CONSTITUTIONAL COURT OF SOUTH AFRICA

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

CCT 110/19

Date of hearing: 15 August 2019
Date of judgment: 11 June 2020

MEDIA SUMMARY

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

On Thursday 11 June 2020 at 10h00 the Constitutional Court handed down judgment in an application for leave to appeal the judgment and order of the High Court of South Africa, Western Cape Division, Cape Town. The application concerned whether the Electoral Act 73 of 1998 (Electoral Act) is unconstitutional to the extent that it does not provide for adult citizens to be elected to the National Assembly and Provincial Legislatures as independent candidates. Relying on sections 1(d), 46(1)(a) and 105(1)(a) of the Constitution, the High Court dismissed the application. The applicants appealed to the Constitutional Court.

The matter was first heard by the Constitutional Court on an urgent basis on 2 May 2019. The Court concluded that the matter lacked urgency and postponed it for hearing in the ordinary course on 15 August 2019.

An argument advanced by all four applicants, New Nation Movement NPC, Ms Chantal Dawn Revell, GRO and Indigenous First Nation Advocacy SA, was that the Electoral Act is unconstitutional for unjustifiably limiting the right to stand for public office and, if elected, to hold office, as conferred by section 19(3)(b) of the Constitution. In addition, some applicants submitted that the Electoral Act infringes their right to freedom of association protected by section 18 of the Constitution. The participating respondents, the Minister of Home Affairs, the Electoral Commission and the Speaker of the National Assembly, countered that, at best for the applicants, section 19(3)(b) is neutral; it does not require that membership of the National Assembly and

Provincial Legislatures must include independents. They argued that on the contrary, other provisions of the Constitution, like sections 1(d), 46(1)(a), 105(1)(a), 57(2), 178(1)(h) and 236, point away from the interpretation contended for by the applicants.

The Council for the Advancement of the South African Constitution and the Organisation Undoing Tax Abuse (OUTA) participated as *amici curiae* (friends of the Court).

In a judgment penned by Madlanga J (concurred in by Cameron J, Jafta J, Khampepe J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ) (first judgment), the Constitutional Court upheld the appeal and set aside the order of the High Court. It held that the Electoral Act is unconstitutional to the extent that it requires that adult citizens be elected to the National Assembly and Provincial Legislatures only through their membership of political parties. In reaching this conclusion, the first judgment held that, despite having been pleaded as being discrete, 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. Accordingly, in order to avoid pitting the two rights against one another, the first judgment held that the Court should prefer an interpretation of section 19(3)(b) that promotes freedom of association.

In determining whether the respondents' interpretation of section 19(3)(b) indeed results in a denial of section 18, the first judgment determined the content of the latter right. It considered the constitutional purpose of freedom of association, and its treatment in international and foreign law, and concluded that section 18 not only protects the positive right to associate, but also the "negative right" not to be compelled to associate. The first judgment thus held that if the state compels an individual to associate with a political party when such individual does not want to – whether by joining or forming a party – that limits the right to freedom of association.

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. 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. Thus 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, as set out in the inexhaustive list of political choices in section 19(1); and it must equally be deserving of protection.

But that could not be the end of the matter as it was suggested by the respondents that a party proportional representation system is indicated by a number of other provisions in the Constitution.

In relation to the section 1(d) founding value of "a multi-party system of democratic government", the first judgment held that this says no more than that South Africa must never be a one-party-state; it says nothing about exclusive party proportional representation. The Electoral Commission also placed reliance on sections 46(1)(a) and 105(1)(a) of the Constitution. These sections require that the electoral system be prescribed by national legislation. The Electoral Commission argued 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 these sections. The first judgment found that sections 46(1)(a) and 105(1)(a) are not by any means giving Parliament *carte blanche*. The electoral system it prescribes must be constitutionally compliant. And the question is whether what it has prescribed is constitutionally complaint.

In varying degrees, the other provisions invoked by the respondents had some measure of support for the respondents. But, according to the first judgment, none comes anywhere near indicating sufficiently that the Constitution requires an exclusive party proportional representation system.

A constitutional provision that on the face of it provided the strongest support for the respondents' interpretation was found to be section 157(2)(a). It requires Parliament to enact legislation that prescribes a system of proportional representation exclusively based on party lists, for election to a Municipal Council. After calling for submissions on this issue after the oral hearing, the first judgment accepted the argument by OUTA that section 157(2)(a) entails a discrete and narrow limitation on the rights protected by sections 18 and 19, but only in the local government sphere. The first judgment also considered the crucial background of what took place in the negotiations for the attainment of democracy. It found that there were issues that uniquely affected municipalities. As a result, negotiations in respect of municipalities were conducted separately from the rest of the negotiation process. Accordingly, the framers of the Constitution 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. Viewed with this background in mind, the first judgment held that section 157(2)(a) does not contradict section 19(3)(b).

Given the importance of political rights within the South African context and the far-reaching implications that such rights have on the right to human dignity, the first judgment held that the rights in sections 18 and 19(3)(b) of the Constitution must be interpreted generously, rather than restrictively.

This led 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. The question was thus whether the limitation is reasonable and justifiable, as envisaged in section 36(1) of the Constitution. In this regard, the first judgment could conceive of no reason to hold that the limitation is justified, and found that the respondents had offered no compelling justification.

It was thus declared that, insofar as makes it impossible for candidates to stand for political office without being members of political parties, the Electoral Act is unconstitutional.

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. For that not to happen, the first judgment held that the declaration of invalidity must take effect from the date of the judgment. Finally, it suspended the declaration of invalidity for 24 months.

A second judgment penned by Jafta J (concurred in by Cameron J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ) agreed with the outcome and reasoning in the

first judgment. The second judgment highlighted two principles which guide the interpretation of section 19 of the Constitution. The first principle is that section 19 must be read in its historical context, in which Africans were denied the right to vote and the right to be voted into public office. 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.

The second judgment held that section 19(3) draws a distinction between citizens by conferring rights upon a specific class of citizens. The bearers of rights enshrined in this section are adult persons who are citizens. The second judgment reasoned that 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. 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).

The second judgment further held that section 19(3)(b) must be construed in the same way that section 19(3)(a) is read and understood. It held that 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". Furthermore, requiring citizens to exercise the right to contest elections and hold office through political parties only subverts section 19(3)(b), as the section confers the right on adult South Africans and not political parties.

The second judgment concluded 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.

The third judgment of Froneman J agreed that leave to appeal must be granted, but disagreed with the reasoning and outcome of the first and second judgments on the merits of the appeal. The third judgment disagreed with the interpretation of section 19(3)(b) in the first and second judgment 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. According to the third judgment, it was not shown that the Constitution prescribes something other than political parties in its fundamental multi-party system of democratic government. The right under section 19(3)(b) needs to be determined not according to the notional ability or preferences of individual adult citizens to stand for, and hold, political office in any general, everyday sense, but according to the actual content of the right within the constitutional democracy envisaged in the Constitution.

The third judgment disagreed with 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. This, according to the third judgment would be an illogical leap that cannot be sustained because it conflates electoral preferences with constitutional rights. 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.