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POST 2019 ELECTIONS: TIME FOR ELECTORAL REFORM AND DUSTING OFF THE VAN ZYL SLABBERT REPORT

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In the aftermath of a highly-contested national and provincial election, questions must be asked why only 65.99% of registered voters turned out to vote, compared with 89.3% in 1999. There might be many factors contributing to this low turnout, such as voter disillusionment following State capture, corruption, lack of accountability and an ailing economy. However, there are other possible explanations: it may be that voters do not feel that they are properly represented by the people who sit in Parliament; and that Parliament has simply become a rubber stamp in the hands of the Executive.

The real problem may be the lack of a proper relationship between voters and their representatives in Parliament - the root of which, may lie in our electoral system itself.

On national and provincial level, as opposed to local government elections, we only vote for registered political parties contesting elections. In accordance with the *Electoral Act*, these registered political parties must submit a list of candidates to the Independent Election Commission (IEC) corresponding with the number of seats in Parliament. The party's representation in the National Assembly (NA) - i.e. number of seats allocated to the party - proportionally reflects the number of votes received by the party, based on a formula. The same occurs at provincial level in the National Council of Provinces (NCOP). There are 400 seats in the NA, of which 200 are filled from parties' regional lists and the remaining 200 are filled from the parties' national list. After the 2019 general elections, the ANC were accordingly allocated 230 seats in the NA, with the two major opposition parties, the DA and EFF, following with 84 and 44 seats respectively.

The above system is known as the closed-list proportional representation system. The advantage with the proportional representation system is that smaller parties are also represented in Parliament, and it is a relatively simple and inclusive electoral system. The downside, however, is the disconnect between the electorate and Members of Parliament (MPs). As the electorate has no power over the political party's candidate list and who effectively represents the party in Parliament, dissatisfaction by the electorate can only be truly exercised at the next general election, against the party as a whole.

Although Parliament is constitutionally-mandated to represent the people and "*ensure government by the people*", section 47(3)(c) of the Constitution provides that "*a person loses membership of the National Assembly if that person... ceases to be a member of the party that nominated that person as a member of the Assembly.*" This means, in effect, that MPs do not account to the people, they account to their respective parties. They serve at the pleasure of their parties. Failure to toe the party line in parliamentary votes might accordingly result in ejection from Parliament and all the benefits of a political career.



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This effective control that political parties exercise over MPs also undermines a proper separation of powers between the Executive and the Legislature. This was especially seen during the Zuma era, where Parliament failed its constitutional mandate to exercise proper legislative oversight over the Executive, to the extent that the Courts had to intervene. In December 2017, the Constitutional Court in *Economic Freedom Fighters and Others v the Speaker of the National Assembly and Another*, castigated Parliament for failing to make rules regulating the removal of a President in terms of section 89(1) of the Constitution.

The issue of accountability in our electoral system also indirectly came to the fore in a recent legal challenge in *New Nation Movement PPC and others (New Nation) versus the President and Others*. The matter concerned the failure of the *Electoral Act* to provide for independent candidates to stand in the national and provincial elections. In local government elections, independent candidates can be nominated as ward candidates, if 50 registered voters nominated such person in that ward's voting district. New Nation's argument was essentially that section 19(3)(b) of the Constitution provides every adult citizen with the right to "*stand for public office, and if elected, to hold office*". This should make it possible for eligible independent candidates to become Members of Parliament without being a member of a political party.

New Nation relied on the Chief Justice's remarks in the 2018 Constitutional Court judgment of *My Vote Counts NPC v Minister of Justice and Correctional Services and Another (My Vote Counts)* to argue that the *Electoral Act* is unconstitutional to the extent it does not give effect to section 19(3)(b) of the Constitution. In *My Vote Counts*, the Chief Justice held that "*the right to stand for public office is tied up to the right to 'vote in elections for any legislative body' ... 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 the legislation*".

The Western Cape High Court dismissed New Nation's constitutional challenge in April 2019 and the Court held that the wording of section 19(3)(b) of the Constitution does not specifically refer to independent candidates, as opposed to members of a political party. New Nation initially asked for an order compelling Parliament to change the electoral scheme before the 2019 elections (which was highly unrealistic) but they later amended their High Court application to ask for electoral reform as soon as possible. However, despite the looming elections, New Nation proceeded with an urgent application for leave to appeal the judgment to the Constitutional Court, arguing that a constitutional crisis justified the urgency.

The Constitutional Court heard New Nation's urgent leave to appeal a mere six days before the general elections. The reality is that the matter from the outset raised complicated questions regarding the electoral system. It was highly unlikely that the Court would have dealt with the merits of the case and New Nation subsequently failed to justify the urgency of the matter. As the IEC pointed out, at that stage 63.6 million ballots had been printed,



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distributed and voting at foreign missions had already been finalised. It could not simply be a matter of printing an additional second ballot paper with independent candidates' names, as suggested by New Nation in their Constitutional Court papers. The remedy itself would require lengthy legislative reform of the electoral system, to see how independent candidates could be elected. As the IEC stated, it would probably require constituencies to be established on a national and provincial level (similar to local government elections). The case, however, has been postponed to 15 August 2019. It would be important for the Constitutional Court to provide finality on this issue, especially since conflicting views on the meaning of section 19(3)(b) of the Constitution exist.

The issue of electoral reform in post-democratic South Africa has been extensively analysed and a possible blueprint for reform does exist.

In 2002, the Cabinet appointed an Electoral Task Team, headed by Dr Frederik Van Zyl Slabbert, to investigate electoral reform. They were to propose a preferable electoral system, as the Constitution did not envision the current electoral system of proportional representation to extend beyond the first two democratic elections. The Task Team identified four criteria that an electoral system must satisfy, namely fairness, inclusivity, simplicity and accountability. Accountability was specifically identified as a weakness. Public surveys showed the need for individual accountability in the electoral system - with a representative accounting to a designated area. Collective accountability was not enough.

The Van Zyl Slabbert Majority Report accordingly recommended a "mixed system", where 300 members of the NA are to be chosen from multi-member constituencies (to be established) and the remaining 100 on the current proportional representation system. The Majority Report proposed that 69 multi-member constituencies be established and depending on the number of voters in such a constituency the number of MPs representing that constituency could vary, from three to seven MPs. This arguably will provide for closer interaction between the electorate and MPs.

Sadly, the Van Zyl Slabbert Majority Report was never adopted. There was very little political push for electoral reform from the governing party, as proportional representation arguably suited them very well. At the time the Van Zyl Slabbert Report was finalised, the time constraint for such legislative changes (considering the 2004 general elections) was a critical hindrance. However, with the focus on the next general election and with the pending New Nation Constitutional Court hearing, it could be the opportune time to push for electoral reform and reconsideration of the Van Zyl Slabbert Report. This will ensure that Parliament will, in fact, represent the people.