

SOUTH AFRICA / JUDGMENT

Speaker of the National Assembly and Others v New Nation Movement NPC and Others (CCT 110/19) [2023] ZACC 12; 2023 (7) BCLR 897 (CC) (20 April 2023) [2023] ZACC 12

COURT

Constitutional Court

BEFORE

Zondo CJ, Maya DCJ, Kollapen J, Madlanga J,
Majiedt J, Mathopo J, Mhlantla J, Rogers J, Tshiqi J

CASE / FILE NUMBER

CCT 110/19

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CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 110/19

In the matter between:

SPEAKER OF THE NATIONAL ASSEMBLY First Applicant

CHAIRPERSON: NATIONAL COUNCIL OF PROVINCES Second Applicant

MINISTER OF HOME AFFAIRS Third Applicant

and

NEW NATION MOVEMENT NPC First Respondent

CHANTAL DAWN REVELL Second Respondent

GRO Third Respondent

INDIGENOUS FIRST NATION ADVOCACY SA PBO Fourth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Fifth Respondent

ELECTORAL COMMISSION OF SOUTH AFRICA Sixth Respondent

COUNCIL FOR THE ADVANCEMENT OF

THE SOUTH AFRICAN CONSTITUTION First Amicus Curiae

ORGANISATION AGAINST TAX ABUSE Second Amicus Curiae

Neutral citation: Speaker of the National Assembly and Others v New Nation Movement NPC and Others [2023] ZACC 12

Coram: Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Rogers J and Tshiqi J

Judgment:

Maya DCJ (unanimous)

Order issued on: 20 January 2023

Reasons

issued on: 20 April 2023

Summary: Suspended declaration of invalidity — Urgent application for a further extension of a suspension of invalidity — Eleventh hour

application — Interests of justice — 2024 Elections

REASONS FOR ORDER

MAYA DCJ (Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Rogers J and Tshiqi J concurring):

Introduction

[1] This is an application for an extension of the further suspension of the order made by this Court on 11 June 2020 in New Nation Movement II (first order).[1] In that matter, this Court declared the Electoral Act[2] unconstitutional to the extent that it stipulates that adult citizens may be elected to the National Assembly and Provincial Legislatures

only through their membership of political parties. This Court in the first order suspended the declaration of invalidity for a period of 24 months to afford Parliament an opportunity to remedy the defect.[3] Counting from the date of the order, the period of suspension expired on 10 June 2022. On 10 June 2022, and arising from an application to this Court by the applicants, an order was issued extending the suspension of the order for a period of six months, that is, from 10 June 2022 to 10 December 2022 (second order).[4] The reasons for that order were issued on 29 June 2022.

[2] Serving before us was another application brought on an urgent basis on Monday, 5 December 2022 for yet another extension. On 9 December 2022, this Court granted an interim order, in terms of which the declaration of invalidity was further suspended from 10 June 2022 to 31 January 2023, pending a final determination of the application. The interim order was granted to avoid the lapse of the second order on 10 December 2022 and the

coming into effect of the declaration of invalidity as it was clear that Parliament would not be able to meet that deadline. The interim order also called for submissions from the parties.

[3] Following the filing of written submissions by the parties, this Court, on Friday, 20 January 2023, made the following order:

1. Condonation for the late filing of the first respondent's written submissions is granted.
2. The first respondent's counter-application is refused.
3. The declaration of invalidity in paragraph 5 of the order of this Court in *New Nation Movement NPC and Others v President of The Republic of South Africa and Others* (CCT 110/19) [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) is further suspended from 10 December 2022 to 28 February 2023.
4. No order as to costs is made.
5. Reasons for this order shall be given at a later date.

[4] This matter was decided without a hearing. These are the reasons for the order.

Urgent extension application

- [5] Four days before the expiry of the further suspension period granted by this Court in the second order, the applicants, the Speaker of the National Assembly (Speaker), the Chairperson: National Council of Provinces, and the Minister of Home Affairs jointly filed an urgent application in this Court seeking a further extension of the suspension period until 28 February 2023. In the alternative, they sought an interim extension whilst this Court considered whether the further extension sought should be granted.
- [6] Participating in the matter were the first, second and sixth respondents, namely the New Nation Movement NPC (New Nation Movement), Ms Chantal Dawn Revell and the Electoral Commission of South Africa (Commission), respectively. The New Nation Movement and Ms Revell opposed the application for the grant of an extension. The Commission supported the application as it found the extension application competent on condition that the extension did not run beyond 28 February 2023 and it filed a notice to abide. Two amici curiae, the Council for the Advancement of the South African Constitution and the Organisation Against Tax Abuse, also abided by this Court's decision.
- [7] On 9 December 2022, the respondents were directed by this Court to file answering affidavits on or before Monday, 19 December 2022, and written submissions by 9 January 2023. Written submissions were received from the New Nation Movement, Ms Revell, and the Commission. The New Nation Movement's written submissions were two days late and it accordingly applied for condonation. It also filed a counter-application, which Ms Revell supported.

- [8] As in the first extension application, the tussle here was about whether the urgent application for an extension should be granted, with regard being had to the principles relating to urgent applications, the time the application was brought, and the implications which the terms of the order in *New Nation Movement II* have for our democracy and the rule of law.

Applicants’

submissions

- [9] The applicants stated that, until late November 2022, Parliament was on track to pass the Bill before the scheduled deadline of 10 December 2022. However, when the National Council of Provinces (NCOP) passed the Bill, together with proposed amendments, on 29 November 2022 and referred it back to the National Assembly, it became evident that the proposed amendments were substantive and required further public participation, as they arose during the NCOP process and had therefore not been subjected to direct public discussion. Having determined this, the applicants realised that the consequence of the necessary public consultation would be that the Bill could not be enacted by 10 December 2022. This, they submitted, was the reason for seeking the extension shortly before the expiry of the extension period previously granted. And they immediately instructed their legal representatives to urgently file this application once they realised the need to approach this Court.
- [10] The applicants submitted that the amendments proposed by the NCOP include a proposed broader electoral reform that goes beyond merely including independent candidates in the 2024 elections. They explained that while it is not possible for such reform to be implemented in time for the 2024 elections, they held the view that the issue should nonetheless be considered formally and expeditiously. The proposed amendments also related to the current Bill which, according to the applicants, treats independent candidates unfavourably as compared to political parties when it comes to the number of signatures that must be obtained for inclusion on the ballot paper.
- [11] The applicants submitted that the Bill is not intended to determine the position for all future elections. Rather, it is intended to act as a stop-gap measure for the 2024 elections and put a system in place in which independent candidates will be given an opportunity to run. After the Bill is enacted, the public and Parliament can then debate the merits of a more radical and extensive electoral reform. According to the applicants, there is insufficient time to properly debate, consult on and implement wide-ranging reforms in time for the 2024 elections. Therefore, it is inappropriate to make wide ranging and long term decisions regarding the electoral system at this stage.

[12] The applicants further pointed out that, if an extension was not granted, the declaration of invalidity would come into effect and there would be no binding electoral system for the National Assembly and Provincial Legislatures. Further, if the deadline lapsed, this Court would not have the authority to suspend the declaration of invalidity.

First respondent's submissions

[13] The New Nation Movement opposed the grant of an extension and filed a counter application accompanied by an application for

condonation for its late submissions. Its explanation for the delay was that its submissions could only be prepared during the December recess period when its counsel were travelling. It asserted that the delay was minimal and would cause no prejudice to any party to these proceedings.

[14] The New Nation Movement argued that a grant of the extension would necessitate adequate time to be afforded in order to challenge the constitutional validity of the Electoral Act, as amended (in proceedings from the High Court to this Court). And, once that challenge was finalised, there would have to be adequate time for the Commission to start with the electoral process. It argued that the applicants had failed to establish why the pending amendments justified their failure to meet their obligations under the New Nation Movement II judgment. In its submission, the amendments concern a new statutory body that must consider the electoral system beyond 2024, and, as such, have nothing to do with the order of this Court in New Nation Movement II. This was so, it argued, because the defect that Parliament had to remedy was the Electoral Act's failure to allow

independent candidates to contest national and provincial elections. Additionally, that the applicants did not sufficiently explain Parliament's failure to remedy that particular defect within the suspension and extension periods.

[15] In its counter-application, the New Nation Movement sought a declaration that Parliament had failed to meet its constitutional obligations,

leave to challenge the Bill and directives for that hearing, and a supervisory interdict, in the alternative to the constitutional

challenge.

Second respondent's

submissions

[16] Ms Revell argued that (a) the relief sought by the applicants was not sustained by the facts set out in their affidavits; (b) the time period for the extension sought seemed irrational and should not be accepted by this Court as credible; and (c) the amendments cited by the applicants are not required to give effect to her right to stand for public office. She submitted further that the applicants had dragged their feet and simply failed to meet the deadlines set by this Court and their own deadlines. As such, there was no guarantee that the applicants

would adhere to the deadline this time, despite the Speaker's assurances to this Court on how much time is required to finalise the process. Their previous assurances have proven to be wholly unreliable. She argued that the application should fail and the counter-application succeed in the light of Parliament's failure to comply with the New Nation Movement II judgment and the second order.

Sixth respondent's submissions

- [17] The Commission found the extension application competent as long as the extension did not go beyond 28 February 2023. It objected only to a longer extension on the basis that it would be prejudicial to it, taking into account the adjustments and preparations it has to make, which are inclusive of redesigning its systems to accommodate the new electoral system, in order to run free and fair elections in 2024.

Analysis

Urgency

- [18] In terms of rule 12 of the Rules of this Court, an urgent application must be by way of a notice of motion supported by an affidavit,

"setting forth explicitly the circumstances that justify a departure from the ordinary procedures".

Circumstances

which render the application urgent must be explicitly set out in the supporting affidavit to enable the Court to exercise its discretion and authorise a departure from the ordinary procedures.

- [19] In determining whether this matter is urgent, this Court considers, among others, the adequacy of the reasons provided for the failure to comply with the extended suspension period, the consequences if the relief sought is or is not granted, and the prospects of curing the constitutional defects within the new deadline or, more generally, the prospects of complying with the deadline.[5]
- [20] As stated, in the present case the suspension period of the order was set to expire on 10 December 2022. It does appear from the applicants' undisputed explanation for the delay that Parliament had not remained supine and that, were it not for the belated amendments to the Bill occasioned during the NCOP leg of the relevant process, which demand public consultation, it would have met the deadline. In the Commission's assessment, an extension to 28 February 2023 would still afford it sufficient time to finalise the necessary processes. This explanation does not seem unreasonable. The Commission is a critical role player in these proceedings. It saw a benefit in allowing the extension, albeit expressing a strong, well-motivated view against a prolonged delay beyond 28 February 2023.

[21] To my mind, these were compelling reasons for an expedited resolution of the matter. And so was the ominous threat that, if an extension was not granted and the deadline lapsed, the declaration of invalidity would come into effect. There would then be no binding electoral system for the National Assembly and Provincial Legislatures and this Court would not have the authority to suspend the declaration of invalidity. So, despite the last minute launch of the application, in the public interest and

to avoid Parliament's otherwise inexorable failure to meet the deadline of the second order, this Court had to decide the matter on an urgent basis.

Power of this Court to grant an extension

[22] Section 172(1)(b) of the Constitution affords courts a wide discretionary power to grant a just and equitable remedy. The predominant consideration in the exercise of this power is the interests of justice. In Electoral Commission of South Africa, this Court stated that "extensions should be granted with great caution and 'not be granted simply as a matter of course or at the last minute'".[6] The power to extend the period of suspension of a declaration of invalidity is to be exercised sparingly.[7] A proper case justifying the need for an extension must be made out because the effect of suspending the operation of a declaration of invalidity is to preserve law which has been found unconstitutional and void, usually, as was the case here, to afford Parliament

opportunity to remedy the defect.

The further extension sought

[23] As I have said, it did appear from the applicants' undisputed explanation for the delay caused by amendments requiring public

participation and, importantly, supported by the Commission, that the extension sought by the applicants was reasonable and justified.

This view should not be mistaken for tolerance of Parliament's tardiness or failure to meet its deadlines. This Court was merely cognisant of the nature of the matter, which clearly transcends the interests of the parties, and implicates the interests

of the general public and our democracy. These factors, in my view, warranted the grant of the extension as a just and equitable

remedy and it was in the interests of justice to make an order towards that end.

For the Applicants: S Budlender SC and M de Beer instructed by State Attorney, Johannesburg
For the First Respondent: T Ngcukaitobi SC and K Premhid instructed by Maphalla Mokate Conradie Incorporated
For the Second Respondent: C Brown instructed by Marais Muller Hendricks Incorporated
For the Sixth Respondent: A Bham SC and J Bleazard instructed by Moeti Kanyane Incorporated
For the First Amicus Curiae: S Magardie instructed by the Legal Resources Centre
For the Second Amicus Curiae: I Goodman and E Webber instructed by Norton Rose Fulbright

South Africa Incorporated

[1] New Nation Movement NPC v President of the Republic of South Africa

[2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC). Owing to the earlier judgment in New Nation Movement NPC v President of the Republic of South Africa

[2019] ZACC 27; 2019 (9) BCLR 1104 (CC), where this Court dealt only with the question of urgency in respect of an urgent application for direct leave to appeal to it. There too, the central question was whether it is constitutionally permissible to prohibit eligible South Africans from standing for election to the National Assembly and Provincial Legislatures other than through party lists. To avoid confusion, for the purposes of this judgment I shall refer to the 2020 judgment as New Nation Movement II.

[2] 73 of 1998.

[3] New Nation Movement II above n 1 at paras 4 and 5 of the order.

[4] Speaker of the National Assembly v New Nation Movement NPC

[2022] ZACC 24; 2022 (9) BCLR 1165 (CC). Here, the applicants applied for the first extension in respect of order 5 in New Nation Movement II.

[5] Electoral Commission of South Africa v Speaker of the National Assembly

[2018] ZACC 46; 2019 (3) BCLR 289 (CC) at para 69.

[6] Id.

[7] Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children

[2015] ZACC 16; 2015 (10) BCLR 1129 (CC) at para 12.

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