REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 48541/2010
REPORTABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

30/10/2012 ..... DATE

..... SIGNATURE

In the matter between:

EMPEROR THEMBU 2ND VOTANI MAJOLA **Applicant**

and

THE STATE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **1st Respondent**

THE CHAIRPERSON INDEPENDENT ELECTORAL COMMISSION **2nd Respondent**

J U D G M E N T

MOKGOATLHENG J:

INTRODUCTION

(1) The applicant in this application seeks an order declaring that:

(a) ***Section 57A*** read with ***Schedule 1A of the Electoral Act No. 73 of 1998 is*** inconsistent with ***Section 19(3)(b) of the Constitution of the Republic of South Africa Act No 108 of 1996;,*** further that the electoral system foreshowed therein is unconstitutional as it does not permit independent candidates to contest elections to the National Assembly and Provincial Legislatures if they are not members of a political party; and

(b) the previous election of the sitting members of the National Assembly and Provincial Legislatures to be unconstitutional.

(2) Further the applicant seeks an order compelling:

(a) the State President and the Chairperson of the Independent Electoral Commission within 6 months after the declaration of the invalidity set out in *prayers 1(a) and (b)* above, to develop and finalize an electoral system which permits independent candidates to contest elections to the National Assembly and

Provincial Legislatures without being members of a political party; and

(b) compelling the State President within 6 months after the finalization of the new electoral system to declare the date of the elections of the National Assembly and Provincial Legislatures failing which, the Constitutional Court to declare the date of such elections; and further

(e) referring the order of the constitutional invalidity of ***section 57A, and Schedule 1A of the Electoral Act No 73 of 1998*** to the Constitutional Court for confirmation.

THE APPLICANT'S CONTENTIONS

(3) The application is launched in his personal capacity and in the public interest. The applicant is a registered voter and not a member of a political party. The electoral system in the Republic of South Africa does not allow voters to directly elect Members of the National Assembly and the Provincial Legislatures. Only political parties contest elections to the National Assembly and Provincial Legislatures.

(4) South African adult citizens vote for political parties which are presumed to represent the voter's interests. The political parties draw up lists of candidates to represent the relevant political party as their members to the National Assembly and Provincial Legislatures.

(5) In the current electoral system unless an adult citizen is a member of a political party, he or she has no right to be elected to the National Assembly or Provincial Legislature. The right of such adult citizen to personally contest elections for membership to the National Assembly and Provincial Legislature and if elected, to hold public office pursuant to ***section 19(3)(b) of the Constitution*** is clearly violated by the current electoral system.

(6) In contradistinction, in terms of the existing laws governing elections of local government in the Republic of South Africa, independent candidates are permitted to contest local municipal elections in their own right. Consequently, because the present electoral system denies independent candidates the right to personally contest elections of the National

Assembly and Provincial Legislatures is inequitable and unconstitutional.

(7) The grave injustice resulting from this electoral system does not only prejudice prospective independent candidates, but prejudices the voters because they are effectively compelled to vote for candidates not of their choice, but those chosen and presented by political parties to represent the political parties' interests and indirectly the voters' interests.

(8) It is in the best interests of justice, fairness, equity and good governance, that voters should be afforded the right to vote for a candidate of their choice to represent their interests, with such candidate to be accountable to the voters who elect them to the National Assembly and Provincial Legislature.

THE APPLICANT'S SUBMISSIONS

(9) The current electoral system unreasonably and unjustifiably limits the electoral right of voters and independent candidates because it proscribes such electoral right permanently as opposed to a mere *'limitation'* thereof,

alternatively, the limitation of such electoral right does not fulfill the criteria set out in the ***section 36(3)(b) of the Bill of Rights.***

(10) Mr Majola on behalf of the applicant argued that ***section 46(1)(d) of the Constitution*** accorded the National Assembly a discretion to prescribe an electoral system which in general embraces the notion of proportional representation. However, the National Assembly in implementing its constitutional obligation pursuant to ***section 46(1)(d) of the Constitution*** unconstitutionally limited and restricted the meaning of "*Proportional Representation*" to a notion which only accommodated registered political parties of contest elections to the National Assembly and Provincial Legislatures.

(11) The construction of "*Proportional Representation*" within the context of ***sections 46 and 105 of the Constitution*** properly construed doesnot exclude the right of independent candidates to contest elections of the National Assembly and Provincial Legislatures, consequently, the electoral system pertaining to the National Assembly and Provincial Legislatures is unfair, unjust inequitable and unconstitutional.

(12) ***Section 7(2)*** of the Constitution provides *"...the state must respect, protect, promote and fulfill the rights in the Bill of Rights..."*. ***Section 8(1)*** *provides "...the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."* Consequently, when the National Assembly drafted the electoral system at issue herein, it had a constitutional obligation to honour the aforesaid provisions by allowing independent candidates to contest elections of the National Assembly and Provincial Legislatures in the exercise of their political rights pursuant to ***section 19(3)(b) of the Constitution***.

(13) Mr Majola argued that judicial activism dictates that when interpreting the Bill of Rights as contemplated in ***section 8(3)(a)*** **of the Constitution** and in applying the provisions of the **Bill of Rights** to a natural person, a court-in order to give effect to a right in the **Bill of Rights** is obliged to interpret the **Constitution** and enhance that right.

(14) In support of the above submission counsel cited the case of **President of the *Republic of South Africa and Another v***

Hugo 1997 (4) SA 1 (CC) at para 29, where Goldstone J, analyzing a host of authorities on the doctrine of the separation of powers referred with approval to the case of ***Operation Dismantle v The Queen (1985) 13 CRR 287*** where Wilson J said:

> *"The Courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of State. Equally, however, it is important to realize that judicial review is not the same thing as a substitution of the Court's opinion on the merits for the opinion of the person or body to whom a discretionary decision making power has been committed. The first step is to determine who as a constitutional matter has the decision making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.*
>
> *If we are to look at the Constitution for the answer to the question whether it is appropriate for the Court to "second guess" the executive on matter of defence, we would conclude that it is not appropriate. However, if*

what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so."

(15) Mr Majola further argued that although ***section 47(1)*** provides: *"...every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly except..."* among the exceptions listed in the section there is none reading: *"except anyone who is not a member of a political party."* The same reasoning advanced by counsel applies with equal force to ***section 106*** which governs membership to the Provincial Legislatures.

(16) In further arguing the purported unconstitutionality of the present electoral system counsel cited the case of ***New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC)*** **at para 19** where the court in holding that the rational connection test is a standard for reviewing legislation declared:

"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 government purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional."

(17) Counsel submitted that the provisions in ***section* 19** in the Bill of Rights are quite clear in that an adult citizen has a choice to independently join a political party and campaign for a particular political cause, it logically followed that an adult citizen as an individual should also have the right to stand for public office and, if elected, to hold office in the National Assembly or Provincial Legislatures.

(18) Counsel contended further that ***section 19(1)*** does not compel an adult citizen before exercising his or her political right, to be a member of a political party, consequently, ***section 19(3)*** correctly construed does not provide that an adult citizen is compelled to be a member of a political party before he or she can stand for public office and if elected, to

hold public office in the National Assembly and Provincial Legislatures.

(19) In support of his argument counsel referred to the case of ***UDM v President of the Republic of South Africa 2003 (1) SA 495 CC at para 28, page 510*** where the court held: "*...Constitutional Principle VIII provides that...there shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and, in general, proportional representation*".

Counsel submitted that significantly, however, ***section 1(d) of the Constitution*** incorporates all the provisions of Constitutional Principle VIII, save for the last requirement which refers to proportional representation, consequently, if it had been contemplated that "*proportional representation*" should be one of founding values it was difficult to understand why those words were omitted from ***Section 1(d) of the Constitution***.

(20) In view of this omission, counsel contended that this Court has a constitutional imperative to advance human rights

pursuant to the **Bill of Rights** because ***section 19*** rights are substantive rights which occupy a higher status of protection when compared with the "*proportional representation*" principle set out in ***sections 46(1)(d) and 105 (1)(d)*** in the **Constitution**.

THE EVALUATION OF EVIDENCE

(21) The gravamen of the constitutional challenge is that unless an adult citizen is a member of a political party, his right to '*contest membership to the National Assembly and Provincial Legislature is violated by the current electoral system'.* Secondly, the applicant contends that there are many adult citizens who in the exercise of their constitutional right, choose not to join any political party. Such individuals the contention goes, are precluded from holding office in the National Assembly or Provincial Legislatures by the present electoral system.

(22) The applicant argues that the matter ought to be approached by '*balancing*' ***section 19 of the Constitution*** and the

principle of proportional representation. Further that such balancing shows that the present electoral system does not take into account that '*numerous dynamical changes that have taken place which have a direct bearing on whether the present electoral system'* remains valid.

(23) Consequently, the argument proceeds, the present electoral system is unconstitutional because it fails to take into account certain changes which have taken place and have an influence on whether the proportional representative electoral system remains valid.

(24) Both propositions are legally unsound. Firstly, by requiring the balancing of **section 19** against the proportional representation electoral system, the applicant argues for an oppositional or disjunctive reading of **sections 19 and 46(1)(d)** of the **Constitution**. This approach to constitutional interpretation has been rejected in favour of an approach which calls for a harmonious reading of the **Constitution**. In ***Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC)*** it was held that constitutional provisions must be read consistently with one another.

(25) Secondly, the argument that the electoral system is unconstitutional because there are changing dynamics is equally unsound. A statutory provision does not become unconstitutional because certain things have changed in society. Constitutional invalidity arises where it can be demonstrated on objective grounds, that there is a conflict between a statutory provision and the **Constitution**.

THE CONSTITUTION ENTRENCHES A PARTY SYSTEM

(26) The foundational values espoused in ***Section 1(d) of the Constitution*** embraces amongst others *"universal adult suffrage, a national common voters roll, regular elections and multi-party system of democratic government, to ensure accountability, responsiveness and openness."*

(27) ***Section 19 of the Bill of Rights***, which is central to the present application, which deals with political rights 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 a 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.'

(28) The legislative bodies referred to in ***section 19* of the Constitution** are established in terms of ***section 46*** (in respect of the National Legislature) and ***section 105*** thereof (in respect of Provincial Legislatures). The text of ***sections 46 and 105***, save for a few minor differences is the same. Both sections deal with the composition of the legislatures and provide:

'(1) The [National Assembly and Provincial Legislature] consists of [women and men] elected in terms of an electoral system that –

(a) Is prescribed by national legislation;

(b) Is based on the national common voters roll;

(c) Provides for a minimum voting age of 18 years; and

(d) Results in general, in proportional representation.'

(29) It was the National Assembly's prerogative to choose one or other electoral system, the only constraint being that such electoral system should, in general, embrace proportional representation and that such electoral system should pass constitutional muster and be in conformity with the prescripts of ***sections 46 (1)(d)*** and ***section 105 (1)(d) of the Constitution.***

(30) ***Item 1 of Annexure A of Schedule 6*** which deals with the rights of political parties and party lists of candidates submitted by a party is indicative of the constitutional imperative that only persons whose names appear in the political party lists submitted are eligible to occupy seats in the National Assembly and Provincial Legislature.

(31) ***Section 44 of the Constitution*** states that the national legislative authority of the Republic vests in the National Assembly which has the power to pass legislation with regard to any matter. ***Section 46(1) of the Constitution***

posits the power to choose an electoral system of the National Assembly, with the *caveat* that the electoral system must, *inter alia*, result in proportional representation, in general.

(32) **Items 2 and 3 of Annexure A of *Schedule 6 of the Constitution*** deal with the mechanism of filling the seats in the National Assembly and Provincial Legislatures established in terms of ***sections 46 and 105 of the Constitution.*** It is clear in respect thereof that the National Assembly and Provincial Legislatures are composed of members drawn from political party lists.

(33) ***Sections 46 and 105 of the Constitution*** which establish the National Assembly and Provincial Legislatures are subject to ***Annexure A of Schedule 6 of the Constitution.*** The employment of the phrase '*subject to*' is pivotal when construing the electoral system. The provisions of ***Annexure A*** of ***Schedule 6*** are decisive and paramount when the National Assembly exercised its discretion in choosing the existing electoral system.

(34) In ***Chevron Engineering (Pty) Ltd v Nkambule and Others [2003] 3 ALL SA 365 (SCA)*** at para 16 in dealing with the construction of '*subject to*' in the context of the Constitution it held:

> *'In my opinion the inclusion of the words 'subject to the Constitution' saves item 22(6) from being found to be unconstitutional. They can only mean that if the Constitution says something different in regard to the possibility of an appeal lying to some other court from a decision of the LAC hearing an appeal under item 22(5) from what is said later in the sub-item then what the Constitution says will prevail. This is not because what is said in the sub-item will be unconstitutional but because the sub-item itself provides that whatever the Constitution says on the point (if in conflict with what follows) will prevail in terms of the sub-item itself. This follows from the use of the expression 'subject to' which indicates clearly that to which the rest of the sub-item is subject is paramount and will override it: See* ***S v Marwane 1982 (3) SA 717 (AD) at 747H-748A and Zantsi v Council of State, Ciskei and Others 1995 (4) SA 615 (CC) at 624D-G (para [27]).***

(35) On a proper construction, it is clear that ***Annexure A of Schedule 6*** only permits a party electoral system, and not independent candidates because the seats in the National Assembly and Provincial Legislatures can only be filled from lists of the names submitted by political parties.

(36) Regardless of the textual meaning of ***section 19(3),*** the fact is that any individual can stand for office to a National Assembly or Provincial Legislature established by the ***Constitution***. Such assemblies (at national and provincial level) are constitutionally constituted only through party lists.

(37) ***Section 57A*** read in conjunction with ***Schedule 1A of the Electoral Act No. 73 of 1998*** establishes and governs the electoral system of proportional representation in the National Assembly and Provincial Legislatures.

(38) The applicant is not contending that the electoral system envisaged in ***section 57A of the Electoral Act*** does not result in general, in proportional representation. For as long as the electoral system passes the constitutional requirement that it must in general result in proportional representation, then such system satisfies the constitutional requirement for its validity.

(39) The principle of the separation of powers means neither the applicant not the Court is able to arrogate to himself or itself the power the **Constitution** has vested in the National Assembly in terms of sections 44 and 46, namely, to pass legislation with regard to any matter. The applicant, as is the case with any other citizen is able under the present electoral system to stand for public office and if elected to hold public office under an electoral system the National Assembly has chosen by becoming a member of a political party and voting for same, or by forming his own party and voting for same.

(40) The applicant does not suffer any impediment to the constitutional exercise of his ***section 19*** rights. What the applicant cannot do is to dictate to the National Assembly which electoral system is best able to serve his interests the interest of the people of South Africa.

(41) The concept "*proportional representation in general*" is also said to be attained "*when an electoral system provides for the achievement of overall or complete proportionality, bar the deviation caused by the participation of independent*

candidates." Consequently, it is not unconstitutional to achieve complete proportionality by political parties participating in the present electoral.

(42) The final Constitution incorporating ***sections 46(1)(d) and 105(1)(d)*** requiring the establishment of an electoral system which results in proportional representation was certified by the Constitutional Court as meeting the constitutional requirements in the context of the chosen electoral system by the National Assembly.

(43) The electoral system under the **Electoral Act** does meet the constitutional requirement of proportional representation in general, although it does not permit an individual candidate to contest elections of the National Assembly or in the Provincial Legislature without being a member of a political party and without the name of such individual candidate not being on the list of a political party.

(44) The current electoral system does not violate South African citizens' rights spelled out in ***section 19(3)(b) of the***

Constitution because the current electoral system is in perfect harmony with the ***Constitution***.

(45) Although local government elections offer an opportunity for individual candidates to contest elections independently in that sphere of government. The electoral system for local government permits the achievement of proportional representation as required by the ***Constitution***.

(46) The comparison of the proportional representation electoral system operational in the National Assembly and Provincial Legislatures with the local government electoral system is misplaced. ***Sections 157(3) and (4) of the Constitution*** expressly contemplate the co-existence of a dual electoral system at local government level consisting of a proportional representation system (party system) and a ward system (direct representation system). The difference between local government councils on the one hand and National and Provincial Legislatures on the other, is expressly contemplated and mandated by the ***Constitution.***

(47) The reference by the applicant to section 36 of the Constitution is misplaced because the provisions of ***section 36*** are not applicable in this matter. ***Section 36*** only applies where there is a limitation of a constitutional right. In this case, no constitutional right to vote for the party of one's choice is limited because constitutionally only parties may contest elections at National Assembly and Provincial Legislature level. There is accordingly no scope for any argument regarding the violation of an independent candidate's or individual's political constitutional rights.

(48) Dealing with the exercise of executive power, which applies with equal force in relation to legislation, in ***Pharmaceutical Manufactures of SA*: In re ex parte *President of the RSA 2000 (2) SA 674 (CC)at para 90***, Chaskalson P said:

> *"Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirement of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute*

their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."

(49) In relation to the interplay between the Courts and the Legislature Ngcobo J (as he then was) in ***DPP v The Minister of Justice and Constitutional Development 2009 (4) SA 222 (CC) at para 181*** said:

"The importance of the principle of the separation of powers in our constitutional democracy cannot be gainsaid. It is required by the very structure of our Constitution. While there are no bright lines that separate the role of the courts from those of other branches of government, "there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this

separation (Footnote omitted) Courts too must observe the constitutional limits of their authority."

(50) In ***Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) at para 37*** the Court emphasized the principle of the exercise of the separation of powers in these terms.

> *"The constitutional principle of the separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflect the concept of separation of powers. The principle has important consequences for the way in which and the institutions by which power can be exercised. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not*

interfere in the process of other branches of government unless to do so is mandated by the Constitution".

(51) Chaskalson P ***Ferreira v Levin NO 1996 (1) BCLR 1 CC*** para 183 expressed the principle in these terms:

"In a democratic society the role of the legislature as a body reflecting the dominant opinion should be acknowledged. "...It is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate."

(52) Because the applicant was raising a constitutional issue not only in his personal capacity but also in the public interest, and although the legal contentions he advances in respect thereof are not legally sustainable, one cannot argue that the application was capriciously launched, consequently, this is a case where the principle that the costs follow the result can be waived.

THE ORDER

(53) In the premises:

(a) the application is dismissed; and

(b) there is no order as to the costs, each party is to bear its own costs.

Dated the 30 day of October 2012 at Johannesburg

MOKGOATLHENG J

JUDGE OF THE SOUTH GAUTENG HIGH COURT

DATE OF HEARING:

DATE OF JUDGMENT: 30 OCTOBER 2012

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