

Private Member's Bill to introduce multi-party constituencies

By Farouk Cassim

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Member of Parliament and leader of the Congress of the People (COPE) Mosiuoa Lekota submitted a Private Member's Bill, the Electoral Laws Second Amendment Bill (B34-2020), to the National Assembly (NA) in December 2020 in response to a ConCourt ruling in favour of amending the Electoral Act 73 of 1998. This served as a trigger to get electoral reform under way. His advisor, party member FAROUK CASSIM, outlines the changes proposed in this Bill.

Mosiuoa Lekota submitted the Electoral Laws Second Amendment Bill (B34-2020), in his capacity as a Member of Parliament, to the NA in December 2020. This followed the judgment handed down by Justice Madlanga on June 11, 2020,

which deemed that our electoral law was, in part, unconstitutional. The Constitutional Court gave Parliament until June 22, 2022 to amend Electoral Act 73 of 1998.

The need to change how we elect our MPs and Members of Provincial Legislatures (MPLs) started way back. On 26 March 1999, President Mandela, in his very last address to the NA, asked whether Parliament did not 'need to re-examine our electoral system, so as to improve the nature of our relationship, as public representatives, with the voters!' Three years later, in 2002, the Cabinet appointed a team under the leadership of the late political analyst, businessman and politician, Frederik van Zyl Slabbert, to investigate electoral systems and to report on what would best suit South Africa. One of the task team's main recommendations was for South Africa to have a mix of proportional representation and a constituency-based system. However, Cabinet shelved the recommendations.

In 2006, in a discussion document for its 2006 conference, the Congress of SA Trade Unions (Cosatu) punted a constituency-based electoral system which 'will promote more dynamic contact between the people and

public representatives, [and hold] the possibility of people's views being heard.' It also favoured introducing the element of constituents in more directly determining candidates.

The Cosatu document pointedly highlighted the problems associated with the closed list proportional representation (PR) system, namely: '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.' Cosatu correctly and presciently expected that sycophancy was soon going to dominate our politics. This is indeed what happened.

In 2006, the Speaker of the NA appointed an independent panel, chaired by former MP Pregs Govender, to investigate the deficiencies of our electoral system. The panel recommended a mixed system that captured 'the benefits of both the constituency-based and proportional representation electoral systems'. As section 46(1)(d) of our Constitution requires the electoral system to >>

result, in general, in proportional representation, Parliament needed to make the electoral system constituency based. This is what the Van Zyl Slabbert panel had also recommended.

Parliament demurred for all of 15 years in creating a constituency-based system. It wanted more convincing. It gave the task to former president Kgalema Motlanthe, and in 2017 the High-Level Panel, led by Motlanthe, made the following submission in its report to Parliament:

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.

Parliament needed to act on this report. As usual, it did not.

On 15 August 2019, four applicants, the New Nation Movement NPC, Ms Chantal Dawn Revell, GRO and Indigenous First Nation Advocacy SA made their case in the Constitutional Court that the Electoral Act is unconstitutional. They argued it was unjustifiable for the electoral system to limit the right of citizens to stand for public office as independents. The Council for the Advancement of the South African Constitution (CASAC) and the Organisation Undoing Tax Abuse (OUTA) took part as *amici curiae* (friends of the Court). This follows the dismissal of the case heard in the Western Cape High Court in April 2019.

On 17 June 2020, in a judgment penned by Madlanga J (concurring in by Cameron J, Jafta J, Khampepe J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ), the Constitutional Court upheld the appeal and set aside the order of the High Court. It held that the Electoral Act is unconstitutional to the extent that it requires that adult citizens be elected to the NA and provincial legislatures only through their membership of political parties.

The first judgment held that the declaration of invalidity must take effect from the date of the judgment. Finally, it suspended the declaration of invalidity for 24 months. Parliament has until June 2022 to amend our electoral law so that it passes constitutional muster.¹ After discussions with several people who were interested in this judgment and who believed that Parliament had overlooked too many recommendations to undertake electoral reform, Mosiuoa Lekota seized the bull by the horns. He started the drafting of the Electoral Laws Second Amendment Bill (B34-2020) and officially lodged it with Parliament on 4 December 2020.²

The following are the key elements of the Private Member's Bill (B34-2020):

1. Inclusion of independent candidates in elections;
2. Creating a hybrid system providing for proportional representation and for 52 multi-member constituencies;
3. Keeping the single transferable vote mechanism to ensure proportional representation;
4. Substituting the closed list PR system with an open list PR system allowing voters the right to vote for a specific candidate on a political party's list rather than the party per se as has happened from 1994;
5. Requiring each candidate to publish how that candidate will seek to advance the Bill of Rights when elected;

6. Achieving a smaller national legislature, as well as smaller provincial legislatures; and
7. Making provision for the Independent Electoral Commission (IEC) to explore the viability and desirability of electronic voting.

Why did we choose to have 52 multi-member constituencies? Simply because South Africa already has 52 wall-to-wall boundary-delimited districts. These comprise 44 municipal districts and eight metropolitan council areas. We all know that municipal government is failing citizens abysmally. The failure of the two higher levels of government to abide by the constitutional injunction in section 41(1)(h) to 'co-operate with one another in mutual trust and good faith by- (i) fostering friendly relations; (ii) assisting and supporting one another; and (iii) informing one another on matters of common interest' has exacerbated the situation. The Bill has sought to make constituencies align with district boundaries to ensure that co-operative governance works as intended in the Constitution. MPs, Members of Provincial Legislatures (MPLs) and councillors who come from one geographical district will need to form a team to service the people in that area in each sphere of government.

MULTI-MEMBER CONSTITUENCIES

Since there are only 52 districts, some districts will have more representatives in each of the two legislatures than others. This is especially true of metropolitan areas. The Bill has decreased the number of MPs from 400 to 350 and the number of MPLs from 430 to 300. In the NA, 300 MPs will come from constituencies and 50 from the country in its entirety. The Constitution will allow for such an arrangement. The 52 constituencies, therefore, will send 300 public representatives to the NA and 300 public

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[Does Parliament not] ‘need to re-examine our electoral system, so as to improve the nature of our relationship, as public representatives, with the voters!’ – Nelson Mandela



representatives to the nine provincial legislatures. In this way, South Africa will have 650 public representatives and not 840 members as at present. South Africa will have 190 fewer public representatives if the Bill becomes law.

The metros will have more than 20 MPs and more than 20 MPLs. Some districts with sparse populations will have just one MP and one MPL, but most constituencies will have multi-member representation. In the metropolitan areas, the IEC will combine five or six contiguous wards to create a seat or sub-constituency. Each seat will have one MP, one MPL and five or more councillors. Each seat will have to have a constituency office where

citizens can meet a public representative from the NA or the provincial legislature and several councillors. This will provide citizens with a one-stop service.

TRANSFERABLE VOTE

The Bill envisages a system where the IEC will determine a quota for each seat. Suppose the quota is 35,000 votes, each candidate who gets 35,001 votes will have a seat in the legislature to which the voting applied. Any excess votes will spill over to the next candidate. In this way, a political party will win seats in proportion to the number of votes it gained in the election. However, the Bill adds an important element, the open list.

OPEN LIST

From 1994, South Africa has used the closed list proportional representation system. In this system, people voted for a political party and the candidates listed by the party. The Bill proposes a big change. Political parties will still submit their respective lists of candidates in placement position determined by each party. If the Bill becomes law, voters will select the candidate they prefer and not the party per se. This, most likely, will see the order on the list rearranged. Voter preference will trump party preference. A candidate who occupies an inferior position in the list could displace someone higher up on the list. Voters will determine who occupies which position on the list.

Elected representatives will carry a mandate from voters. They will, therefore, have to account to voters first and only after that to their respective parties. As mentioned above, excess votes of each candidate who meets the IEC quota will spill over to the candidate next on the list. Political parties will lose nothing in this arrangement but voters will score handsomely.

CANDIDATES MUST GIVE AN UNDERTAKING TO ADVANCE THE BILL OF RIGHTS

The Bill of Rights is the most prized jewel in our Constitution. It makes our Constitution the envy of people around the world. Yet, in elections, inferior manifestos have precedence over the Bill of Rights. The Bill rectifies this.

Wikipedia notes that ‘the Bill of Rights, [is] a human rights charter that protects the civil, political and socio-economic rights of all people in South Africa. The rights in the Bill [of Rights] apply to all law, including the common law, and bind all branches of the government, including the national executive, Parliament, the judiciary, provincial governments and municipal councils. Some provisions, such as those prohibiting unfair discrimination, also apply to the actions of private persons.’ Section 7 of our Constitution states:

1. The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
3. The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

The Bill requires an undertaking from each candidate that upon being elected that candidate, as a public representative, will do his or her utmost to ensure that the state will indeed ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. It is important for the credibility of our Constitution and our democracy that each MP and each MPL has such an obligation and meets that obligation. ➤

REDUCING THE SIZE OF GOVERNMENT

The government is bloated. The Bill proposes to reduce the number of public representatives to the extent the Constitution allows. How will that work? Hypothetically, if the voter numbers are as in column two of in the following table, it will work something like this:

Fifty more seats in the NA will come from votes that are cast nationally. Arrangements for constituting the National Council of Provinces (NCOP) will remain as at present because the Constitution prescribes the procedure for its establishment.

VOTING PROCEDURE

The Bill proposes new voting procedures, ideally electronic voting. Each candidate for each of the 52 constituencies will have a unique number. Upon activation of the screen, the system will require a voter to input the number of the constituency candidate they select for the NA, the number for the provincial candidate selected for the provincial legislature and the third number for the candidate receiving the vote nationally. If the head shot, party symbol and logo on the screen for each segment of the election show the selected candidate, the voter will confirm that. If not, the voter will go back and make the required correction. When the voter has made the three selections, and confirmed them, the printer will print three cards, each with a different colour. The voter will then slide the card, face down, into the ballot box with the matching colour. This will make vote counting easy and swift as voting

PROVINCE	VOTERS WHO CAST THEIR VOTES	PERCENTAGE OF TOTAL VOTERS	PROVINCIAL SEAT ALLOCATION	NATIONAL SEAT ALLOCATION	FINAL NA SEAT ALLOCATION
Gauteng	6,381,220	23.848%	40	71.544	71
Western Cape	3,128,567	11.693%	35	35.079	35
KwaZulu-Natal	5,524,666	20.648%	40	61.944	61*
Northern Cape	626,471	2.341%+1%	30	10.023	10
Mpumalanga	1,951,776	7.295%	30	21.885	22*
Free State	1,462,508	5.466%	30	16.398	16
Eastern Cape	3,363,161	12.57%	35	37.71	37
North West	1,702,728	6.364%	30	19.092	19
Limpopo	2,608,460	9.745%	30	29.235	29
			300	302.91	300

station managers will use machines. Where any party disputes the votes tally, manual counting can take place.

CONCLUSION

We need to concentrate our minds on the loss of interest in voting and revive citizen interest in elections and strengthen our democracy.

Finally, the insurrection that occurred in July 2021 revealed to all of us the danger of factionalism that the closed list proportional representation system presents. The fight inside the ANC spilled onto the streets and became an insurrection that damaged our economy, caused loss of life, strained race relationships and scared both local and international investors.

We need to heed what Nelson Mandela, Pregs Govender as the leader of her panel, and Kgalema Motlanthe as the leader of the High-Level Panel advised Parliament. We need to ditch the

closed list proportional representation system to improve governance, heighten accountability and bring brighter talent into government. South Africa can no longer afford a system which exists to support the patronage network and place incapable people in ministerial positions to achieve party political balance.

The Electoral Laws Second Amendment Bill (B34-2020) is available for scrutiny at <https://www.parliament.gov.za/bill/2294692>. As citizens of South Africa, we need to study what it contains and determine whether the amendments made to the Electoral Act 73 of 1998 go far enough to lift us to a higher plain.

ENDNOTES

1. See <http://www.saflii.org/za/cases/ZACC/2020/11media.pdf>
2. See <https://www.parliament.gov.za/bill/2294692> **NA**

