IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case no: **110/19**
WCHC case number: **17223/18**

In the application of:

ORGANISATION UNDOING TAX ABUSE	Applicant for leave to intervene as *amicus curiae*

In re:

NEW NATION MOVEMENT NPC	First Applicant
CHANTAL DAWN REVELL	Second Applicant
GRO	Third Applicant
INDIGENOUS FIRST NATION ADVOCAY SA PBO (IFNASA)	Fourth Applicant

and

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

and

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	*Amicus curiae*

INDEX TO APPLICATION FOR LEAVE TO FILE SUPPLEMENTARY AFFIDAVIT

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Item No	Description	Pages
1	Notice of Motion	1 – 5
2	Supplementary Affidavit of Laura Macfarlane	6 – 9
2.1	OUTA's Proposed Written Submissions	10 – 33
2.2	Letter to all parties and Registrar of the Constitutional Court dated 5 August 2019	34 – 36

Signed at **SANDTON** on this the 5th day of **AUGUST 2019.**

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and	
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	*Amicus curiae*

NOTICE OF MOTION:

APPLICATION FOR LEAVE TO FILE SUPPLEMENTARY AFFIDAVIT

KINDLY TAKE NOTICE that the applicant for admission as *amicus curiae* hereby apply for an order in the following terms:

1. The applicant for admission as *amicus curiae* is granted leave to file its supplementary affidavit.

2. The applicant for admission as *amicus curiae* is granted further and or alternative relief.

TAKE NOTICE FURTHER that the supplementary affidavit deposed to by **LAURA ASHLEY MACFARLANE** will be used in support of this application.

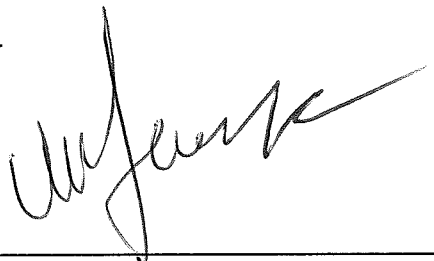
TAKE NOTICE FURTHER that the applicant has appointed **Norton Rose Fulbright Inc** as its attorneys of record, at the address set out below, at which the applicant will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER that, if you intend opposing this application, you are required:

(a) to notify the applicant's attorneys in writing on or before **12:00 on 6 August 2019** and in such notice to appoint an address at which you will accept notice and service of all documents in these proceedings; and

(b) to deliver your answering affidavit on **14:00 on 8 August 2019** or within such other time as may be directed by the Chief Justice or the Court.

Dated at **JOHANNESBURG** on 5th August 2019.



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SUPPLEMENTARY AFFIDAVIT:

APPLICATION TO INTERVENE AS AMICUS CURIAE

I, the undersigned,

LAURA ASHLEY MACFARLANE

MT

do hereby make oath and say that:

1 I am the lead attorney representing the Organisation Against Tax Abuse ("**OUTA**"), the applicant for admission as *amicus curiae*.

2 The facts herein contained are within my personal knowledge, unless otherwise indicated by the context, and are to the best of my belief true and correct.

PURPOSE OF THIS AFFIDAVIT

3 OUTA's application for admission as *amicus curiae* was filed on Wednesday 31 July 2019. At paragraph 6.5 of the Founding Affidavit, OUTA undertook that, should it be admitted as *amicus curiae*, it would be in a position to file its written submissions on 2 August 2019 (the same day on which CASAC was required to file its written submissions).

4 To date, OUTA has not received directions from this Court regarding its application for admission.

5 However, in accordance with its undertaking in paragraph 6.5, OUTA prepared written submissions. It wishes to supplement its application for admission as *amicus curiae* with its proposed written submissions. Those submissions are attached hereto as Annexure "**LM1**".

6 I submit that OUTA's proposed written submissions will be of use to the Court in its consideration of OUTA's application for admission as *amicus curiae*. They demonstrate that the legal argument that OUTA intends to make will be relevant, novel and useful in the adjudication of this matter. Therefore, it is in

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the interests of justice that this supplementary affidavit is placed before the Court.

7 I am aware that the hearing of this matter is fast approaching. In order to provide the other parties adequate notice of OUTA's proposed submissions (and to avoid causing any prejudice to those parties), we served copies of the proposed submissions on the other parties on the morning of 5 August 2019. The letter to the other parties is attached hereto as Annexure "**LM2**".

PRAYER

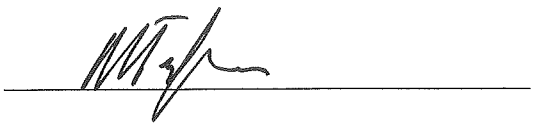
8 For the reasons set out above, I seek to leave to file this affidavit in supplementation of OUTA's application for admission as *amicus curiae*.

LAURA ASHLEY MACFARLANE

I certify that the deponent has acknowledged that she knows and understands the contents of this declaration and informed me that she does not have any objection to taking the oath and that she considers it to be binding on her conscience and that the deponent uttered the following words "I swear that the contents of this declaration are true, so help me God". I certify further that the provisions of Regulation R1258 of the 21st July 1972 (as amended) have been complied with.

Signed and sworn to before me at **SANDTON** on this the 5th day of **AUGUST** 2019.

MT



COMMISSIONER OF OATHS

Max Taylor
EX OFFICIO
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA
11 ALICE LANE
SANDTON

LM1

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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ORGANISATION UNDOING TAX ABUSE	Applicant for admission as Second *amicus curiae*

MT

OUTA'S PROPOSED WRITTEN SUBMISSIONS

INTRODUCTION

1. This case turns on the proper interpretation of sections 46 and 105 of the Constitution. These provisions set out the necessary elements of the national and provincial electoral systems, respectively. They require, in express terms, that members of the National Assembly and provincial legislatures must be elected in terms of an electoral system that is prescribed by national legislation, confers voting rights on adults only, is based on the common voters roll (the national roll or the province's segment of that roll) and "*results, in general, in proportional representation*".[1]

2. The Applicants argue that they require, in addition, that the electoral system make provision for independent candidates who are not associated with any political party to run for elections. We refer to this as "***the implicit meaning***".

3. The Respondents reject the implicit meaning. They argue that sections 46 and 105 are permissive – that these sections set broad parameters for the national and provincial electoral systems and leave it to Parliament to decide

[1] Sections 46(1)(d) and 105(1)(d).

MT

the details. Provided that it adheres to the express requirements set out in these sections, they say, Parliament has a free choice regarding the design of the electoral system for provincial and national elections. This, the Respondents maintain, includes the choice of whether or not to allow independent candidates to participate in elections. We refer to this as the "***permissive interpretation***".

4. OUTA submits that the permissive interpretation is flawed. It does not have proper regard to the context in which sections 46 and 105 appear. In particular, it fails to take into account the requirements that flow from sections 18 and 19 of the Constitution (the right to freedom of association and the right to stand for political office) and from the foundational norm of accountability. When considered in light of these requirements, sections 46 and 105 do not give Parliament an unconstrained choice regarding electoral systems.

5. In these submissions, we demonstrate that the implicit meaning of sections 46 and 105 is to be preferred. In doing so, we address the following issues in turn:

   5.1. First, we set out the principles that guide the interpretation of constitutional provisions.

5.2. Second, we consider the factors that support the implicit meaning. These include the requirements imposed by the right to stand for political office, the right of freedom of association and the norm of accountability. We consider the threats to accountability under the party list system and the manner in which a system that provides for independent candidates mitigates those threats.

5.3. Finally, we consider the factors that have been cited by the respondents in favour of the permissive interpretation.

PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

6. This Court has laid down the principles that apply when interpreting constitutional provisions.

6.1. In *Matatiele (No 2)*,[2] this Court emphasised that individual constitutional provisions cannot be interpreted in isolation and must be construed in light of the Constitution as a whole:

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

[2] *Matatiele Municipality and Others v President of the RSA and Others (No 2)* 2007 (6) SA 477 (CC).

> with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole."[3]

6.2. This approach was reiterated in *UDM v Speaker, National Assembly*[4] where Mogoeng CJ observed that the provisions of the Constitution are inseparably interconnected:

> "Our entire constitutional enterprise would be best served by an approach to the provisions of our Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution."[5]

6.3. In *UDM v President of The Republic of South Africa (No 2)*,[6] this Court emphasised that constitutional provisions that could potentially conflict must be interpreted consistently with one another:

> "Amendments to the Constitution passed in accordance with the requirements of s 74 of the Constitution become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another."[7]

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[3] Ibid at para 36.

[4] *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC).

[5] Ibid at para 31.

[6] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC)

[7] Ibid at para 12.

MT

6.4.It means, we submit, that constitutional provisions must be interpreted in the manner that best gives effect to other constitutional provisions.

FACTORS FAVOURING THE IMPLICIT MEANING

7. When sections 46 and 105 are construed in light of the Constitution as a whole, it becomes clear that the implicit meaning must be preferred. The permissive interpretation (in terms of which the electoral system need not make provision for independent candidates) does not properly give effect to the constitutional rights of citizens to stand for public office and to freely associate, and is inconsistent with the constitutional norm of accountability. We address these issues in turn.

(i) The right to stand for political office

8. Section 19(3)(b) gives citizens an unqualified right to run for, and hold, political office. There is no requirement that citizens must join a political party (and be selected by to party leadership) to run for political office.[8]

9. Sections 46 and 105 must be interpreted in harmony with the unqualified right of citizens to stand for political office. The only way in which to achieve such harmony is to interpret sections 46 and 105 to include a requirement that independent candidates be permitted to contest the elections

[8] The nature and requirements of section 19(3)(b) are aptly addressed in the written submissions of the New Nations Movement. There is no need for further elaboration here.

(the implicit meaning). The permissive interpretation favoured by the respondents (which gives Parliament the power to choose an electoral system that excludes independent candidates) is inconsistent with section 19(3)(b).

(ii) The right of freedom of association

10. Section 18 of the Constitution enshrines the right of freedom of association. The courts have repeatedly pronounced on the nature of this right:

10.1. In *Case v Minister of Safety and Security,*[9] this Court recognised that freedom of association is part of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), the right to freedom of expression (section 16), the right to vote and to stand for public office (section 19) and the right to assembly (section 17).[10] Taken together, these protect the ability to form and express opinions, whether individually or collectively:

> "*These rights, taken together, protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and*

[9] *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others* 1996 (3) SA 617 (CC).

[10] Ibid at para 27.

express opinions, whether individually or collectively, even where those views are controversial"[11]

10.2. Section 18 protects an individual's the ability to form groups of like-minded people. However, it also protects that person's right to dissociate from whosoever he or she chooses.[12] This includes the right to dissociate from political parties.

11. An electoral system that forces citizens to join or form a political party in order to stand for office necessarily circumscribes the right to freedom of association. The African Court of Human and Peoples' adopted this view in the matter of *Tanganyika Law Society v United Republic of Tanzania.*[13]

11.1. That case concerned an amendment made to the Tanzanian Constitution in 1992 by the Eighth Constitutional Amendment Act. The amendment required that any candidate who ran for presidential, parliamentary or local government elections had to be a member of, or sponsored by, a political party.[14]

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[11] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 8.

[12] *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA) at para 32.

[13] *Tanganyika Law Society and Another v The United Republic of Tanzania; Reverend Christopher R. Mtikila v The United Republic of Tanzania (Applications No. 009/2011 and 011/2011) African Court of Human and Peoples' Rights.*

[14] Ibid at para 67.

11.2. Reverend Mtikila challenged the Amendment Act on the basis that it was inconsistent with the Constitution of Tanzania as it violated the right of citizens to participate in the public affairs of the country. After failing to obtain relief in the domestic courts, the applicants approached the African Court of Human and Peoples' Rights. They argued that the prohibition on independent candidates violated (amongst others) the right to freedom of association (Article 10 of the Africa Charter)[15] and the right to participate in the public or governmental affairs of one's country (Article 13(1) of the Charter).[16]

11.3. The African Court upheld the claim, finding (*inter alia*) that a prohibition of independent candidacy violated the right to freedom of association. It stated that:

> *"It is the view of the Court that freedom of association is negated if an individual is forced to associate with others. Freedom of association is also negated if other people are forced to join up with the individual. In other words freedom of association implies freedom to associate and freedom not to associate.*
>
> *The Court therefore finds that by requiring individuals to belong to and to be sponsored by a political party in seeking election in*

[15] Article 10 (2) of the Charter indeed states that:

> "2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association".

[16] Article 13(1) provides that:

> "1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

> *the Presidential, Parliamentary and Local Government posts, the Respondent has violated the right to freedom of association. This is because individuals are compelled to join or form an association before seeking these elective positions."*[17]

11.4. The Court held that, on the evidence before it, this limitation was not justified.

12. The *Tanganyika Law Society* case supports the proposition that an electoral system which bars independent candidacy violates the right to freedom of association.[18]

13. Section 46 and 105 of the Constitution must be interpreted to give effect to the right to freedom of association. An electoral system that compels citizens to join political parties in order to stand for public office is wholly inconsistent with the right of freedom of association. The permissive interpretation, which empowers Parliament to choose such an electoral system, is untenable. The implicit meaning (which requires that independents may stand for office) is consistent with the right of freedom of association.

(iii) The constitutional normal of accountability

[17] *Tanganyika Law Society and Another v The United Republic of Tanzania* (supra) at para 113 – 114.

[18] Section 39 of the Constitution provides that when interpreting a right in the Bill of Rights, a court must have regard to international law and may have regard to foreign law. South Africa ratified the African Charter on Human and Peoples' rights on 9 July 1996.

14. Section 46 and 105 must, in addition, be interpreted consistently with the constitutional norm of accountability.

15. The norm of accountability is sourced in a number of constitutional provisions:

15.1. First and foremost, the principle of accountability is enshrined in section 1(d) of the Constitution as a founding democratic value. Section 1(d) provides that South Africa is a sovereign, democratic state founded on the values of universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government "*to ensure accountability, responsiveness and openness.*"

15.2. Second, the principle of accountability is entrenched by section 195 Constitution. Section 195(1) provides that the public administration must be governed by the "*democratic values and principles enshrined in the Constitution*" including accountability and responsiveness. Section 195(3) expressly provides that national legislation must promote the values in subsection 195(1).[19] Therefore, when exercising its power to enact national legislation detailing the national and provincial electoral systems, Parliament has a duty to promote the

[19] The High Court emphasized the importance of this requirement in *Equal Education and Another v Minister of Basic Education and Others* 2019 (1) SA 421 (ECB) at para 182 ("***Equal Education v Minister of Basic Education***")

principle of accountability and transparency. This duty is underscored by section 41(1)(c) of the Constitution, which imposes an obligation on all spheres of government and all organs of state within each sphere to provide "*effective, transparent, accountable and coherent government for the Republic as a whole.*"

15.3. Third, the State is obliged, in terms of section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights. In *Glenister (No 2)*,[20] the majority of this Court observed that corruption incontestably undermines the rights in the Bill of Rights and imperils democracy. As a consequence, it held that the state's obligation in section 7(2) creates a duty to create efficient anti-corruption mechanisms.[21] Similarly, in order to effectively fulfil its obligations under section 7(2), all functionaries of the State (including members of national and provincial legislatures) must be accountable and responsive.[22] Therefore, section 7(2) imposes a duty on the state to create accountability-promoting mechanisms.

16. The principle of accountability permeates the Constitution and informs the interpretation of sections 46 and 105.

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[20] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

[21] Ibid at para 177.

[22] *Equal Education v Minister of Basic Education* at para 196.

16.1. Accountability, as a founding value in section 1 of the Constitution, has an important role to play: this Court has held that the founding values "*inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid.*"[23]

16.2. It self-evidently requires that the national and provincial electoral systems must promote accountability and transparency.

17. An electoral system that is based exclusively on closed political party lists and excludes independent candidates does not promote the principles of accountability and transparency. It actively undermines them. It does so in the following ways:

17.1. Members of the national and provincial legislatures ("**MPs**") who assume office through their political party are beholden to the party and subject to its disciplines, rather than to voters.[24] It places party politics and loyalties ahead of promises made to the electorate.[25]

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[23] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC) at par 19 ("***UDM v President (No 2)***")

[24] This Court recognised as much in ***UDM v President (No 2)*** at par 71: "*Members elected on party lists are subject to party discipline and are liable to be expelled from their party for breaches of discipline. If that happens they cease to be members of the Legislature.*" See also ***UDM v Speaker*** at par 76 recognising that in a party system, "*[m]embers' fate or future in office depends largely on the party.*"

[25] *Certification of the Constitution of the Republic of South Africa, 1966, In re: Ex parte Chairperson of the Constitutional Assembly* 1996 (4) SA 744 (CC) par 186 (***"First Certification judgment"***). See also High Level Panel on the Assessment of Key Legislation at p 535 of its report. The High Level

17.2. By contrast, independent candidates are not beholden to party leadership. They are directly elected by, and are answerable to, the voters in their constituency. If an MP fails to keep his or her electoral promises, there is a real likelihood that they will be voted out. It is far less likely that an MP appointed from a closed party list will be voted out in similar circumstances – the reason being that the voter cannot reject the candidate without also rejecting the political party.[26]

17.3. In addition, a proportional representation system based on closed party lists distances the elected officials from the people.[27] Citizens do not know which MP to approach with their proposals or their grievances. Even when citizens are able to identify the relevant MPs, it is not guaranteed that the views and demands of the citizenry will gain traction—especially if they are contrary to party opinions and policies. With this in mind, the Electoral Task Team[28] observed that a direct constituency-based system would put "*a face to representation*"

Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change was established to review post-apartheid legislation, including the Electoral Act. It released its report in November 2017 ("**the High Level Panel Report**").

[26] *First Certification judgment* par 185-186.

[27] High Level Panel Report, p 525 – 526.

[28] The Electoral Task Team was appointed by Cabinet in 2002 to draft legislation in preparation for the 2004 national and provincial elections. The Task Team was instructed to identify the constitutional parameters of the electoral system; identify the list of options available in the South African context, canvass the preferences and views of the relevant stake-holders, develop specific proposals identifying the preferred electoral system and formulate a draft Bill for submission to the Minister. The Task Team, chaired by Dr F Van Zyl Slabbert, released its report in January 2003 ("**the Van Zyl Slabbert Report**").

and create "*a much closer link with the electorate than is presently the case.*" It noted that "*putting a face to politicians seems to be the only way to increase accountability significantly at the present time*".[29]

18. Therefore, the norm of accountability read with sections 46 and 105 of the Constitution requires that independent candidates be permitted to contest the elections.

(iv) Conclusion

19. In sum, the only way in which to achieve harmony between the norm of accountability, citizens' unqualified rights to stand for political office and to freely associate, and sections 46 and 105 of the Constitution is to adopt the implicit meaning of the latter provisions. In other words, sections 46 and 105 must be read as limiting the range of acceptable electoral systems to those that provide for independent candidates. The sections do not give Parliament the power to choose an electoral system that excludes independent candidates. When considered in light of the Constitution as a whole, this is the only feasible interpretation of sections 46 and 105.

THE PERMISSIVE INTERPRETATION CANNOT BE SUSTAINED

20. The respondents cite various constitutional provisions in support of the permissive interpretation. These include:

[29] Van Zyl Slabbert Report at para 4.5.1.9.

20.1. Section 1(d) of the Constitution, which lists the foundational values of South Africa and states that it is "*a multi-party democratic government*".

20.2. Section 157 of the Constitution, which prescribes a local government electoral system of proportional representation based on party lists, with the option of a system of ward representation.

20.3. Annexure A of Schedule 6 of the Constitution, which describes a closed party-list proportional representation system for the 1999 provincial and national elections.

21. Properly understood, these provisions do not support the permissive interpretation of sections 46 and 105. At best for the respondents, they are neutral or irrelevant. At worst, they support the implicit meaning. We deal with them in turn.

(i) Section 1(d) – "a multi-party democratic government"

22. The second respondent (the Minister) suggests that the wording of section 1(d) of the Constitution supports the permissive interpretation of sections 46 and 105, whereby Parliament may choose a proportional representation system based solely on political party lists. In particular, the Minister relies on the reference in 1(d) to a "multi-party democratic government".

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23. However, this provision does not mean that the electoral system should be solely based on political parties lists. The section has a different import. It "*excludes a one-party State, or a system of government in which a limited number of parties are entitled to compete for office.*"[30] In other words, it enshrines the ideal of an open and competitive democratic system.[31]

24. At best for the respondents, section 1(d) requires an electoral system that makes provisions for political parties which may freely operate, campaign and contest the elections. It does not limit the electoral system to one based exclusively on political parties. As such, this provision is neutral and irrelevant to the debate at hand.

(ii) Section 157 of the Constitution – Local Government Elections

25. Section 157(2) provides that members of a Municipal Council must be elected in accordance with national legislation, which must prescribe a system –

> "(a) of proportional representation based on that municipality's segment of the national common voters' roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or

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[30] *UDM v President (No 2)* at para 24.

[31] See *UDM v President (No 2)* at para 26:

> "*A multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid.*"

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(b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on the municipality's segment of the national common voters' roll." (emphasis added)

26. Section 157 thus imposes a requirement that, at local government level, the electoral system must be one of proportional representation based on party list system. It gives Parliament the option to combine that party-list system with another system of ward representation (without specifying whether votes in the ward/constituency must be counted on a first-past-the-post or proportional representation basis) – but even then, a party-list system remains compulsory.

27. Properly understood, then, section 157 compels a particular kind of proportional representation ("PR") voting system at local government level. This is significant because proportional representation can be achieved through a range of different voting systems[32] – including systems where only political parties contest the elections and MPs are appointed from their lists

[32] The Single Transferable Vote ("STV") system is a proportional representation voting system that is used in Australia at federal and state level. The STV system gives voters a single vote but allows them to rank their choices. A candidate is elected when his or her total number of votes equals or exceeds a pre-determined quota. Any surplus votes are transferred to other candidates in proportion to the voters' stated preferences. See Electoral Council of Australia and New Zealand, 'Proportional Representation Voting Systems of Australia's Parliaments' available online at [https://www.ecanz.gov.au/electoral-systems/proportional]. The Mixed Member proportional representation system is a mixed electoral system in which voters get two votes – one to decide on a representative for their single-seat constituency and one for a political party. This system is used in New Zealand and Germany. See ACE, The Electoral Knowledge Project, 'Electoral Systems' available online at [http://aceproject.org/ace-en/topics/es/esd/esd03/esd03a/default]. See also Donovan & Smith "Proportional Representation in Local Elections: A Review", Washington Institute for Public Policy (December 1994), available online at [https://www.wsipp.wa.gov/ReportFile/1181/Wsipp_Proportional-Representation-in-Local-Elections-A-Review_Full-Report.pdf]

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(a party-list system); or where both political parties and independents contest the elections; or where only independents contest the elections. Proportional representation is concerned with how votes are counted, rather than who participates in the election.

28. The respondents suggest that section 157 supports the permissive interpretation because it refers to "ward representation" in relation to local government elections, whilst sections 46 and 105 do not expressly provide for "ward representation".

29. But section 157 is of no assistance to the respondents. The reason is twofold:

29.1. First, the respondents conflate "ward representation" with independent candidacy. This is not correct. Ward representation refers to a system in which representatives are elected from geographically demarcated constituencies. It says nothing about who may contest the elections in that constituency or how the votes are counted and weighed. These are separate and distinct questions. Therefore, the reference to "ward representation" in section 157 has nothing to do with the question of whether independents can or cannot stand for office. It is not relevant to the present debate.

29.2. Second, section 157 is the only provision in the Constitution that prescribes a PR system that is based purely on political party lists –

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and, in so doing, expressly requires that (some or all) local government representatives belong to political parties. Sections 46 and 105, by contrast, make no mention of party lists systems – and thus do not endorse a system that would exclude independent candidates who are not affiliated to, and elected through, a political party. Had the Constitution intended that independents would be excluded from running in national and provincial elections, sections 46 and 105 would have contained wording similar to the party-list prescription in section 157. In this respect, section 157 supports the implicit meaning.

(iii) Annexure A of Schedule 6 of the Constitution

30. Annexure A of Schedule 6 to the Constitution ("**Annexure A**") describes a proportional representation electoral system where provincial and national MPs are appointed exclusively from party lists.

31. Annexure A does not support the permissive interpretation of section 46 and 105. On the contrary, it supports the implicit meaning. The reasons are as follows:

31.1. First, Annexure A introduces a specific, time-limited exception to the clear constitutional requirements that independent candidates be permitted to contest the national and provincial elections (which

requirement is imposed by the rights in sections 18 and 19 and the norm of accountability). Annexure A is a transitional provision that carried over the content of Schedule 2 of the Interim Constitution ("**Schedule 2**") with various amendments. This system was temporary and was intended to apply to only the 1994 and 1999 elections.[33]

31.2. The exception created by Annexure A was necessary given the political context in which it was enacted. There was little time between the conclusion of constitutional negotiations and the first democratic elections. It would have taken considerable time to design the electoral system, to appoint an independent body to demarcate national and provincial constituencies (if a constituency-based system were adopted), and to complete the demarcation process.[34] Before the first democratic election, there was simply insufficient time to carry out this process. Schedule 2 thus provided for a simple and inclusive party-list PR system for the 1994 elections. By the time the Final Constitution was enacted, a new electoral system had not yet been designed. Annexure A of Schedule 6 was inserted to carry over the

[33] Schedule 6, Item 6(3)(a) and Item 11(1)(a) provide that Schedule 2 of the Interim Constitution, as amended by Annexure A, applies "to the first election of the National Assembly under the new Constitution" and "to the first election of a provincial legislature under the new Constitution", respectively.

[34] In its written submissions at para 49, the Electoral Commission explains that considerable time would be needed were to make provision for independent candidates in our electoral system.

contents of Schedule 2 (with limited amendments) for the 1999 elections only.

31.3. Therefore, one cannot infer that Annexure A of Schedule 6 constitutes a constitutional endorsement of a PR electoral system that is based purely on party lists and excludes independent candidates. On the contrary, Schedule 6 introduced an exception to the general rule that was intended to operate only for the 1994 and 199 elections.

31.4. Second and in any event, Schedule 6 cannot be construed as a constitutional endorsement of a PR system that excludes independent candidates because it lacks the status of a constitutional provision. It has the status of ordinary legislation and should be treated as such. In the Second Certification judgment,[35] this court held that Schedule 6 to the Constitution is a form of ordinary legislation and is subject to challenge on the basis that it is unconstitutional:

> "The first question for consideration, therefore, is whether the retained provisions form part of the AT or not. AT Schedule 6 s 24(1) provides that the listed provisions shall 'continue in force'. It does not provide that the provisions are deemed to be part of the AT (as does, for example, IC Schedule 6 s 22 in relation to the epilogue to the IC). In addition, subparas (b) and (c) make it plain that the retained provisions are subject to amendment by the

[35] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitutional Assembly* 1997 (2) SA 97 (CC). "AT" refers to the amended text of the new constitution.

> procedures applicable to ordinary legislation, and that they are subject to the supremacy of the Constitution. All these factors, in our view, indicate that the provisions retained do not form part of the text of the AT but are a form of ordinary legislation.
>
> The remaining question posed is whether the CA had the competence to retain provisions of the IC as ordinary legislation. It may be that it is not necessary to answer this question now. The present inquiry is whether the AT is in compliance with the CPs and no other question is relevant to the current proceedings. On this view, nobody would be precluded by IC 71(3) from raising the question of the validity of the retained provisions in subsequent proceedings, for if the retained provisions themselves do not form part of the text of the Constitution, they will not be subject to the ouster contained in IC 71(3)."[36]

32. In light of the above, it is clear that Schedule 6 does not inform the interpretation of sections 46 and 105. It cannot be relied upon to support the permissive interpretation proposed by the respondents. To the extent that the respondents rely on Schedule 6 in support of their interpretation, they misunderstand the transitional and limited nature of Annexure A.

CONCLUSION

33. When construed in light of the Constitution as a whole, it is clear that sections 46 and 105 contain an implicit requirement that the provincial and national electoral system must make provision for independent candidates. Any interpretation that allows for the exclusion of independent candidates is

[36] Ibid at para 91 and 92. Emphasis added.

inconsistent with citizens' unqualified rights to stand for political office and to freely associate, and at odds the constitutional norm of accountability.

ISABEL GOODMAN

EMMA WEBBER

Counsel for the Second *Amicus Curiae*

Chambers, Santdon

5 August 2019

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Dear Sirs

OUTA intervention as amicus curiae: New Nation Movement NPC & Others / President of the Republic of South Africa and Others CCT110/19

1. As you are aware, we act for the Organisation Against Tax Abuse ("**OUTA**").

2. OUTA's application for admission as amicus curiae in the abovementioned matter was filed on Wednesday 31 July 2019. At paragraph 6.5 of the Founding Affidavit, OUTA undertook that, should it be admitted as *amicus curiae*, it would be in a position to file its written submissions on 2 August 2019 (the same day on which CASAC was required to file its written submissions).

3. To date, OUTA has not received any directions from the Court regarding its admission as *amicus curiae*.

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4. However, OUTA has prepared written submissions and intends supplementing its application for admission with those submissions. We intend to file the supplementary affidavit today or tomorrow.

5. We are aware that the hearing is fast approaching. Therefore, in order to give parties adequate notice of OUTA's argument (if admitted), we attached the proposed written submissions hereto.

Yours faithfully

Laura Macfarlane, Associate
Nicki Van't Riet, Director
Norton Rose Fulbright South Africa Inc

Munyembate, Juliana

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Sent:	5 August 2019 11:06
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Cc:	registrar@concourt.org.za; Munyembate, Juliana
Subject:	PBO2272: OUTA intervention as amicus curiae: New Nation Movement NPC & Others / President of the Republic of South Africa and Others CCT110/19 [NRFSA-CPT.FID1272156]
Attachments:	PBO2272 Letter to parties (signed).PDF; OUTA's written submissions PBO2272 001.pdf

Dear all

Please see attached for your attention.

Kindly confirm receipt.

Kind regards

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