly and Provincial Legislature a discretion to prescribe an electoral system which in general embraced the notion of proportional representation. These two sections are subject to Annexure A of Schedule 6

of the Constitution which are decisive and paramount when the National Assembly exercised its discretion in choosing the existing electoral system.

3. On a proper construction, it is clear that Annexure A of Schedule 6 only permits a party electoral system and not an independent candidate because the seats in the National Assembly and Provincial Legislature can only be filled from lists of the names submitted by political parties."

[134] The Minister's defence was restricted to the issue of interpreting section 19(3). He did not engage with the cause of action based on section 18 of the Constitution. He merely noted the allegation made in support of that claim. Whereas the Speaker of the National Assembly had filed notice to abide the High Court's decision, she placed an affidavit before that Court, which disputed the interpretation of section 19(3) advanced by the applicants, and she contended that it was the Constitution that excluded individuals from contesting the elections at national and provincial levels.

[135] For its part, the Electoral Commission opposed the relief sought to the extent that it was going to hamper preparations and the running of the 2019 elections which were then impending. The Commission made it plain that it did not wish to enter the debate on the merits of the invalidity attack, which was brought as a matter of urgency on 10 October 2018.

[136] In deciding the matter, the High Court's focus was on the interpretation of section 19(3) of the Constitution, which it held does not include the right for individuals to contest elections as independent candidates. Having noted a conflict between the judgments of this Court in *My Vote Counts II*[140] and *Ramakatsa*[141], the High Court preferred to leave resolution of the issue of permitting citizens to contest election as individuals to Parliament. The Court lamented that it was placed in an invidious position by the two decisions, even though it took the view that the proposition

[140] *My Vote Counts II* above n 18.

[141] *Ramakatsa* above n 16.

expressed in *My Vote Counts II* was obiter. I return to these decisions later in the judgment.

[137] At the hearing of this appeal the respondents conceded that if section 19(3) confers a right on citizens to contest elections as individuals, by omitting to provide for this, the Electoral Act would be inconsistent with the Constitution. The concession is well-founded. On the papers before us there was no attempt to justify the limitation imposed on the section 19(3) rights. Instead the respondents took the view that on a proper construction, the provision does not afford the right on which the applicants rely.

Issues

[138] Two issues arise for determination. The first is whether section 19(3) affords citizens the right to contest elections as individuals. If it does, then the second question would arise. This is whether, by failing to facilitate the exercise of that right, the Electoral Act is inconsistent with the Constitution. The answer to the first question lies in the interpretation of section 19(3).

[139] But before I undertake the interpretation exercise it is necessary to state briefly what this case is not about. The applicants do not dispute the right of political parties to contest elections. They accept that ours is a multi-party system of democracy and that the Constitution affords political parties a role to play in elections and also in the membership of the National Assembly and Provincial Legislatures. The applicants do not quibble with all of that. Their complaint is a narrow one. It is that when passing the Electoral Act, Parliament omitted to cater for the exercise of the rights in section 19(3) by individuals.

[140] This omission, the applicants complained, denies them an opportunity to take up a seat at the legislative table in national and provincial spheres. This is because the rights they claim to have cannot be exercised without legislative facilitation. They contend that in the constitutional provisions that permit political parties to participate in elections, there is nothing that suggests that individual participation should be

prohibited. They say the multi-party electoral system and the individual participation system are not mutually exclusive and therefore they urge this Court to read section 19(3) in a manner that harmonises it with the other provisions of the Constitution, which allow political parties to contest elections.

Proper approach to interpretation

[141] It is appropriate at the outset to remind ourselves of the principles which will guide us in construing section 19 of the Constitution. The first one is that the section must be read in its historical context. Africans were denied the right to vote and its twin, the right to be voted into public office. In this way the majority of people in this country were not only disenfranchised, but were excluded from holding any position that governed the country. In 1936 the right to vote, which was enjoyed by some Africans in the Cape, was taken away by means of legislation.[142]

[142] The right to vote and the right to stand for public office have always been viewed as interconnected and crucial to a democratic system of government. It came as no surprise that the Freedom Charter[143] placed these rights at the top of aspirations for change during the apartheid era of the past. The Charter declares:

> "Every man and woman shall have the right to vote for and to stand as a candidate for all bodies which make laws; all people shall be entitled to take part in the administration of the country"

[143] This Court has affirmed the relevance of our history in the process of interpreting the rights in the Bill of Rights.[144] In *Ramakatsa* this Court reaffirmed the importance

[142] The Representation of Natives Act 12 of 1936.
[143] The Freedom Charter is a document that was adopted in a historic meeting of progressive organisations which were fighting for democratic changes in the apartheid era. This meeting was held in June 1955.
[144] *Department of Land Affairs v Goedgelegen Tropical Fruits* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen Tropical Fruits*); *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC); and *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

of our history in determining the scope and content of political rights enshrined in section 19 of the Constitution. *Ramakatsa* reminds us that we should read and understand those rights in the context of total disenfranchisement of African people and their exclusion from governing the country.[145] In the same vein *August* tells us:

> "The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood."[146]

[144] The other principle is that the language employed in section 19 must be accorded a generous and purposive meaning to give every citizen the fullest protection afforded by the section. Moreover, rights conferred without restriction should not be cut down by reading implicit limitations into them.[147]

[145] Section 39(1) of the Constitution also plays a vital role in the interpretation of section 19. It obliges us to promote the values that underlie "an open and democratic society based on human dignity, equality and freedom." Section 39(1) also requires us to consider international law. Of relevance to the interpretation of section 19 is article 25 of the International Covenant on Civil and Political Rights (ICCPR) which provides:

> "Every citizen shall have the right . . .
>
> . . .
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."

[146] And finally the interpretation of section 19 must also be informed by values like universal adult suffrage and a multi-party system of democratic government. In

[145] *Ramakatsa* above n 16 at para 64.
[146] *August* above n 116 at para 17.
[147] *SATAWU v Moloto* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) at para 44.

addition, this section must be read in the context of other provisions of the Constitution which confer rights on citizens. It is now convenient to interpret section 19.

Meaning of section 19

[147] Section 19 provides:

> "(1) Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[148] The first notable issue from this text is that the section guarantees a number of rights which are exclusively available to citizens. And we know it from the reading of section 3 of the Constitution that all citizens are equally entitled to the rights, privileges and benefits of citizenship.[148] It is the birth-right of citizens to determine within the bounds of the Constitution, the type of government they want and generally the people who should lead that government. Non-citizens are excluded from that process so as to insulate it from foreign interference and influence.

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[148] Section 3 of the Constitution provides:

> "(1) There is a common South African citizenship.
>
> (2) All citizens are—
>
> (a) equally entitled to the rights, privileges and benefits of citizenship; and
>
> (b) equally subject to the duties and responsibilities of citizenship.
>
> (3) National legislation must provide for the acquisition, loss and restoration of citizenship."

[149] Section 19 is not the only section that reserves rights for citizens.[149] While section 21 guarantees freedom of movement within and out of the Republic, the right to enter, remain and reside in the Republic are preserved for citizens. As is the right to a passport and the right to choose a trade, occupation or profession. The word citizen in all relevant provisions carries the same meaning which is that of individuals. Again section 3 of the Constitution informs us that citizens are subject equally to duties and responsibilities of citizenship. These include loyalty and maintaining allegiance to the Republic.

[150] But section 19(3) draws a distinction between citizens by conferring rights upon a specific class of citizens. In consonance with the value of universal adult suffrage, the sub-section restricts the rights it guarantees to adult citizens only. Its language places it beyond doubt that the bearers of the rights it enshrines are adult persons who are citizens. This settles the issue of the identity of the right holders.

[151] Turning to the rights themselves, the first right conferred is the right to vote in elections for the National Assembly and Provincial Legislatures. To avoid the exclusion of other people as it happened under apartheid, the right is conferred upon every adult citizen. And to safeguard the free exercise of the right, the Constitution demands that the actual voting must be conducted in secret. This is a singular condition that section 19(3) imposes for the exercise of the right to vote.

[152] The condition reveals the inter-relatedness between the right to vote and the right to free, fair and regular elections which is guaranteed by section 19(2). If the elections are not free and fair, there can be no proper exercise of the right to vote and consequently the content of the right to vote itself would be emasculated. And that would place at risk the entire democratic project. This illustrates that the right to vote is vital to our

[149] The other provisions which confer rights on citizens are sections 20, 21 and 22.

democratic order, not only with regard to who gets the honour of exercising political power, but also in respect of the policies to be adopted in governing the country.

[153] Affirming the importance of this right in *New National Party*, this Court stated:

> "The Constitution effectively confers the right to vote for legislative bodies at all levels of government only on those South African citizens who are 18 years or older. It must be emphasised at this stage that the right to vote is not available to everyone in South Africa irrespective of age or citizenship. The importance of the right to vote is self-evident and can never be overstated. There is however no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy for without it there can be no democracy. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless."[150]

[154] The drafters of our Constitution were quite alive to the fact that one cannot vote unless there is someone she can vote for. In their wisdom they added to the mix the right to contest elections and the right to hold office. The latter right depends on winning the election contest. However, it is significant to note that in plain language, section 19(3) reserves the right to stand for public office which entails contesting elections for adult South Africans. It is them only, who are entitled to be voted into public office. And the words "every adult citizen" at the opening of section 19(3) demonstrate that each adult South African is the bearer of the right to stand for public office and if elected, to hold the office she stood for. This construction is consistent with the language of the provision, which is framed in inclusive terms to prevent the exclusion of some South Africans from exercising those rights as it happened during the apartheid era. This interpretation is also in alignment with international law. It will be recalled that the ICCPR provides that every citizen shall have the right to vote and be elected by secret ballot.

[150] *New National Party* above n 11 at para 11.

[155] In rejecting the interpretation of section 19(3)(b) that says adult South Africans as individuals have a right to contest elections, the High Court relied on the value of a multi-party system and provisions of section 46(1)(a) and 105(1)(a) of the Constitution, which grant Parliament a discretionary power to prescribe electoral systems. The High Court reasoned:

> "The clear wording of section 19(3)(b) does not necessarily mean what the applicants contend. Nowhere in the wording of the section does it expressly state that standing for office must include standing for such office 'as an independent candidate', as opposed to a member of a political party. Similarly, nowhere in the wording of the said section does it state that 'public office' necessarily includes public office at every level of government."[151]

[156] The difficulty with this approach is that it proceeds from an assumption that an electoral system that caters for political parties cannot co-exist with a system that allows individuals to contest elections as individuals. This is not correct. The second flaw is the belief that for that to happen, the words "as an independent candidate" must be read into section 19(3)(b). There is no need for that. Section 19(3)(b) must be construed in the same way that section 19(3)(a) is read and understood. It cannot be gainsaid that the right to vote which is conferred in similar terms is exercised by voters as individuals, without the need to add words like "as individuals".

[157] But more importantly, requiring citizens to exercise the right to contest elections and hold office through political parties only subverts section 19(3)(b). This is because the section confers the right on adult South Africans and not political parties. Political parties contest elections in their own right and the source of that right is not section 19(3)(b). And political parties contest elections individually. It is that right which entitles them to nominate candidates from within their membership.

[151] High Court judgment above n 5 at para 13.

[158] When political parties contest elections, they do not do so at the behest of citizens. And citizens who are not members of the party cannot demand to be nominated by it. Even those who are members cannot all be nominated despite their wish to hold public office. The nomination of candidates is left to the whims of the political party concerned. This is inimical to the exercise of rights so fundamental to our democracy. Section 19(3)(b) entitles every adult South African who wishes to do so, to contest elections and if elected to hold public office.

[159] The exercise of these important rights is not within the gift of political parties which may choose who gets to enjoy the right to hold office. Political parties may justifiably do that where they have contested elections in their own right. If they win, it is proper for them to nominate their own representatives in the National Assembly or Provincial Legislatures.

[160] In unequivocal terms, section 19(3)(b) confers upon every adult South African the right "to stand for public office and, if elected, to hold office". Whilst Parliament has the power to pass legislation that regulates the exercise of the right, it cannot enact legislation that prevents the exercise of the right. In its present form, the Electoral Act does not allow every adult South African to exercise the right to contest elections on their own.

[161] In *Mazibuko*[152] this Court declared that chapter 4 of the Constitution, in which section 46 is located, does not empower Parliament to make legislation or rules that render constitutional entitlements worthless. In that matter Moseneke DCJ said:

> "Lobbying, bargaining and negotiating amongst political parties represented in the assembly must be a vital feature of advancing the business and mandate of parliament conferred by chapter 4 of the Constitution. However, none of these facilitative processes may take place in a manner that unjustifiably stands in the way of, or renders nugatory, a constitutional prescript or entitlement. That is so because our Constitution

[152] *Mazibuko* above n 132.

> is supreme and demands that all law and conduct must be consistent with it. We may not hold that an entitlement that our Constitution grants is available only at the whim or discretion of the majority or minority of members serving on the programme committee or any other committee of the assembly."[153]

[162] Therefore, I conclude that on a proper interpretation of section 19(3) of the Constitution, 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. South Africans are bearers of these rights individually just as they hold the right to vote and which they exercise in secret as individuals.

[163] I have also had the benefit of reading the judgment by my colleague Froneman J (third judgment). It suggests that the interpretation of the provisions of section 19 of the Constitution preferred in this judgment and the first judgment is flawed. This is so because, reasons the third judgment, the content of the right of an adult South African to stand for and hold public office must be determined with reference to foundational values and constitutional norms governing the electoral system.[154]

[164] While it is true that foundational values play a role in the interpretation of the Bill of Rights, their role is limited to illuminating the language of a particular provision of the Bill. Those values cannot be used to replace that language with something different. Our jurisprudence places a premium on fidelity to the language chosen by the framers of our Constitution. Quite early in its existence in *Zuma* this Court declared:

> "We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the

[153] Id at para 58.

[154] Third judgment at [198].

> lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."[155]

[165] *Endumeni Municipality* reminds us of what the interpretation process entails: "[i]nterpretation is the process of attributing meaning to the words used in a document".[156] The words used in section 19(3) of the Constitution are simply that every adult citizen has a right: (a) to vote in elections for any legislative body and to do so in secret; and (b) to stand for public office and, if elected to hold office. This is the language we are called upon to interpret and give specific meaning to. Of course that interpretation process must occur in the context of the entire Bill of Rights. But the primary function remains and is assigning meaning to those words. *Matatiele* on which the third judgment relies does not change this principle.[157] Nor was that decision concerned with the interpretation of the Bill of Rights.

[166] When it comes to interpreting a provision in the Bill of Rights, our jurisprudence is clear:

> "We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees."[158]

[167] The approach to interpretation preferred in the third judgment was adopted in *Qozeleni* where the following was stated:

> "If the Constitution is to fulfil its stated purpose, it must not only be interpreted in such a manner as to give clear expression to the values it seeks to nurture for a future South

[155] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18 and *Democratic Alliance v Speaker, National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at para 46.

[156] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni Municipality*) at para 18.

[157] *Matatiele* above n 24.

[158] *Goedgelegen Tropical Fruits* above n 144 at para 53.

> Africa, but this should be done in a way which makes it a living document for all the citizens of the country and not only for the chosen few who deal with it in courts of law."[159]

[168] But in *Zuma* this Court cautioned against overlooking the language of the Constitution in favour of its values. The Court stated:

> "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean."[160]

[169] The third judgment also relies on sections 46-47, 106-107 and 157-158 of the Constitution for concluding that the scope of the right in section 19 is restricted to what the Electoral Act permits at national and provincial levels.[161] This conclusion is reached without any interpretation of the language employed in section 19.

[170] A fundamental shortcoming of that approach is that it fails to tell us the meaning of the words "an adult citizen has the right to stand for public office and, if elected, to hold office". In terms of this right what entitles the citizen to holding office is being elected. On the third judgment's approach, no one may hold office as a result of being elected. All those who hold office must do so as a result of being nominated by political parties they had joined. Even then not all members of the party are guaranteed the exercise of the right to hold office. It is only those chosen by the party itself who may exercise that right.

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[159] *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 634.

[160] *Zuma* above n 155 at para 17.

[161] Third judgment at [223] to [224].

[171] The crucial words "if elected, to hold office" plainly indicate that the adult citizen who wishes to exercise the right conferred by section 19(3)(b) must first contest elections. In that context "elected" means being voted for. One does not get voted for if one's name does not appear on the ballot paper. Without contesting elections, it is impossible for any adult citizen to exercise the right to stand for and hold public office if elected. A nomination by a political party which contests elections in its own name does not constitute the exercise of that right by a citizen.

[172] In essence the interpretation favoured by the third judgment amounts to a complete denial of the right to contest elections, regardless of whether one is a member of a political party or not. This is because in the present proportional representation provided for by the Electoral Act, it is political parties only which may contest elections. There is nothing in the Constitution which, even remotely, may be read to suggest that a complete denial of a right it guarantees is permissible, let alone by mere interpretation.

[173] Affording the rights-bearers an opportunity to exercise rights is not at odds with the role played by political parties. This is because an electoral system that permits political parties to contest elections may operate side-by-side with a system that allows individuals to participate in the same elections. The two systems are not mutually exclusive. Indeed at municipal level, the two systems operate without difficulty.

[174] It is in this context that the statements in *My Vote Counts II* must be read and understood. Pointing out the existence of the right by every adult South African to contest elections at national and provincial spheres, Mogoeng CJ stated:

> "Finally, the section addresses the fundamental right every adult 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."[162]

Defect in the Electoral Act

[175] But the mere existence of the rights to stand for public office and if elected to hold that office, does not entitle adult South Africans to exercise those rights without regulation and conducive conditions being created for that exercise. This is because the Constitution requires Parliament to pass legislation regulating elections and that the Executive should take steps to ensure that a national common voters' roll is compiled, and that the conditions for holding free and fair elections are maintained. Without all of this, the right to stand for public office is worthless. In *New National Party*, Yacoob J observed that without proper arrangements for its exercise, the right to vote "is both empty and useless".[163] The same applies to the right to contest elections.

[176] The Electoral Act is legislation that was passed by Parliament to regulate the exercise of the right to vote and the holding of elections. However, the Act omitted to cater for the exercise by individual South Africans of the right to contest elections and hold office if elected. This oversight may have been caused by the fact that at the time the Electoral Act was passed into law, transitional requirements emanating from the interim Constitution were still in place.[164] Those transitional arrangements lasted until the first elections under the Constitution, which were held in 1999. Those arrangements required that candidates for membership of the National Assembly and Provincial Legislatures be nominated from party lists which excluded nomination of independent candidates. But those arrangements have since lapsed.[165]

[177] The question that arises is whether after the lapsing of the transitional arrangements, the failure to cater for individual or independent candidates in the Electoral Act renders it inconsistent with the Constitution. There can be no doubt that

[162] *My Vote Counts II* above n 18 at para 29.
[163] *New National Party* above n 11 at para 11.
[164] Schedule 6 of the Constitution.
[165] First judgment at [65] to [69].

the omission prevents the applicants from contesting elections as individuals and as a result, they are denied enjoyment of a right conferred by the Constitution.

[178] As illustrated in the first judgment, the Constitution mandates Parliament to pass legislation that regulates the holding of periodic elections and which also facilitates the exercise of the rights in sections 19(2) and (3). The Electoral Act was passed in an attempt to fulfil the obligation to pass legislation.

[179] The circumstances of this case demonstrate beyond question that the Electoral Act has serious shortcomings by omitting to cater for adult South Africans who wish to contest elections as individuals. The Act falls short of fulfilling the obligation imposed on Parliament by the Constitution. In *My Vote Counts II* this Court had to determine whether the Promotion of Access to Information Act[166] (PAIA) was invalid by failing to provide for reasonable disclosure of information on the private funding of political parties. The Court held that access to such information was necessary for a proper exercise of the right to vote, for a lack of such information might undermine our nationhood and sovereignty.[167]

[180] Like the Electoral Act which was enacted to give effect to constitutional rights, PAIA was passed to give effect to the right of access to information guaranteed by section 32 of the Constitution. The deficiency or omission to provide for access to information on private funding of those running for public office was found to be inconsistent with the Constitution. By parity of reasoning, the Electoral Act must equally be inconsistent with the Constitution by failing to ensure that adult South Africans contest elections as individuals and if elected, hold public office.

[181] Unless that inconsistency is reasonable and justifiable, the Electoral Act falls to be struck down to the extent of the inconsistency in question. As mentioned in the first

[166] 2 of 2000.
[167] *My Vote Counts II* above n 18 at paras 37-41.

judgment, the respondents have failed to put information that shows that the limitation flowing from the omission was reasonable and justifiable.

[182] Instead, the respondents argue that the inconsistency does not arise if section 19(3) is interpreted harmoniously with section 157(2)(a) of the Constitution. The latter section regulates the election of members of municipal councils. It provides:

> "The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system—
>
> (a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference".

[183] While it is true that in express terms section 157(2)(a) permits Parliament to pass legislation which provides for an electoral system in terms of which candidates are drawn from party lists only, section 157(2)(b) also authorises Parliament to pass legislation that prescribes a combination of party representation and ward representation. In fact Parliament chose the combined system. As a result individuals are permitted to contest elections at municipal level.

[184] However, the argument advanced by the respondents is that read in isolation section 157(2)(a) is inconsistent with the right of adult South Africans to contest elections as individuals at national and provincial level. In order to reconcile the two, the respondents suggest that section 19(3) should be interpreted not to mean that adult South Africans may stand for public office as individuals.

[185] The first difficulty I have with this proposition is that the interpretation that says adult citizens may contest elections as individuals is sought to be applied not at the municipal level but at national and provincial levels where section 157 of the Constitution finds no application. All we know is that at municipal level an electoral

system that allows political parties alone to participate in elections is permitted. This does not mean that the same system is authorised at national and provincial levels. There is no equivalent of section 157(2)(a) at both national and provincial levels. If they wanted this to be the position, the framers of the Constitution could have easily done that. They did not.

[186] The structure of our Constitution is such that it addresses each sphere of government separately. For example, section 46 regulates the composition and election of members of the National Assembly. Whereas section 105 deals with the composition and election of the provincial legislatures. The operation of each of these provisions is limited to the sphere in which it is located. Similarly section 157 regulates the composition and election of members of municipal councils. By design its operation is limited to that sphere.

[187] The second difficulty is that the proposition that says the provisions of the Bill of Rights must be given a meaning that is consistent with section 157(2)(a) is at variance with section 39(1) of the Constitution and also with established jurisprudence. Provisions of the Bill of Rights are given a generous interpretation so as to afford right holders the fullest protection. And rights conferred without limitation may not be narrowed by reading implicit limitations into them.[168]

[188] Moreover, the interpretation that recognises that the right to stand for public office is conferred upon adult South Africans as individuals promotes the values of universal adult suffrage, a national common voters roll, regular elections and it ensures openness, accountability and responsiveness. This interpretation enables voters to choose their representatives instead of the choice being made for them by political parties which may place their own interests ahead of the interests of the voters. Members of Parliament who are directly elected by voters are accountable to them and are not obliged to follow the party line in relation to issues that arise in Parliament.

[168] *SATAWU* above n 147 at para 53.

[189] Section 39(1) also requires that international law be considered when interpreting the Bill of Rights. An interpretation that is consonant with international law should be preferred over the one that is not. Of course international law must first and foremost be consistent with our Constitution.

[190] According to section 7(3) of the Constitution,[169] rights in the Bill of Rights are subject to limitations referred in section 36 or elsewhere in the Bill itself. Section 157(2)(a) does not constitute a limitation referred to in section 36. Nor is it part of the Bill of Rights. It follows that section 157(2)(a) does not impose a limitation envisaged in section 7(3) of the Constitution.

[191] Accordingly I conclude that the deficiency in the Electoral Act to the extent that it fails to enable adult South Africans to stand for public office as individuals is inconsistent with the Constitution.

Contradiction between Ramakatsa and My Vote Counts II

[192] The High Court held that the statement in paragraphs 29 of *My Vote Counts II* to the effect that independent candidates have a right to stand for public office and if elected to hold office is contrary to *Ramakatsa*.[170] In *Ramakatsa*, this Court stated:

> "Our democracy is founded on a multi-party system of government. Unlike the past electoral system that was based on geographic voting constituencies, the present electoral system for electing members of the national assembly and of the provincial legislatures must 'result, in general, in proportional representation'. This means a person who intends to vote in national or provincial elections must vote for a political

[169] Section 7(3) of the Constitution provides:

> "The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

[170] High Court judgment above n 5 at paras 22-6.

> party registered for the purpose of contesting the elections and not for a candidate. It is the registered party that nominates candidates for the election on regional and national party lists. The Constitution itself obliges every citizen to exercise the franchise through a political party. Therefore political parties are indispensable conduits for the enjoyment of the right given by section 19(3)(a) to vote in elections."[171]

[193] As New Nation Movement argued, this contradiction is more apparent than real. *Ramakatsa* was concerned with and its reach was limited to cases where an adult South African has chosen a political party to be a vehicle through which she would exercise the right to vote. That case was concerned with the representation that involved political parties. Within that system, a voter is obliged to vote for a political party and it is the party which nominates candidates. Whether those candidates meet the approval of the voters or some of the voters is irrelevant. Once they have voted for the party, it falls upon the party to identify who will be their representative. And that representative is directly accountable to the party concerned.

[194] However, this does not mean that *Ramakatsa* held that the right to vote can only be exercised through political parties. Read in its proper context, the statement was addressing the question of voting in a system involving participation of political parties.

[195] For these additional reasons I support the order proposed in the first judgment.

FRONEMAN J:

[196] I have had the privilege of reading the judgments of my brothers, Madlanga J and Jafta J (first and second judgments). I gratefully adopt the first judgment's exposition of the facts, litigation history and summary of the parties' arguments. I agree that leave to appeal must be granted but, regrettably, differ on the outcome of the appeal. I would dismiss the appeal. I consider the approach to, and the interpretation of,

[171] *Ramakatsa* above n 16 at para 68.

section 19(3)(b) of the Constitution in the first and second judgments to be flawed for not having proper regard to the constitutionally required electoral framework within which the right "to stand for and, if elected, to hold office" must be exercised.

[197] Our Constitution, said Ngcobo J in *Matatiele*,[172]—

> "embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it 'has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.' Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole."[173]

[198] The right "to stand for public office and, if elected, to hold office" under section 19(3)(b) of our Bill of Rights, like other rights in the Bill of Rights, does not have an uncontested, pre-given meaning that can be determined without having regard to the constitutional context. What needs to be determined first is not the notional[174] ability or preferences of individual adult citizens to stand for, and hold, political office in any general, everyday sense, but the actual content of the right of citizens to stand for, and hold office within the constitutional democracy envisaged in the Constitution. A contextual interpretation of section 19 thus requires consideration of the foundational values and the constitutional norms governing the electoral system in order to determine its proper role and meaning within our system of democratic governance. It is only

[172] *Matatiele* above n 24.

[173] Id at para 36.

[174] In Woolman et al above n 27 at 17, Woolman and Botha, in the context of the relationship between fundamental rights analysis and the limitations analysis, compare the notional approach with a value-based approach. The notional approach suggests that certain forms of behaviour, which do not necessarily merit constitutional protection, will in fact receive prima facie protection. It expands the number of claims that make it to the limitations analysis, which may result in a more flexible limitations analysis instead of a rigorous limitations analysis of a serious infringement. This undercuts the courts' ability to articulate analytically rigorous conceptions of rights at the first stage of analysis and useful standards of justification for limitations at the second stage of analysis.

once that is determined that the question arises whether the Electoral Act limits the right of citizens to stand for and hold office within the kind of constitutional democracy envisaged in the Constitution.

Foundational constitutional values and norms

[199] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[200] Democracy is not defined in the Constitution, but it is clear that the requirements of "[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government" refers to the election of public office-bearers to representative legislatures.[175]

[201] A "multi-party" system in plain language means a "multi-[political] party" system.[176] This is also how it is understood in the Constitution. Section 236 provides:

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[175] Section 1(d) of the Constitution.

[176] That is how children are taught to understand it. See for example Wordsmyth Children's Dictionary – Kids.Wordsmyth, available at https://kids.wordsmyth.net/we/?level=2&rid=58807, which defines multi-party democracy as "a system of government in which three or more major political parties participate in the electoral process". The same goes for adults. Compare Simpson and Weiner *The Oxford English Dictionary* 2 ed (OUP, Oxford 1989) at 83, which defines multi-party as "[c]omprising several parties or members of several parties; of an electoral or political system which results in the formation of three or more influential parties" and also Definitions, which defines multi-party democracy as "a political system in which multiple political parties across the political spectrum run for national election, and all have the capacity to gain control of government offices, separately or in coalition", available at https://www.definitions.net/definition/multi-party+system.

> "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."

[202] In *Ramakatsa*,[177] this Court recognised the crucial role of political parties:

> "In our system of [multi-party] democracy political parties occupy the centre stage and play a vital part in facilitating the exercise of political rights."[178]

[203] A multi-party system of democratic government also necessarily implies a representative democracy, founded on the principle of elected officials representing a group of people.[179] This too finds obvious support in the Constitution, which provides:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does so by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action." [180]

[204] A multi-party system of democratic representative government certainly excludes a one-party system or any other authoritarian kind of system, but it also means more than that. If it is contended that the Constitution prescribes something other than

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[177] *Ramakatsa* above n 16.

[178] Id at para 65. The role of political parties was further explained at paras 66-7:

> "In the main, elections are contested by political parties. It is these parties which determine lists of candidates who get elected to legislative bodies. Even the number of seats in the National Assembly and Provincial Legislatures are determined '[b]y taking into account available scientifically based data and representations by interested parties'.
>
> In order to enhance multi-party democracy, the Constitution has enjoined Parliament to enact national legislation that provides for funding of political parties represented in National and Provincial Legislatures. Public resources are directed at political parties for the very reason that they are the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy."

[179] *Certification judgment* above n 75 at paras 186-7.

[180] Section 42(3) of the Constitution.

political parties in its fundamental multi-party system of democratic government, then it must be shown where that prescription is located in the Constitution and what groupings other than political parties are prescribed in the Constitution. There are, however, no provisions in the Constitution that tell us that.

[205] Another feature of our multi-party system of democratic electoral government is that it must be based on an electoral system that "results in general, in proportional representation".[181] At local government level the system of proportional representation must, in addition to one based on a municipality's segment of the national common voters roll according to party lists,[182] be combined with a system of ward representation.[183]

[206] Participation in our democratic process is, however, not confined to participation in elections. The Constitution is primarily aimed at establishing and safeguarding a representative democracy that has participatory elements.[184] The democratic government contemplated by the Constitution is one that is accountable, responsive and transparent, and that makes provision for public participation by way of public access to and involvement in the legislative and other processes at national, provincial and local government level.[185]

[207] The Constitution is not only participatory in relation to representative government. It also makes provision for direct democracy. This "serves as a

[181] Sections 46(1)(d), 105(1)(d) and 157(3) of the Constitution.

[182] Section 157(2)(a) of the Constitution.

[183] Section 157(2)(b) of the Constitution.

[184] *Doctors for Life* above n 24 at para 111, where it was held that "our constitutional democracy is not only representative but also contains participatory elements." See also *Matatiele* above n 24 at para 40 and *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at para 26.

[185] See further sections 59, 72, 116(1), 118 and 160(7) of the Constitution. See also *Doctors for Life* id at para 116.

counterweight to the importance of political parties in a representative democracy".[186] Direct democracy is therefore of particular importance for those individuals and groups whose interests are neglected by political parties, or who find it difficult to make use of the possibilities for participation.[187] Direct forms of participatory democracy are found in the section 17 right to assembly, demonstration, picket and petition,[188] and in the constitutional provisions which provide for the calling of national and provincial referendums.[189]

[208] Based on these constitutional values and norms it seems fair to conclude that the right to stand and hold elective office in terms of section 19(3)(b) is an individual right to represent the people in a multi-party system through the medium of political parties that results, in general, in proportional representation.

[209] It has not been suggested that the Electoral Act is constitutionally invalid for failing to comply with this. The applicants contend that it is constitutionally invalid because it does not provide for *something more*, namely the right to stand for, and hold, elective office as an independent candidate, without representative, multi-political party, and proportional representation restrictions.

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[186] Currie and de Waal above n 27 at 16.

[187] Id.

[188] Section 17 of the Constitution provides:

> "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

See *S v Mlungwana* [2018] ZACC 45; 2019 (1) SACR 429 (CC); 2019 (1) BCLR 88 (CC) at para 69, where it was held:

> "Nowadays, progressive constitutional democracies, including our own, recognise that the right to freedom of assembly 'is central to . . . constitutional democracy'. *People who lack political and economic power have . . . protests as a tool to communicate their legitimate concerns*."

See also *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 61, where it was held:

> "The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. *Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms*."

[189] Sections 84(2)(g) and 127 of the Constitution.

[210] Is the *something more* to be found in section 19 itself?

Section 19

[211] Section 19 reads:

> "(1) Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[212] The section deals with distinct rights. The first is the right of every citizen to make political choices. The second is the right of every citizen to free, fair and regular elections. The last are the rights of adult citizens to vote in elections for a legislative body, and to stand for and, if elected, to hold office.

[213] The first judgment holds that "[o]nce an adult citizen is forced to exercise the section 19(3)(b) right through a political party, that divests her or him of the very choice guaranteed by section 19(1) not to form or join a political party".[190] I do not agree.

[214] Textually, section 19 deals with distinct, not overlapping, rights. One can exercise one's right to form or join a political party, or not form or join a political party, without exercising one's right under section 19(2) to insist on free, fair and regular elections. And one can do the same without voting in elections or standing for public

[190] First judgment at [18].

office in elections under section 19(3). Choosing to exercise each of these rights results in independent consequences.

[215] This textual reading is supported by constitutional context and purpose. The democratic framework established by the Constitution allows for representative, participatory and direct democracy. Representative electoral government requires a multi-party system, which, in ordinary parlance and understanding, constitutional detail and this Court's jurisprudence, requires political parties at its core. There is no textual, contextual or purposive basis in the Constitution to include groupings other than political parties within the meaning of a "multi-party system of democratic government". An attempt to find one will necessarily be strained.

[216] This does not mean that a "multi-party system of democratic government" in its ordinary sense of a multi-(political)-party system cannot co-exist with other forms of democratic government. This recognises that while contestation among multiple political parties is an essential feature prescribed by our system of elected democratic government, it does not necessarily exhaust the Constitution's vision of democracy.[191] As long as these additional forms complement, rather than replace, multi-party democracy, then they are constitutionally permissible.

[217] This feature, namely the constitutional recognition of different forms of democracy, provides a direct answer to the assertion that the choice not to form or join a political party under section 19(1) renders that choice constitutionally defective. It does not. The consequence of that choice is that democracy may be pursued directly, by the use of the section 17 right to assembly, demonstration, picket and petition, or by

[191] For a general discussion of a dominant-party democracy and an explanation of the value of having a multi-party system of democratic government see Choudhry "'He had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2009) 2 *Constitutional Court Review*. The discussion by Choudhry shows that the requirement of multi-party democracy is not all that "thin" a concept.

calling for a referendum. The choice to champion a cause,[192] rather than a political party, still remains and may be pursued by other constitutionally protected democratic means.

[218] This also explains why seeking support from "the right not to associate" is inapposite.[193] Firstly, section 19 compels no one to form or join a political party. If, however, someone exercises the right not to associate with political parties, the Constitution itself provides the consequence: that person must then pursue the direct democratic means available under the Constitution and not that of standing for electoral office. This, on a constitutional level, is the same as holding that the right not to associate does not infringe upon other rights that stem from regulated association with trade unions or professions.[194] The "regulation" here is found in the Constitution. It defines the right.

[219] The differentiation in consequence flowing from the choice to associate with a political party (the ability to stand for and hold electoral office) from that flowing from the choice not to associate with a political party (to exercise one's political rights through other democratic means provided in the Constitution) can thus not be said to limit some general right, free-floating outside the Constitution. But even if that can somehow conceptually be envisaged, the constitutionally sanctioned differentiation will also immediately show why the so-called limitation will then be reasonable.

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[192] Section 19(1)(c) of the Constitution.

[193] First judgment at [22], [29], [48], [55] and [58].

[194] See for example *Tloubatla* above n 70 at 12 (citing *Keller v State Bar of California* 496 US 1 (1990)), where it was held:

> "It is, however, noteworthy that despite the recognition of the right not to associate, states may compel lawyers to join bar associations and compulsory contributions to such associations are lawful".

See also *Municipal Employees Pension Fund v SAMWU National Provident Fund* [2019] ZASCA 42; 2019 JDR 0630 (SCA) at para 53.

[220] That brings one to the constitutional norm that our electoral system must result, in general, in proportional representation.[195] The applicants contended that a historical interpretation supported their reading of section 19(3)(b). However, the "never again" impulse of section 19 does not boil down to the simplistic view that our past of disenfranchisement means that the ambit of constitutionally protected interests in section 19(3)(b) should be set as widely as possible to supposedly promote enfranchisement. As already noted, this notional approach ignores the direct constitutional context and purpose. It also fails to give nuanced attention to the historical rationale for the Constitution's choice of a multi-party system of proportional representation and the trade-offs that were made in negotiating this vision of constitutional democracy.

[221] The entrenchment of proportional representation, and its achievement through the vehicle of political parties, flows from the prioritisation of equality in political voice (every vote counts equally) over the accountability that might be better secured through a constituency-based system or a mixed system. The "never again" impulse of section 19 is therefore not merely that whole categories of citizens must not be disenfranchised, but also that never again must some people's voices count more than others in our representative democracy. The rationale thus goes beyond disenfranchisement, to the distortion of equality in political voice.

[222] This "never again" impulse is perhaps most clearly demonstrated with reference to the 1948 election: not only did a minority of political voices matter (white minority rule) but the "inherent disproportionality" of the constituency-based system was exposed with the National Party coming to power in spite of polling only 37% of the total vote, whilst the then governing party lost the election in spite of obtaining 49% of

[195] See [205].

the total vote.[196] This "dramatic disproportional ratio" was sustained in the period 1961-1981, during which the National Party, on average, attained little more than 50% of the vote but held approximately 75% of the seats in Parliament.[197] In *Executive Council, Western Cape Legislature*, this Court was sensitive to this continued risk of distortion in electoral outcomes that flows from our legacy of spatial apartheid in South Africa.[198]

[223] The scope of the right guaranteed in section 19, as established through contextual (structural), purposive and historical interpretation, places several important constraints on the electoral system, such as universal suffrage, multi-party democracy, and proportional representation. The electoral system must meet these requirements if it is to be constitutionally compliant but, beyond these, it does not prescribe any particular electoral arrangement.

[224] When read together, sections 46-47, 105-106 and 157-158 of the Constitution provide a clear picture of the electoral systems that operate at national, provincial and municipal level. The explicitly different electoral arrangements at municipal level clarify, by implication, the constitutional parameters of the electoral system at national and provincial levels. The emphasis at national and provincial level is on the importance of equality of political voice in representation. While the entrenchment of proportional representation applies across all three tiers of government, it is underscored as the rationale for the electoral system at national and provincial level. Section 42(3) provides that "[t]he National Assembly is elected to *represent the people and to ensure government by the people* under the Constitution". This speaks to the rationale of promoting democracy and the equality of political rights: every vote counts equally in proportional representation, with this representativeness optimising rule by the citizen body.

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[196] Basson *South Africa's Interim Constitution: Text and Notes* (Juta & Co Ltd, Cape Town 1994) at 64.

[197] De Villiers *Birth of a Constitution* (Juta & Co Ltd, Cape Town 1994) at 110.

[198] *Executive Council, Western Cape Legislature* above n 136 at para 7.

[225] By contrast, the constitutional provisions regulating the municipal electoral system do not contain an analogous, let alone identical, statement about representativeness being the purpose of the electoral system. Instead, the municipal electoral system is unique in clearly placing the emphasis on accountability. The objects of local government in section 152(1)(a) include "to provide democratic and accountable government for local communities". This distinctive choice does not merely stem from sound political theory in advocating for subsidiarity in governance, but also from the "never-again" impulse that animates the constitutional requirements for our electoral system. This was eloquently captured by this Court in *Executive Council, Western Cape*:

> "Our history has produced a rigid pattern of racial division in society. Black residential areas were, and still are, characterised by a lack of amenities, physical infrastructure and services. Where these exist, they are of inferior quality compared to those enjoyed in historically white residential areas. Local government was equally divided along racial lines. In recognition of this history, the negotiations relating to the transformation of local government were conducted separately from the negotiations regarding the transition of power at the national and provincial levels."[199]

[226] The Constitution reflects the outcome of these different negotiations and different rationales in its regulation of local elections versus national / provincial elections. While sections 46 and 105 only mandate proportional representation, section 157(2) expressly provides for the choice of a mixed system (party lists combined with a ward system) at municipal level.

[227] Section 157(2) does not prescribe a mixed electoral system at municipal level, but rather makes such a system constitutionally permissible so long as it still results, in general, in proportional representation (section 157(3)). It explicitly leaves it up to "national legislation, which must prescribe a system" of either: (a) proportional representation achieved through party lists; or (b) a mixed system of party lists and ward

[199] *Executive Council, Western Cape* above n 109 at para 44.

representation. A mixed system at municipal level is permissible but not constitutionally prescribed.

[228] Thus, even at municipal level, there is no constitutional right to stand for and hold political office as an independent candidate in terms of section 19(3)(b). That choice, in prescribing an electoral system, is left to Parliament. The discretion of Parliament to determine the electoral system has been accepted by this Court. In *AParty*, this Court stated that the scheme of the electoral system is "a matter that lies peculiarly within Parliament's constitutional remit".[200] It also noted:

> "*Parliament has the constitutional authority and duty to design an electoral scheme to regulate the exercise of the right to vote*. This is apparent from sections 46(1), 105(1) and 157(5) of the Constitution."[201]

[229] That the Constitution mandates an electoral system that enables independent candidates to stand for and hold political office at national and provincial level is an even more tenuous proposition. Sections 46 and 105 do not expressly permit a mixed system. The fact that a mixed system is not even mentioned as a constitutionally permissible electoral arrangement at national and provincial level means that it certainly cannot be read in as a constitutionally prescribed requirement. At worst, this silence means that non-political party representation is prohibited. At best, it means that the accommodation of independent candidates is permissible so long as it still yields, in general, proportional representation.

[230] This latter position, namely that the parameters of the electoral system set out in the Constitution do not prohibit non-political party representation but rather, through its

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[200] *Aparty v Minister of Home Affairs, Moloko v Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at para 80.

[201] Id at para 6. See also *New National Party* above n 11 at para 14, where it was held that—

> "[t]he right to vote contemplated by section 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. *The details of the system are left to Parliament*."

silence, makes this permissible, seems more tenable. In following this approach, the question that arises next is to what extent accommodation can be made for independent candidates within the bounds of what is constitutionally permissible. This would, however, as in local government, play out at the level of legislative design of the electoral system. The Legislature may decide to allow or permit independent candidates to stand for, and hold, political office. That legislative choice to allow independent candidates could be constitutionally challenged if it failed, generally, to yield proportional representation. That is not an issue presently before this Court.

[231] The reasoning that, because there may be no obstacle in the Constitution to independent candidates, we should therefore interpret section 19(3)(b) as securing such a right, makes an illogical leap that cannot be sustained. This conflates the distinction between permissive and prescriptive constitutional norms – or, put differently, it conflates electoral preferences with constitutional rights.

[232] Finally, it needs to be emphasised that those who do not wish to participate through the party political process are not deprived of their democratic political voice. They retain their rights to freedom of expression, assembly, demonstration, picket and petition in our often tumultuous and robust public debate. They may convince others of their cause and persuade Parliament to legislate for non-party political groupings or individuals to stand for and hold office. Or even register something like "The Non-Political Party". Registration under the Electoral Act is relatively easy and its regulation is light. If our society can recognise the legitimate concerns of the Unemployed Workers Union of South Africa, even when its members are not able to claim employment benefits under the Labour Relations Act,[202] the idea might not be as strange as it initially sounds.[203]

[202] 66 of 1995.

[203] See for example George "Unemployed Workers' Union of SA turns 30" *DispatchLIVE* (10 September 2015), available at https://www.dispatchlive.co.za/news/2015-09-10-unemployed-workers-union-of-sa-turns-30.

[233] For these reasons I would grant leave to appeal, but dismiss the appeal.

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