

# Policy Paper

## **An Opportunity for Meaningful Electoral Reform in South Africa**

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## **1. Introduction**

In view of the broad consensus that electoral reform is necessary, it is imperative to place on the table ideas for effecting changes to the Electoral Act 73 of 1998.

An electoral system that is people-centred and fully supportive of accountability and responsiveness from elected representatives is urgently needed. The system, moreover, must make provision for independent candidates, have a strong proportional element and be accommodative of constituencies.

This white paper seeks to suggest how this may be achieved. Accordingly, in this submission we will set out:

- how multi-member constituencies will be delineated;
- how many seats will be awarded to the National Assembly, Provincial Legislatures and the National Council of Provinces (NCOP);
- the utilisation of the Open List Proportional Representation (PR) System;
- the contestation of candidates and various concomitant requirements; and
- recommendations for practical steps after voting.

## **2. Vision**

Our vision is to reform South Africa's electoral system so that it will:

- encourage stronger voter participation resulting in the election of representatives who will diligently advance the provisions of the Bill of Rights enshrined in Chapter 2 of our Constitution;
- promote national unity;
- secure the well-being of the people of the Republic;
- provide effective, transparent, accountable and coherent government;
- co-operate with one another as public representatives in mutual trust and utmost good faith so to achieve the optimal level of co-operative governance as required in Section 41(h) of our Constitution;
- win the trust of society;
- display agility in meeting the demands of the future;
- provide Incentives for conciliation;
- ensure stable and efficient Government;
- hold the Executive accountable in a meaningful and bipartisan manner;
- husband the resources of the state;
- grow the economy sustainably; and
- entrench the rule of law with equal justice for all.

### **3. Values**

Citizens who are elected to a provincial or national legislature must in their political strivings earnestly repay voter trust by giving full effect to the realisation of the following constitutional and democratic 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) A multi-party system of democratic government, to ensure accountability, responsiveness and openness.

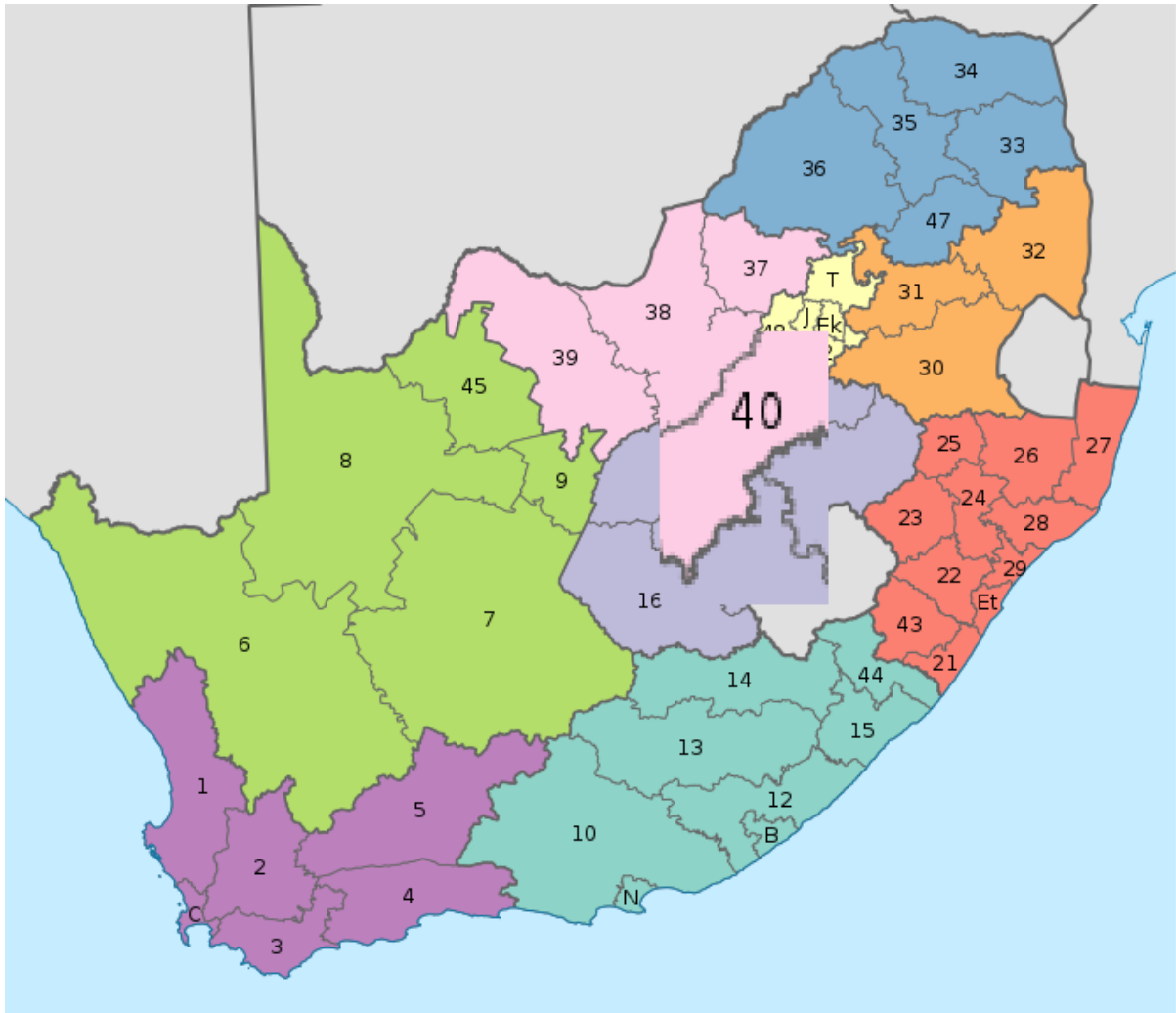
Members of every legislature in our country, therefore, must make it their singular mission to make the above values thrive and to work relentlessly to eradicate corruption, husband national resources for the genuine benefit of all and allow the highest level of government accountability, demanded by the Constitution and society, to prevail at all times.

### **4. Creation of Multi-member Constituencies**

In their report, the Van Zyl Slabbert Commission recommended the establishment of 68 constituencies along district boundaries for a revised South African electoral system. Our submission is to utilise the already-established boundaries of the 52 district municipalities as gazetted by the Municipal Demarcation Board to demarcate 52 multi-member constituencies.

This will allow for what is already in existence to be readily utilised and moreover will foster greater intergovernmental cooperation and joint accountability.

In this regard, the map below demonstrates the boundaries of the 52 districts as proposed in the draft Electoral Bill.



## 5. The Open List PR System

In order to achieve fair representation for all segments of society and for voters to get who they actually voted for as public representatives rather than a political party, the Open List PR System should be used.

The Open List PR System allows voters to cast their votes for a candidate even when that candidate is on the list of a political party.

The general elections, therefore, will have three ballots as follows –

- a. ballot 1 will be the election for constituency to provincial legislature;
- b. ballot 2 will be the election for constituency to National Assembly; and
- c. ballot 3 will be the election for national to National Assembly.

A voter will accordingly have three single transferable votes to cast for candidates of his/her choice, one for the provincial legislature, one for constituency to national legislature and the last one for the national to the national legislature.

Next, we will set out our submission regarding the demarcation of the determination of seats in both the National Assembly and provincial legislatures.

## **6. Determining the number of seats per constituency for the National Assembly**

We submit that a smaller government is preferable because we believe this will be more cost-effective. Therefore, we propose that the National Assembly should be constituted by a minimum of 350 seats as set out in section 46(1) of the Constitution, rather than 400 seats, of which 300 seats will made up by virtue of direct elections via 52 constituencies, utilising the droop quota system allowing for the transferability of surplus votes; and the balance of the 50 seats by virtue of the national ballot in exactly the same manner.

## **7. Determining the number of seats per Provincial Legislature**

The total number of registered voters in a province at the time of the closure of the voters' roll must be converted to a percentage of the number of all voters in South Africa and the IEC must use that ratio in a fair and logical manner to distribute the 300 seats available for the 9 provincial legislatures on the following basis –

- |  |           |
|--|-----------|
| a. provinces with fewer than 10.5% of total voters | 30 seats; |
| b. between 10.5% and 20.5% of total voters         | 35 seats; |
| c. above 20.5% of total voters                     | 40 seats. |

Once again, the total number of seats in the provincial legislatures has been reduced to 300 because government cannot be larger than the extremely strained fiscus can afford in the circumstances in which it finds itself.

The Constitution in Section 105(2) states –

A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation.

According to the formula above, 4 provinces will have a legislature of 30 members, another four of 35 and Gauteng will have a legislature of 40 members.

Below, please find a table of provinces with the suggested allocated seats described above to the National Assembly and the Provincial Legislatures.

PROVINCE	REG VOTERS	PERCENTAGE	NATIONAL SEAT ALLOCATION	PROVINCIAL
<b>OUT OF 300</b>	<b>NATIONAL ASSEMBLY SEAT ALLOCATION</b>			
Eastern Cape	3 146 791	13%	39	35
Free State	1 390 179	5.76%	17	30
Gauteng	5 669 476	23.51%	70	40
Kwa Zulu-Natal	4 821 437	19.996%	60	35
Limpopo	2 379 744	9.869%	29	35
Mpumalanga	1 749 988	7.258%	22	30
North West	1 593 885	6.61%	20	30
Northern Cape	574 139	2.38%	9 (7 + 2)	30
Western Cape	2 786 775	11.557%	34	35
<b>TOTAL</b>	<b>24 112 414</b>	<b>99.94%</b>	<b>300</b>	<b>300</b>

## 8. Determining seats per constituency for the Provincial Legislatures

The total number of registered voters in the constituency at the time of the closure of the voters; roll must be converted to a percentage of the number of all registered voters in the province where it is located and the IEC must use the resultant ratio in a fair and logical manner to distribute the seats available in the Province to each constituency according to its share as follows -

- a. fewer than 10.5% of the registered voter population - 2 seats
- b. more than 10.5% of the voter population but fewer than 20.5% - 5 seats
- c. more than 20.5% of the voter population but fewer than 30.5% - 10 seats
- d. more than 30.5% of the voter population but fewer than 40.5% - 15 seats
- e. more than 40.5% of the voter population 20+ seats

The Western Cape as an example, therefore, will have a legislature comprising 35 members and it will send 34 MPs to the national legislature.

Below, please find a breakdown of the suggested allocation of seats from constituencies in the Western Cape, as an example, to both the National Assembly and the Provincial Legislatures.

CONSTITUENCY	POPULATION	PERCENTAGE	PROVINCIAL SEATS	CONSTITUENCY TO NATIONAL
Cape Winelands	866 001	15%	5	5
Central Karoo	74247	1.23%	2	2
Cape Town	4 005 016	68%	21	20
Garden Route	611 278	10.45%	5	5
Overberg	286 786	5%	2	2
<b>TOTAL</b>	5 843 328		35	34

We will subsequently set out who can contest in the national and provincial elections and what concomitant requirements there should be.

## **9. Who Can Contest The Provincial As Well As The National Elections?**

Registered political parties in good standing with the IEC as well as Independent Candidates on paying their respective deposits and complying with all requirements and whose names appear on the voters' roll applicable to the election will be able to contest either one or both of the elections.

### **9.1. Political Parties**

Political parties will have to register to contest the election in every constituency in the country or selectively choose one or more for that purpose.

Political parties will submit a separate list for each constituency and the number of candidates can be no more than the number of seats available in a given constituency.

### **9.2. Independent Candidates**

Independent candidates will qualify to contest the elections.

### **9.3. Gender representation**

In our draft Electoral Bill, we propose that each party must ensure that at least 33% of the nominated candidates are women. We believe that this will address gender inequity in our current parliamentary system.

### **9.4. Requirements for every candidate**

Every candidate must at the time of nomination publish a personal manifesto setting out how and to what extent the candidate is committed to making real and visible the



rights enshrined in Chapter 2 of the Constitution in order to engender optimal belief in the founding document of our democracy among citizens.

Every candidate in the constituency to provincial election and constituency to National Assembly election must submit to the IEC at the time of nomination a list of verifiable supporters numbering 0.035% or more of registered voters in that constituency.

Every candidate in the election for national to National Assembly must submit to the IEC a list of verifiable supporters numbering 0.00035% or more of all registered voters in South Africa.

The supporters must to the extent that is possible reside in contiguous wards or within an area in which a sub-council has jurisdiction so as facilitate the most appropriate siting of a Constituency Office for that candidate after being officially declared a member of the provincial or national legislature.

The same modus operandi will apply to allocate Constituency Offices for the 50 members of the National Assembly who are nationally elected.

## **10. Requirements for nomination as a candidate**

Political parties and candidates standing as independents must furnish the following documents to the IEC -

- a. A copy of the page of each candidate's identity document (ID) or front of Smart ID on which the candidate's photo, name and ID number appear;
- b. In the case of a registered political party, a List of Candidates signed by an Authorised Party Representative;
- c. A list of verifiable supporters numbering not less than .035% of registered voters in a constituency for the constituency to provincial legislature elections and constituency to National Assembly elections depending on whichever is applicable.
- d. A list of verifiable supporters numbering not less than 0.00035% of registered voters in South Africa for the national to National Assembly elections;
- e. A prescribed acceptance on the nomination form signed by each candidate which includes an undertaking to be bound by the Code of Conduct and a Declaration that the candidate is not disqualified from standing;
- f. The prescribed election deposit paid by Bank guaranteed/Bank cheque or proof of payment of direct deposit in favour of the IEC.

## **11. Election Deposits**

The election deposits to be paid by bank guaranteed cheque made out to the IEC will determine the quantum of the deposit according to the following criteria –

- a. one seat in a constituency;

- b. multiple seats across provincial constituencies'
- c. all seats within South Africa;
- d. seats for the national to National Assembly.

## **12. Electoral Technology**

The IEC must keep abreast with technological developments and report to Parliament on an annual basis to determine what new technologies could be explored and/or possibly adopted to improve the quality of elections in South Africa.

To this end, the IEC must establish an Electoral Technology Committee which must:

- Survey the landscape for new electoral technology developments;
- Assess the advantages, risks and conduct a costs-benefits analysis of using the technologies identified;
- Determine whether such technologies could improve the efficiency, security and fairness of South African elections;
- Trial and test electoral technology in testbeds or other small-scale experiments to determine if such technology may be effectively and safely deployed in South African elections;
- Decide on whether such technologies should be adopted;
- Formulate policy and/or legislative amendments to allow for such technology to be implemented;
- Identify possible vendors or solution providers.

## **13. Determining the Quota**

A quota of votes per seat shall be determined in respect of each constituency by dividing the total number of votes cast on the relevant ballot for the constituency by the number of seats reserved for such a constituency plus one and the result plus one, disregarding fractions, shall be the quota of votes per seat in respect of a constituency.

The resulting quota plus one will be divided into by the votes that candidates garnered to arrive at an integer to allocate one seat per integer.

The candidates who did not make the cut in the first round, will then be ranked in descending order in the compensatory list according to the number of votes each candidate gained.

The fractional remainders from candidates of each political party will go the fullest extent that is possible to the candidates of that political party first according to their new ranking.

On the basis of the right to equality, fractional remainders deriving from independent candidates as well as such votes rendered usable because of their being too distant

from the quota threshold will be awarded to those likeminded independent candidates lying closer to the threshold with whom a pre-election agreement was made and publicly announced on the basis of nearness in views or beliefs to get them over the threshold.

Any remaining votes in the last stage will go to the candidate next in line to make the cut until all the votes are used and a result that is close to being as proportional as possible is realised.

#### **14. Surplus votes: Locum Awarded with Surplus (LAWS-voting)**

Our submission envisages that independent candidates must provide a list (a "Surplus List") of other candidates contesting the election, in ranked order of preference, who will be awarded the surplus votes received by an independent candidate.

A political party -

- May list not more than the maximum number of seats available in the respective constituency;
- May list "no candidate" as an awardee, including in the "first preference" position. In such an event, any surplus votes cast for the independent candidate will not be counted;
- Must make known its party list accessible to the electorate at least one month before the election. The list may be modified up until 48 hours before the first votes are to be cast. Any changes made by a candidate to their Surplus List must:
  - Be made publicly available;
  - Be brought to the attention of the electorate.

Votes cast for an independent candidate, which are in excess of the amount of votes needed by the candidate to be elected, will be awarded by that candidate (the "awarder") to other candidates ("the awardee") based on the awarder's Surplus List.

An awarder's surplus votes will be awarded according to the ranked order of preference provided that:

- The listed awardee does not have enough votes on their own to be elected;
- The awardee has crossed a minimum threshold, being at least 25% of the total votes needed to be elected, on their own;
- Once an awardee has received a sufficient amount of votes needed to be elected, the awarder's surplus votes will then go to the next awardee on the ranked preference list;
- This process will repeat, moving down the list of ranked preferences, until the awarder has run out of surplus votes.

An awardee may receive surplus votes from more than one awarder.

An awardee receiving surplus votes from more than one awarder will receive surplus votes in equal measure from each awarder until they have enough votes to be elected.

If a preferent awardee does not muster enough votes from awarders to be elected, the awarder's surplus vote will be transferred to the next preferent awardee on a "single transferable vote" basis.

Please see explanatory memorandum in the addendum below further.

### **15. Breaking a tie**

In the event of two or more candidates in a given constituency polling an equal number of votes in a given election and a careful recount thereof does not yield any change in the result and there is no further seat to be allocated, the Independent Electoral Commission must use the following criteria to determine who gets elected -

- a. gender and youth balance;
- b. health and vigour;
- c. intermediate computer skills –
  - i. Understanding commonly used operating systems
  - ii. Knowing how to email and how to participate in Zoom, Skype and other such platforms;
  - iii. Understanding how to insert links and videos into presentations;
- b. Knowing how to search the internet for information;
- c. Being able to create files.
- d. post-graduate academic, professional or technical qualifications or the equivalent thereof;
- e. multilingual communicative capabilities in respect of two or more official languages widely used in the respective constituency; and
- f. special expertise and experience that a legislature can benefit from.

### **16. Recall of Independents**

We are well aware that the recall of parliamentary members is regulated by the Constitution and Parliamentary rules. However, because independents are not subject to the discipline of political parties we believe it appropriate to submit a recall policy for independents that will pass the muster of constitutionality.

A member of Parliament and Legislature may be recalled by a petition signed by 1% of constituents when that Independent elected member is guilty of:

- a) Having missed three compulsory portfolio committee meetings in succession without submitting a written apology to the Chief Whip in Parliament;

- b) Failing to be in the chamber when parliament is sitting for a period exceeding two weeks without good cause and without the Chief Whip's written permission;
- c) Malfeasance for which a court of law imposes a fine equal to 25% of gross monthly parliamentary remuneration at the time or imprisonment for any period longer than the three months and no appeal is registered to overturn the judgement;
- d) Sexual misconduct or abuse of a woman or child that the parliamentary ethics committee upholds and reports to the house;
- e) Not holding quarterly report back meetings in an open and transparent manner to keep voters informed and be in turn informed of serious voter concerns; and
- f) Misrepresenting expenses to parliament and abusing state resources for personal or family gain.

#### **17. Filling an independent candidate's seat who is removed from office mid-term**

The vacancy will not be filled for the remainder of the parliamentary term.

#### **18. Funding for independent candidates.**

Funding from the state normally follows electoral success. No independent or new political party will get prior state funding. Own funds or private funding will have to be utilised to fight the first election.

Those who win a seat will then be entitled to get what is permitted in the way of funding.

## Explanatory Memorandum

### “Locum Awarded with Surplus” (“LAWS-voting”)

In this system, candidates who receive surplus votes get to award those votes, on the behalf of the people who voted for them, to another candidate contesting the same election. This way surplus votes are not wasted or assigned randomly. Instead voters, when voting for a candidate, will trust that candidate to transfer / award their surplus votes to other candidates who they feel will best serve their mandate or interests based on a “ranked preferent list” made available prior to the election.

For example, Thuli is running for election as an independent. She has positioned herself as an “Anti-Corruption” candidate. She has also indicated during her campaign that should she get any surplus votes, she will "assign" those votes to Tom; and if there are still any votes left over, to Bavesh:

- Tom is also an Anti-Corruption candidate. For many of Thuli’s supporters, he is there clear second pick. As they are aligned ideologically, Thuli believes she can best push through her policy initiatives with Tom's help.
- Bavesh is not an Anti-Corruption Candidate but he has previously indicated his willingness to support Thuli’s policies if she in turn will vote for his Green policies. Thuli’s voters are broadly in favour of Green policies so Thuli believes that Bavesh will be a good person to be loosely aligned with.

Come election time, Thuli needs 10 000 votes to get elected. She is very popular and receives 17 000 votes. She thus has 7000 surplus votes to assign to other candidates on the behalf of the people who voted for her.

At the election, Tom gets 9000 votes so he is just short of the threshold: he needs only 1000 votes more to cross the threshold. Thuli transfers 1000 votes to Tom and he "crosses" the line and is elected.

Thuli thus has 6000 votes left to assign or transfer to other candidates.

Bavesh only has 3000 votes. Even with Thuli’s surplus, she will not be able to push him over the line.

However, Thuli is not the only independent with surplus votes:

- Fellow candidate Thabo has got 1000 surplus votes;
- Thabo had also indicated in the run up to the election that any surplus votes he received he would assign to Bavesh as Thabo's voters too are broadly in support of Green policies.

Thabo and Thuli are not politically aligned at all but agree that Bavesh is a worthwhile candidate their supporters are in favour of. They thus both assign their surplus votes to Bavesh to get him to the 10 000 threshold mark.

### Advantages of LAWS-voting

The first major advantage of LAWS-voting is that it avoids some of the big downsides of the alternatives:

- You do not have to "burn" surplus votes given to an independent candidate. This avoids concerns raised by voters about their votes being wasted if they vote for independent candidates unlike their fellow-voters who vote for political parties where their surplus votes carry-over to other people in the party;
- You do not have to force independent candidates to pool together in one block which surplus votes have to get awarded to. LAWS-voting avoids two major downsides of this system:
  - In this system you effectively are forcing independent voters to vote indirectly for candidates they may want nothing to do with or support. For example, if person X wants to vote for a Fiscally Conservative Independent Candidate, he might hate to know that his vote would go to support an Economically Left-Leaning Candidate if his candidate get a surplus and that surplus goes to a pool of independents. As such, he may decide to rather avoid voting for an independent and instead go with a political party;
  - Additionally, forcing independent candidates to "group" together into one block violates the Right to Freedom of Association. As such it may violate the Constitutional Court's judgment.

The second major advantage of LAWS-voting is that it is more responsive to voter preferences:

- Voters' second-choice preferences can more easily be reflected in the election. If candidate X tells her supporters that all her surplus votes will go to candidate Y, those supporters who are in favour of Candidate X and Y can vote in peace knowing that their preference will be reflected one way or another;
- Or if a voter is pulled between voting for two different independent candidates, she could consider which "surplus-candidates" those two different independent candidates have chosen and use that information has a tie-breaker. For example, Motei could see himself voting for either Leon or Joseph as they are both candidates who he likes. Leon has chosen Tseko as the candidate who will receive his surplus votes while Joseph has chosen Karl. Motei likes Tseko but detests Karl. Accordingly, Motei casts his vote for Leon instead of Joseph.
- Independent candidates can voluntarily build loose alliances and clusters with other independents they want to work with without having to be forced to associate as one block with all other independents. For example, Jack and Jill

are both in favour of prioritising the battle against GBV. They can align themselves by saying that any surplus they get they will assign to the other person. This allows independents to retain their flexibility and independence (that one would normally lose in a party) but still form loose associations to have a broader appeal.

- Voters who are more loyal to parties can take "risks" on voting for independents. An independent could declare that any surplus votes they get will go to a certain party. If someone is broadly in favour of that party but wants to vote for someone slightly more aligned with their personal preference, they can vote for that person knowing that their vote will go to their usual party of choice if their independent runs a surplus.

In summary, LAWS-voting not only tackles the problem posed by surplus votes, it also introduces greater responsiveness to voter-preferences without overly-complicating the voting process.

### Technology & Elections

As we move further into the future, new technologies stand to not only make elections cheaper, more efficient and more secure; they may introduce new ways of voting and participating in democratic life which were previously impractical and/or impossible. Blockchain technology in particular is one of many technologies which has been identified as having great potential in the electoral space.

Bureaucracies are however resistant to change and innovation. The new law should therefore mandate the IEC to keep abreast with technological developments and report to parliament on an annual basis to determine what new technologies could be explored and/or possibly adopted to improve the quality of elections in South Africa.

The Independent Electoral Technology Team should:

- Survey the landscape for new electoral-tech developments;
- Assess the advantages, risks and conduct a costs-benefits analysis of using such new technology;
- Formulate policy and/or legislative amendments to allow for such new technology to be implemented;
- Identify possible vendors or solution providers;
- Trial and test electoral-tech in testbeds or other small-scale experiments to see what works.



## **ADDENDUM**

### Background: The Trigger

The first trigger came from what President Mandela said in his last speech to the National Assembly on 26 March 1999:

But even as we do so, we do need to ask whether we need to re-examine our electoral system, so as to improve the nature of our relationship, as public representatives, with the voters!

In that same speech he also said:

Questions have been raised, we know, as to whether this House is not a carriage on the gravy train, whose passengers idle away their time at the nation's expense.

While Madiba defended the record of the work of the first parliament, he acknowledged that these questions were being raised.

He himself, at the opening of parliament in 1999, had frankly admitted the following:

But we must be honest and acknowledge that, in many respects, this level of government has often played itself out as an Achilles Heel of democratic governance. This is not for the lack of structures and rules. Where this happens, it has more to do with the behaviour and attitudes of cadres that all parties have deployed in these structures. It is a matter of the survival of democracy, of the confidence that people will have in the new system, that all of us should pay particular attention to this issue. The public is justified in demanding better service, more respect and greater concern for their needs rather than self-aggrandisement.

The remarks above, by President Mandela, served as the first important trigger regarding the need “to improve the nature of our relationship, as public representatives, with the voters!”

In the period after 1994, the need to give effect to the aspiration in the Freedom Charter that “the people shall govern” was very strong. We were meant to have a people’s parliament. This was captured in Section 42(3) of the Constitution:

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

Jafta J in concurring with Madlanga J reminded us of seminal issue in the Freedom Charter relating to the founding of our democracy:

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 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”.

All of the above considerations should have settled the matter decisively for reforming the electoral system.

Why did it not happen? Time had run out in the first parliament to develop an electoral system consonant with what the Freedom Charter envisioned. An interim measure was adopted to bring South Africa into the dawn of democracy and for that to give way to something better. In delivering his judgment in the Constitutional Court on June 11, 2020, Madlanga J made this point abundantly clear:

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”.<sup>[93]</sup> 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.

The promise to develop the electoral system in keeping with the Constitution did not materialise.

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) and 105(1)(a) 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.

The judgment of the Constitutional Court handed down on 11 June 2020 serves as the second trigger. The government and the people of South Africa now have 24 months to reform our electoral laws. We need to seize the moment to give effect to a government of the people, by the people, for the people accountable to the people.

## History

### *2002 – The national executive shelved the effort to refine the electoral system*

In 2002, Cabinet appointed a team to investigate what would be the best election system for South Africa. It was headed by former opposition leader Frederik van Zyl Slabbert.

The team couldn't agree on a single system, so it recommended two options.

Most members recommended a mix of proportional representation and a constituency-based system.

This would involve dividing the country into 69 districts (or "multi-member constituencies"), each represented by three to seven MPs.

These constituencies would together elect 300 of the 400 members of the National Assembly. The remaining 100 seats would be filled according to proportional representation.

What was envisaged in the Freedom Charter did not materialise because of a lack of political will on the one hand and more importantly because it suited those in power to have accountability substantially neutered.

### *2006 – Failed parliamentary effort*

An independent panel appointed in 2006 to assess parliament, chaired by former MP Pregs Govender, found that the election system needed "urgent reform". It also recommended a mixed system, "which attempts to capture the benefits of both the constituency-based and proportional representation electoral systems".

Once again it was common cause that urgent electoral reform was required, but nothing was done to advance the process. This report was consigned to the bottom of the heap. Nothing happened. All of the work done by the team was in vain.

### *2006 – COSATU punted a referendum on electoral reform*

In a discussion document for its 2006 conference, Cosatu said a constituency-based electoral system “will promote more dynamic contact between the people and public representatives, holds the possibility of people’s views being heard, and could introduce the element of constituents more directly determining candidates.”

The document went on to say: “The current system of proportional representation also undermines independent thought as individual careers depend on those in the party leadership and the deployment committee. Unless we can achieve it soon, the movement towards sycophancy is inevitable”.

#### *2009 – 2018: The Zuma decade of corruption and devastation*

The political climate that existed after 2009 allowed President Zuma to rule South Africa as his personal fiefdom and to preside over state capture unchecked and allow his close circle of friends and family to be enriched and South Africa to be plunged into a deep economic and financial crisis. Members of his party in parliament were repeatedly whipped into line and completely muzzled. The situation deteriorated to the point where the keys to the National Treasury were very nearly handed over to Gupta surrogates to plunder state resources at will.

#### *2017 – The Motlanthe Commission Report*

On page 568 of the report of the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, published in November 2017, points made previously are reiterated as follows:

One of the major challenges with the current electoral system is the weakness of the proportional representation system in holding politicians to account to the electorate. Members of Parliament are appointed not directly by voters, but rather by their party, based on candidate lists submitted to the Electoral Commission ahead of the elections. This makes them beholden to the party and its leadership rather than voters, and places party politics and loyalties ahead of effectiveness and delivery. By contrast, a constituency system will hold politicians more directly accountable to the voters and will better ensure that election promises are kept for fear of being voted out. Such a system will serve to limit the power of individual party leaders and encourage MPs to vote in accordance with the needs and desires of their constituencies rather than only following party lines (Moepya, 2015). A summary of the arguments for and against electoral reform is presented in Chapter 6.

The Panel recommends that Parliament should amend the Electoral Act to provide for an electoral system that makes Members of Parliament accountable to defined constituencies on a proportional representation and constituency system. The Panel recommends that Parliament should amend the Electoral Act to provide for an electoral system that makes Members of Parliament accountable to defined constituencies on a proportional representation and constituency system for national elections.

*2020 – The Constitutional Court accepts that Independents can stand for election*

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.