IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17223/18

In the matter between:

NEW NATION MOVEMENT PPC	First Applicant
CHANTAL DAWN REVELLE	Second Applicant
MEDIATION FOUNDATION FOR PEACE AND JUSTICE	Third Applicant
GRO	Fourth Applicant
INDIGENOUS FIRST NATION ADVOCACY SA PBP (FNASA)	Fifth Applicant

and

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

JUDGMENT: WEDNESDAY, 17 APRIL 2019

DESAI, J:

1. The right to elect and be elected for public office is a fundamental tenet of modern democracy. It is the Applicant's case that the electoral laws of this country impinge upon that right in a constitutionally invalid manner, more especially in that they fail to regulate the position of individuals who wish to stand for election at national or provincial level.

2. The matter was launched on an urgent basis and the Applicant sought an order compelling parliament to remedy the perceived invalidity forthwith and before the pending elections set to take place on 8 May 2019 - that is a few weeks from now. The relief sought has been amended and the Applicant's now ask that it be resolved "as soon as possible". Any relief granted would, I think, cause substantial distress and uncertainty in relation to the upcoming elections.

3. Save for the Second Applicant, the applicants are not for profit companies or associations. They appear to have similar objectives and it is not entirely clear from their papers whether each of these organisations has a distinct membership and the extent thereof. The founding document of the First Applicant states, *inter alia*, "**the nation has been robbed of its birthright of direct representations in a people's governance system and of the nation's resources through the implementation of an unjust, partisan, greed-driven, secular-humanist system**". Such language permeates the document. Ultimately it is akin to the charter of a political organisation, albeit phrased in somewhat unusual language.

4. The Second Applicant, **Chantal Dawn Revell**, describes herself as "a Princess of the Korona Royal Household which is one of the five official Royal Priesthoods of the Khoe and the San First Nations". She advances the position that "**the Khoe and the San people were the original stewards of all of the land in South Africa and "were deprived of their possession of the land not only by white people from Europe but also by black people from the rest of Africa**". She maintains that the "First Nation Peoples" have been excluded from the debate regarding land expropriation and in her view biblical values should govern the process. She predicts a civil war if the ruling party does so solely on racial grounds.

5. Their complaint appears to be that the Electoral Act 73 of 1998 (the Electoral Act) does not make provision for independent candidates to contest the provincial and national elections. It means that South Africans can only become members of parliament if they belong to a particular party. They argue that the closed party lists system has the effect that the political parties choose their representatives and not the electorate. They say its greatest weakness is that it does not ensure individual accountability.

6. **Advocate A Nelson SC**, who appeared with **Advocate C Brown** on behalf of the Applicants, was not entirely clear whether his clients were advocating a constituency based system. Alerted to the problems of such a system in contemporary South Africa, where spatial apartheid persists, he later in the course of his argument opted for a hybrid system.

7. The Applicants contend that an individual's rights to stand for public office are unjustifiably limited by the current electoral system. The questions which arise are the following:

   What stops the Applicants from exercising the right contained in Section 19 (3)(b) of the Constitution and what stops them from joining or forming a political party?

   The First Applicant registered or intended to register a political party. If that party wins enough votes in the national election, any member of that party could be elected to public office. However, he or she would not have acquired that position by running as an independent candidate.

8. The Second Applicant provides two rather tenuous reasons why she cannot join a political party:

   Firstly, she does not want to belong to a political party because she has no confidence in their ability to care for or represent the interests for which she stands as a woman, a mother and a member of the so-called First Nation Peoples. Secondly, the Royal Houses that she represents have committed themselves to be impartial and politically non-partisan.

   This explanation warrants little comment and is hardly compelling.

9. It is accordingly apparent that the Second Applicant <u>can</u> join a political party and stand for public office. She elects not to do so. If she does

not wish to join any other political party she is at liberty to establish a political party of her own.

10. **Nelson SC** argued on behalf of his clients, the Applicants, that the present system is not as good as the system they would prefer. That, however, is not a matter of constitutional law even though it may be supported by significant political authority. The merits or demerits of the disputed legislation are not at issue. What this court has to decide is the constitutionality or otherwise of the relevant legislation.

11. Section 19(3)(b) of the Constitution reads as follows: "**every citizen has the right to stand for public office and, if elected, to hold office**". Applicants contend that the effect of this section is that every citizen has the right to stand "**as an independent candidate to be elected to municipalities, provincial legislatures and to the national assembly**". On the basis of this interpretation the Applicants seek further declaratory relief, *inter alia*, orders that Section 57A and 1A of the Electoral Act are unconstitutional and invalid. In support of its interpretation of Section 19(3)(b), the Applicants rely upon the wording of the section and, more significantly, upon a dictum at paragraph 29 of the judgment of **Mogoeng CJ** in My Vote Counts NPC v The Minister of Justice and Correctional Services and Others [2018] ZACC at 17.

12. Prior to this judgment there was no suggestion from any quarter that Section 19(3)(b), implied the right to run independently for office and that our electoral system may not be constitutional.

13. 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.

14. A consideration of the Constitution as a whole does not support the Applicant's interpretation of Section 19(3)(b).

    In particular: Section 1 contains the founding values of the Constitution and provides at subparagraph (d) that the Republic of South Africa is a sovereign, democratic state founded on "**universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government (my underlining), to ensure accountability, responsiveness and openness**".

    The provisions of Sections 46(1)(a) and 105(a) of the Constitution accords parliament the discretion to prescribe electoral systems for the National Assembly and Provincial Legislatures which result, in general, in proportional representation.

15. Moreover, the sections that concern elections in local municipalities expressly provide for ward representation and elections.

16. As **Advocate N Cassim SC**, who appeared with **Advocate P Mhlana** on behalf of the Second Respondent, has correctly pointed out, the full wording of Section 19 does not expressly provide for independent candidates. It follows that a textual interpretation of Section 19(3)(b), does not include a right to stand for public office as an independent candidate.

17. The Fourth Respondent (the Speaker of the National Assembly) sets out in her affidavit the historical context of the political rights in the bill of rights and to the electoral systems as a whole. The historic context shows that Section 19(3)(b) could not, on a purposive interpretation have required that independent candidates stand for office in a constituency-based election.

18. **Mokgoatlheng J** in the South Gauteng High Court considered an almost identical matter (see: Majola v The State President of the Republic of South Africa [2012] ZAGP JHC 236), and in my view correctly concluded that the Electoral Act did not impede the Applicants' Section 19 rights. He found further that the Constitution entrenches a party system. The application was accordingly dismissed.

19. The high water mark of **Nelson SC**'s submissions appears to be that it would be permissible for parliament to put in place a constituency based system. He did not demonstrate that it was required for parliament to do so. At best for him he has established that the Constitution does not prohibit a system which allows independents to run. The Constitution permits parliament to make a choice between

allowing independents to run at national and provincial level or only allowing them to run at local level. Once parliament has made the choice, that choice is not unconstitutional.

20. Section 19, the section upon which **Nelson SC** relied so heavily, locates political parties at the centre of political rights and that is in fact what the Constitutional Court says in Ramakatsa and Others v Magashule and Others 2013 (2) BCCR 202 (CC). I shall revert to this decision shortly.

21. Section 19(1) reads as follows:

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.

22. In the final analysis, Applicants' case almost entirely rests upon a statement in My Vote Counts (*supra*). The statement is *obiter dictum*. **Nelson SC** initially conceded that the remarks were *obiter*. He did so in his Heads of Argument. During the course of argument he contended that it is a *ratio* because there is reference to independents throughout the judgment, according to him fifty-five times. The mere fact that reference is made to independent candidates fifty-five times is utterly

irrelevant and does not make it *ratio* because the nub of the case was not about that at all. That case is whether someone running for office has to reveal his or her funding information and the answer in the case was yes.

23. The remarks are quite patently *obiter* and accordingly not binding on this Court. However, they emanate from the highest court in the land and are of enormous persuasive force. The problem though is that there is a directly opposite *obiter* in the Ramakatsa (*supra*) and this Court is left with the unenviable task of charting its own course.

24. In My Vote Counts the Constitutional Court held as follows:

[Section 19 of the Constitution] addresses the fundamental right every citizen has "to stand for public office and, if elected, to hold office". Our constitution does not itself limit the enjoyment of this right to local government elections. The right to stand for public office is tied up to the right to "vote in elections for any legislative body" that is constitutionally established. Meaning, every adult citizen may in terms of the Constitution stand as an independent candidate to be elected to municipalities, Provincial Legislatures or the National Assembly. The enjoyment of this right is not and has not been proscribed by the Constitution. It is just not facilitated by legislation. But that does not mean that the right is not available to be enjoyed by whoever might have lost confidence in political parties. It does, in my view, remain open to

be exercised whenever so desired, regardless of whatever logistical constraints might exist".

25. It must be noted that until this dictum it was not understood that Section 19 of the Constitution conferred the right on members of the public to stand as independent candidates.

26. The contrary seems to appear from an earlier decision of the Constitutional Court. In Ramakatsa (*supra*) the Court held:

"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 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.

27. **Advocate S Budlender**, who appeared with **Advocate N Luthuli** on behalf of the Third Respondent, the Electoral Commission of South

Africa, has submitted that the *dictum* in My Vote Counts must be treated with caution. I agree. It certainly cannot be used uncritically to conclude that the electoral system which has operated in South Africa for twenty years was for all of that time in breach of the Constitution. This core issue which arises for determination is considerably more complex than the Applicants suggest and cannot be resolved simply by relying on the above quoted *obiter* remarks in My Vote Counts.

28. Even if I were to accept the My Vote Counts *dictum* in preference to the apparently contradictory *dictum* in Ramakatsa, there are certain difficulties.

29. On the one hand the dictum recognises that the right of independent candidates to participate in national and provincial government elections is "**not facilitated by legislation**". At the same time, it holds **"… it does, in my view, remain open to be exercised whenever so desired, regardless of whatever logical constraints might exist**". If these statements are given the meaning for which the Applicants contend, it is difficult to reconcile the said statement.

30. The Constitution requires the exercise of political rights under Section 19 to be regulated by national legislation (see: Constitution Sections 10 and 191). The Constitutional Court has recognised that "**the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for democracy, it is both empty and useless**" (see: New National Party of South Africa v The Government of the Republic of South Africa and Others 1999 (3) SA

191 (CC) at para 11). There appears to be no legislative framework to facilitate independent members standing for election and the problem, if such, should accordingly be addressed at that level.

31. It is common cause on the papers that parliament is already seized with the matters dealt with in this application since late 2017. The Applicants say so expressly "**I accept that the current electoral system and the need for change is currently before parliament as a consequence of the High Level Panel**" (see: Replying Affidavit page 464 para 24.1). The question then is whether in these circumstances this court should intervene in the parliamentary process. In this instance it does not appear to be justifiable for this Court to interfere.

32. As **Cassim SC** submitted, the Applicants seek to exact from the judiciary what they cannot obtain in the political arena. It is not difficult to establish a political party. The Applicants are well versed in setting up non-profit and public benefit organisations. The essential skills to perform these functions can be readily employed to establish a political party. The Applicants can then take their political discord with the party-centred election process in the Constitution to the electorate. That may be its proper remedy.

33. One final matter warrants comment. Applicants in their papers refer to "**civil war**" and "**genocide**". During the course of argument I asked **Nelson SC** whether he would consider asking his clients to review the use of such language. He declined to do so. The terms are reminiscent

of humanity at its worst. The use of such terminology often compounds the problem and is to be deprecated.

34. In the result, **THE APPLICATION IS DISMISSED AND THERE IS NO ORDER AS TO COSTS**.

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DESAI, J