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
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
MINISTER OF HOME AFFAIRS	Sixth Respondent
ELECTORAL COMMISSION OF SOUTH AFRICA	Seventh Respondent
and	
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 Another v New Nation Movement NPC and Others* [2022] ZACC 24

Coram: Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ

Judgment: Unterhalter AJ (unanimous)

Order issued on: 10 June 2022

Reasons issued on: 29 June 2022

Summary: Suspended declaration of invalidity — urgent application for extension of a suspension of invalidity — avoid last-minute applications for extension

Interests of justice overarching factor — extension granted

REASONS FOR ORDER

UNTERHALTER AJ (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J and Tshiqi J concurring):

Introduction

[1] This application follows upon this Court's decision in *New Nation Movement II*.[1] On 11 June 2020, this Court in *New Nation Movement II* held that the Electoral Act[2] is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only

[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). I refer to the case as *New Nation Movement II* in light of the earlier judgment in *New Nation Movement NPC v President of the Republic of South Africa* [2019] ZACC 27; 2019 JOL 45026 (CC); 2019 (9) BCLR 1104 (CC) where the parties were requested to address this Court only on the question of urgency in respect of an urgent application for direct leave to appeal to this Court. There, again, 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. That case is *New Nation Movement I*.

[2] 73 of 1998.

through their membership of political parties.[3] The order granted in *New Nation Movement II* shall henceforth be referred to as "the order".

[2] The declaration of constitutional invalidity was suspended for a period of 24 months to afford Parliament the opportunity to correct the defect. The period of suspension expired on 10 June 2022.

[3] On Friday, 10 June 2022, this Court made the following order:

1. Condonation is granted for the late filing of the first and second respondents' answering affidavits.
2. Condonation for the late filing of the first and second respondents' counter-applications is refused, and those counter-applications will not be entertained by this Court.
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 June 2022 to 10 December 2022.
4. No order as to costs is made.
5. Reasons for this order shall be given at a later date.

[3] The full order in *New Nation Movement II* above n 1 reads:

> "1. Leave to appeal is granted.
>
> 2. The appeal is upheld.
>
> 3. The order of the High Court of South Africa, Western Cape Division, Cape Town is set aside.
>
> 4. It is declared that the Electoral Act 73 of 1998 is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties.
>
> 5. The declaration of unconstitutionality referred to in paragraph 4 is prospective with effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.
>
> 6. The Minister of Home Affairs must pay the applicants' costs in the High Court and this Court, such costs to include the costs of two counsel."

[4] Paragraph 5 of the order stated that reasons would be given at a later date. These are the reasons.

Application for extension

[5] On 26 April 2022, approximately seven weeks before the expiry of the suspension period, the applicants, the Speaker of the National Assembly and the Chairperson: National Council of Provinces (Parliament), approached this Court seeking an extension of the suspension period for another six months until 10 December 2022. In the alternative, Parliament sought an interim extension whilst this Court considered and determined whether the extension should be granted. The application was brought in the ordinary course.

[6] The application was opposed by the first and second respondents, New Nation Movement NPC (New Nation) and Ms Chantal Dawn Revell. The sixth and seventh respondents, the Minister of Home Affairs (Minister) and the Electoral Commission of South Africa (Commission) support the application, provided that the extension period sought does not exceed six months. Additionally, the Commission and the first amicus curiae, the Council for the Advancement of the South African Constitution, filed notices to abide.

[7] This matter was determined without oral argument. On 11 May 2022, the parties were directed by this Court to file submissions in which they were to address: (a) the urgency of the application; (b) steps taken by the Minister to give effect to this Court's order; (c) the reasons why the Minister had failed to file an application for extension of the period of suspension; (d) any prejudice that may be suffered in granting the extension sought; and (e) the prospects of the Electoral Amendment Bill[4] (Bill) passing into law during the extended period of suspension. Written submissions

[4] [B1-2022].

were received from Parliament, New Nation, Ms Revell, the Minister and the Commission.

[8] In terms of the directions, the applicants were to file their written submissions by 18 May 2022 and the respondents were to file their submissions by 25 May 2022. On 25 May 2022, approximately 14 days after expiry of the notice period,[5] New Nation and Ms Revell filed notices to oppose. New Nation and Ms Revell complied with this Court's directive to file written submissions by 25 May 2022; however they filed counter-applications to the extension application on 3 June 2022, less than five court days before the expiry of the suspension period.

[9] The issue to be determined is whether the application for an extension should be granted, having regard to the principles relating to applications of this nature and the terms of the order in *New Nation Movement II*.

Counter-applications

First respondent

[10] As already indicated, on 3 June 2022, New Nation filed a counter-application against the extension application. This application was accompanied by a condonation application.

[11] New Nation submits that the reasons for its late filing of the counter-application and answering affidavit in the extension application (principal application) are that its directors reside in different provinces and its legal team was not immediately available for consultation. Additionally, the counter-application had

[5] Parliament's notice of motion stipulated that any party wishing to oppose the relief sought, must file a notice of opposition *within five days* of receipt of the application and file an answering affidavit within 15 days of filing the notice to oppose. This accords with rule 11(1)(b) of this Court's rules which states that—

> "[an] application shall be brought on notice of motion . . . and shall set forth a day, *not less than five days after service* thereof on the respondent, on or before which such respondent is required to notify the applicant in writing whether he or she intends to oppose such application." (Emphasis added.)

to be prepared having considered the written submissions filed by the applicants and the other respondents in the principal application. For these reasons, New Nation submits, this Court should grant condonation for the late filing of the counter-application and its answering affidavit in the principal application.

[12] In summary, New Nation seeks the following relief from this Court:

(a) A declaration that Parliament and the Minister failed to comply with the order of 11 June 2020.

(b) If this Court grants the extension sought, the parties and amici be directed to file further affidavits and written submissions on an appropriate reading-in order to be made in respect of the Electoral Act to cure the constitutional invalidity. This order will be suspended and shall only take effect if Parliament fails to amend the Electoral Act by the extended suspension period.

(c) Additionally, if this Court grants the extension, Parliament and the Minister must be directed to file monthly reports on affidavit setting out, amongst others, how they plan to ensure that the Bill is passed by 10 December 2022. If there is any material change to Parliament's estimate that the Bill will be passed by 10 December 2022, Parliament and the Minister are directed to immediately report this to this Court and all the parties.

[13] New Nation submits that Parliament has not shown why it is necessary to extend the suspension period. It contends that Parliament has given a vague account of its failure to comply with the order and abdicated its responsibilities to the Department of Home Affairs (Department). Furthermore, Parliament cannot blame the Minister because this Court directed Parliament, not the Minister, to cure the Electoral Act's unconstitutionality.

[14] New Nation contends that Parliament and the Executive are beneficiaries of the "old system" and they are now charged with removing an electoral system that benefitted them. New Nation implies that this might also explain the delay and why this Court's intervention is required.

Second respondent

[15] Ms Revell in large measure seeks the same relief from this Court as that sought by New Nation. However, she also seeks additional relief, set out below.

[16] Regarding condonation, Ms Revell says that she required additional time to file the counter-application and answering affidavit.

[17] Ms Revell submits that the Minister, when dealing with the Bill, departed from standard practices for passing legislation and, instead, at the eleventh hour, decided to brief a team of advocates to produce a draft bill. She says that the advocate heading this team was previously appointed to oppose her application to stand for election as an independent candidate. Accordingly, the appointment of this particular advocate is of concern to her.

[18] Ms Revell further avers that this team of advocates were instructed to draft a bill based on the report of the Ministerial Advisory Committee (MAC). However, the Bill they produced does not create a constituency based system and is not an accurate reflection of the minimalistic option proposed by the minority in the MAC. Ms Revell claims that the Bill was produced within a period of only five weeks, despite the complex nature of the legislation. Thus, she submits, it is fair to draw the inference that the Bill was drafted in a rushed manner by a team that should not have been appointed to draft the Bill in the first place.

[19] Ms Revell contends further that, from the Cabinet minutes dated 24 November 2021, it is clear that the Executive did not take a decision regarding which specific opinion (the majority or minority position) in the MAC report it preferred. The entire report was simply sent to Parliament for it to decide. This, she concludes, illustrates that there was insufficient time for members of Cabinet to apply their minds to the report.

[20] Ms Revell submits that the Bill is not constitutionally compliant because it may result in independent candidates requiring almost double the number of votes in order to secure a seat in Parliament compared to the votes that will be required by candidates from political parties. This constitutes a violation of the right to dignity. Furthermore, Ms Revell says the Bill leaves it to the Commission to determine pre-conditions, such as a monetary deposit and supporting signatories. This will disadvantage candidates with limited funds and it is mostly women and poor people who will be impacted by such pre-conditions. These issues are raised by Ms Revell not for this Court to make a determination, but in the hope that solutions can be found so that the Bill is not found to be unconstitutional at a later stage.

[21] Additionally, Ms Revell says that the public participation process followed to date is fundamentally flawed. She submits that the public has not been given an opportunity to comment on the work done by the MAC, to express their views on the desirability of the Lekota Bill (this Bill envisages a constituency-based system) or to engage with Parliament in respect of other possible aspects of electoral reform. Ms Revell seeks a declaration that the public participation process was inadequate, flawed and not constitutionally compliant.

[22] Finally, Ms Revell submits that this Court should call upon the parties to engage in urgent mediation to determine whether the parties can reach consensus on the best way forward. She opines that since the introduction of the new rule 41A of

the Uniform Rules of Court,[6] mediation has become more prevalent in resolving conflict.

Condonation: The first and second respondents

[23] The standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay and the prospects of success.[7]

[24] In this matter, the issue to be decided is whether the period of suspension should be extended to allow Parliament additional time to amend the Electoral Act and cure its constitutional invalidity. The importance of this issue cannot be over emphasised. It relates to an amendment of the Electoral Act to allow independent candidates to stand for elections.

[25] The first and second respondents, New Nation and Ms Revell, did not provide any reasons why they filed notices to oppose approximately a month after the extension application was filed in this Court. Additionally, being well aware of the looming deadline of 10 June 2022, New Nation and Ms Revell only filed their counter-applications on 3 June 2022. The reason for this was that sufficient time was required to consider the extension application and, in the case of New Nation, the location of its directors and the availability of its legal team. These reasons fall short of the requirement that a reasonable explanation must be given for the delay.[8]

[6] This rule regulates mediation as a dispute resolution mechanism.

[7] *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at paras 20 and 22, and *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[8] *Van Wyk* id at para 22.

[26] There are further considerations that are relevant to the grant of condonation. New Nation and Ms Revell were the applicants in *New Nation Movement II* and therefore have a clear interest in the extension application. The basis of their opposition to the extension application may be of assistance to this Court in deciding the application. The grant of condonation would not prejudice Parliament, the Minister or the Commission. Instead, it would permit this Court to consider an opposing position on a matter of considerable public importance. Accordingly, this Court grants condonation for the late filing of the notices to oppose and answering affidavits.

[27] However, the counter-applications of New Nation and Ms Revell stand on a different footing. They have failed to provide a reasonable explanation for the late filing of the counter-applications. The delayed launch of the counter-applications would not have allowed Parliament, the Minister and the Commission a fair opportunity to respond, given the deadline of 10 June 2022. For the most part, the remedial relief sought in the counter-applications may, in any event, be considered by this Court in its determination of the principal application and the just and equitable relief that is warranted. Ms Revell's concern to prevent what she apprehends may cause the legislation, when passed, to be unconstitutional will no doubt have been noted by Parliament. But that apprehension does not found a basis for us to entertain her counter-application at the eleventh hour. In the circumstances, condonation for the late filing of the counter-applications is refused, and those applications will not be entertained.

Submissions in this Court

Applicants' submissions

Steps taken by Parliament

[28] Parliament submits that the legislative process involves both the Legislature and the Executive and that the order did not specify a date for the Executive to introduce the Bill in Parliament, to ensure that Parliament had sufficient time to

deliberate on the Bill, and to facilitate adequate public participation. Parliament contends that on the day that judgment was handed down in *New Nation Movement II*, it scheduled a meeting for 25 June 2020, inviting all relevant role players, including the Minister and the Commission, to develop a programme of action to give effect to the order. During this time, the Portfolio Committee of Home Affairs was instructed by the Minister that the Bill had to be introduced expeditiously, and it was agreed that the Bill would need to be introduced by 10 March 2021 to ensure compliance with the order.

[29] According to Parliament, it has not been lethargic in giving effect to the order. The measures it has taken include numerous meetings held by the Portfolio Committee between 2020 and 2021, a comparative study that was conducted in respect of different electoral systems, and a determination of additional legislation that would also require amendment as a result of an amendment to the Electoral Act.

[30] Parliament submits that when the Minister failed to introduce the Bill according to the agreed timetable, letters were sent to the Minister in January 2021, August 2021, September 2021 and November 2021 requesting an urgent indication as to when the Bill would be introduced. The Minister failed to respond.

[31] On 10 November 2021, Parliament sent a letter to the Department of Home Affairs enquiring whether the Department would be making an application for an extension of the suspension period, as it was well placed to advise this Court regarding the measures taken to give effect to the order. No response was forthcoming. On 21 November 2021, it was decided that Parliament had no option but to await the Executive's introduction of the Bill.

[32] Parliament recounts that it was only when the Bill was introduced by the Minister before the National Assembly that it was in a position to assume control over the passage of the Bill, whilst ensuring adequate public participation. When

the Minister did not file an application to extend the suspension period, on 23 February 2022, it instructed the state attorney to file an application. Due to internal processes, the application could only be filed on 26 April 2022.

Response to this Court's directives

[33] In response to this Court's directives,[9] Parliament submits that, while this matter is indeed urgent, as a result of this Court's decision in *AParty*,[10] where the Court held that it is undesirable for issues of importance and complexity to be determined in haste, it brought the application in the ordinary course.

[34] Parliament contends that if the extension is not granted immediately, it would be unable to obtain redress in due course because it would then not have complied with the order. Thus, it is in the interests of justice to grant the relief sought, more especially since any urgency arising from this matter was not created by Parliament, and this Court may of its own accord decide to deal with an application on the basis of urgency.

[35] In respect of the prejudice that may be suffered in granting the extension sought, Parliament submits that because the next elections will take place in 2024, no prejudice will be suffered by voters, those who intend to stand for elections or the Commission. On the other hand, so Parliament contends, if the extension is not granted, Parliament will not be able to comply with the order notwithstanding that it is not responsible for the delays. In this respect, Parliament also stresses the importance of complying with court orders as held by this Court in *Nyathi*.[11]

[9] See [7].

[10] *AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at paras 78-9.

[11] *Nyathi v MEC for Department of Health, Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 118.

[36] As regards the prospects of passing the Bill during the extended period of suspension, Parliament filed a supplementary affidavit setting out timelines to ensure that the Bill will be passed within the extended period of suspension. In terms of these timelines, on 14 June 2022, the Portfolio Committee was scheduled to consider and adopt the report on the Bill, which will be tabled in the National Assembly. Thereafter, the debate and second reading of the Bill in the National Assembly must be scheduled. If the Bill is adopted by the National Assembly, it will be sent to the National Council of Provinces where it will follow a similar process. It is estimated that the National Council of Provinces will require approximately eight weeks to pass the Bill. The Select Committee on Justice and Security will facilitate public participation in the Bill and thereafter it will table its report before the National Council of Provinces.

[37] Parliament estimates that the Bill will be sent to the President by September 2022. Parliament submits that if the President raises any concerns regarding the constitutionality of the Bill, there will still be sufficient time to refer the Bill back to Parliament for the concerns to be considered.

First respondent's submissions

[38] New Nation opposes the relief sought.

[39] Relying on this Court's decision in *Ex parte Minister of Social Development*,[12] New Nation contends that Parliament has embarked upon a "blame game" to excuse its failure to comply with the order. In *Ex parte Minister of Social Development*, this Court held that government has an obligation to avoid last-minute applications to extend a period of suspension.[13] New Nation takes the position that when the parties were in this Court in *New Nation Movement II*, Parliament and the Minister should

[12] *Ex parte Minister of Social Development* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC).

[13] Id at para 52.

have indicated the amount of time required to correct the constitutional invalidity. However, both Parliament and the Minister failed to do so.

[40] New Nation submits that in terms of section 73 of the Constitution, any member or committee of the National Assembly may introduce a bill.[14] Therefore, there is no constitutional reason why Parliament had to wait for the Executive to introduce an amendment to the Electoral Act. Further, this Court's power to extend a period of suspension must be exercised sparingly, as was held in *Teddy Bear Clinic*.[15] New Nation contends that Parliament's eleventh-hour application creates doubt as to the successful completion of the amendment process in time for the elections in 2024. New Nation reminds this Court of *Electoral Commission*,[16] where this Court had to decide a last-minute application shortly before the local government elections. It contends that in the current circumstances, this Court will be faced with the likelihood that the next elections will proceed on the "old system" and exclude independent candidates despite the order of constitutional invalidity.

[41] New Nation seeks the following relief from this Court:

(a) A declaration that Parliament and the Minister failed in the execution of their constitutional duty to give effect to the right of independent candidates to stand in the national election.

(b) If this Court grants the extension sought, it should either order a reading-in that would take effect if Parliament failed to meet an extended deadline or issue a supervisory order to keep "a monitoring eye" over the legislative process.

[14] Section 73(2) states "[o]nly a Cabinet member or a Deputy Minister, o*r a member or committee of the National Assembly, may introduce a Bill in the Assembly*." (Emphasis added.)

[15] *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* [2015] ZACC 16; 2015 (10) BCLR 1129 (CC) at para 12.

[16] *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* [2021] ZACC 29; 2021 JDR 2101 (CC); 2022 (5) BCLR 571 (CC).

[42] In respect of the reading-in remedy, New Nation submits that this Court should direct the parties to file affidavits regarding the appropriate reading-in order in the event that the Bill is not enacted before the expiration of the extended suspension period. Additionally, so New Nation submits, this Court should direct the parties to file written submissions and set down the application for a hearing to determine the appropriate reading-in order.

[43] In respect of the supervisory remedy, New Nation submits that if this Court grants an extension of the suspension period, it should direct Parliament and the Minister to file monthly reports stipulating how they will ensure that the Bill is passed by 30 September 2022, the steps taken during each month and the measures to be taken the following month, as well as the relevant timelines. Additionally, if there is any material change to Parliament's estimate that the Bill will be passed by 30 September 2022, Parliament and the Minister must be required to report on affidavit immediately to this Court explaining the reasons for and the consequences of the change.

Second respondent's submissions

[44] Ms Revell filed submissions regarding the urgency of the application and any prejudice that may be suffered if the extension sought was granted.

[45] Regarding urgency, Ms Revell submits that the application is urgent because all necessary steps must be taken timeously to complete the process before the next election. Ms Revell also submits that Parliament and the Minister created the urgency themselves. Therefore, it would be inappropriate to grant the relief sought.

[46] Regarding any prejudice that may be suffered in granting the extension, Ms Revell submits that her right to stand at the next election will, in all probability, be prejudiced. She submits that the extension would result in a flawed process being perpetuated and would be a waste of time. This might also mean that the next election will be postponed. Ms Revell makes plain that she intends to seek relief that

Parliament be directed to take steps to ensure public involvement in the deliberative stage of legislative amendments.

[47] Ms Revell opines that she is not confident of the Bill passing within six months and submits that a reasonable amount of time is required to ensure that a constitutionally compliant process is followed.

Sixth respondent's submissions

[48] Regarding the steps taken by the Minister to give effect to the order, the Minister avers that on 11 February 2021, an MAC was established to identify the extent of the legislative and policy reform required to give effect to the order. On 9 June 2021, the MAC presented a report on electoral systems reform to the Minister. Once the Minister had considered the report, legislative drafters were appointed to prepare the Bill. As a result of procurement delays, the external counsel appointed to draft the Bill were only briefed on the MAC's report on 9 October 2021. On 19 November 2021, a draft Bill was sent to Cabinet and on 29 December 2021, the Minister introduced the Bill in terms of the Joint Rules of Parliament. Thereafter, according to the Minister, the Bill became a matter to be dealt with by Parliament.

[49] The Minister states that prior to 29 December 2021, it was not possible to determine whether an extension of the suspension period would be required and after 29 December 2021 it was for Parliament to seek an extension.

[50] The Minister supports Parliament's application to extend the suspension period and submits that no prejudice will arise because it will still be possible for the Bill to be finalised in time for elections in 2024.

Seventh respondent's submissions

[51] The Commission made submissions regarding the urgency of the application and any prejudice that may be suffered in granting the extension sought.

[52] The Commission submits that it will require approximately 18 months from receipt of constituency boundaries to the election date in which to prepare. The earliest possible election date is 22 May 2024, and the last constitutionally permissible date is 14 August 2024.

[53] On urgency, the Commission submits that, considering that the suspension period is due to expire, the application ought to be considered on an expedited basis. The Commission further submits that this Court's decision will impact the Commission's planning and time frames to give effect to the amendment. The Commission indicates that it requires 86 days to plan the election timetable and planning can only commence after the date of proclamation. The Commission submits that, because this matter is of great public interest, in light of the constitutional considerations arising as a result of the proposed amendments, this application is manifestly urgent. The Commission relies on this Court's decision in *Electoral Commission of South Africa*[17] where this Court held that an application for an extension "does not involve grand jurisprudence, but a practical and just exercise of this Court's powers in managing the Commission's duties".[18]

[54] Regarding prejudice that may be suffered in granting the extension, the Commission makes submissions in respect of: (a) the enactment of the Bill in its current form; and (b) the enactment of the Bill in the event that new sub-provincial constituencies are introduced in the final enactment.

[55] Should the Bill be enacted in its current form, a six-month extension to 10 December 2022 will not cause prejudice to the Commission and, in particular, the public.

[17] *Electoral Commission of South Africa v Speaker of the National Assembly* [2018] ZACC 46; 2019 (3) BCLR 289 (CC).

[18] Id at para 5.

[56] The Commission submits that if the Bill is amended to include new sub-provincial constituencies, it would be impossible for it to implement the provisions of the newly enacted Electoral Act in time for the 2024 elections, and additional time would be required. The Commission indicates that in 2020, it informed the Portfolio Committee that an electoral system with sub-provincial constituencies needed to have been finalised in October 2021. In respect of the 2024 national and provincial elections, if the new Electoral Act includes sub-provincial constituencies, the additional six-month extension sought would prejudice the Commission in respect of the time frames required to give effect to the constitutional imperative of free and fair elections.

[57] The Commission makes plain that preparations to configure the electoral infrastructure and administration to accord with the new electoral system would require time frames well beyond the constitutionally prescribed election date. Additionally, the public must be educated on the new electoral system.

[58] The Commission makes no submissions on the prospects of passing the Bill during the extended period of suspension, as it has no influence over the legislative programme that Parliament is constitutionally obligated to implement.

Analysis

Urgency

[59] The suspension period was set to expire on 10 June 2022. After this date, Parliament would have been in contravention of the order. Though this urgency has in large measure been created by the dilatory conduct of the Minister and Parliament in bringing the extension application, conduct that is to be deprecated, this Court must nevertheless assume the burden of determining the matter on an urgent basis to avoid Parliament's otherwise inevitable passage into contravention. Parliament and the Minister should not have placed this Court and the other interested parties in this

position. But this does not detract from the accomplished fact that this matter is urgent and must be dealt with as such.

The application for extension

[60] This Court can grant an extension pursuant to its powers to grant a just and equitable remedy in terms of section 172(1)(b) of the Constitution. The overarching consideration in exercising this power is the interests of justice.[19] However, this Court has stated that "extensions should be granted with great caution and 'not be granted simply as a matter of course or at the last minute'".[20] There are certain factors that must be considered in determining whether to grant an extension. They include—

(a) the sufficiency of the explanation provided for failing to comply with the original period of suspension;
(b) the potential prejudice that is likely to follow if an extension is or is not granted; and
(c) the prospects of curing the constitutional defects within the new deadline or, more generally, the prospects of complying with the deadline.[21]

The power to extend the period of suspension of a declaration of invalidity should be exercised sparingly.[22]

The explanation for failing to comply with the original period of suspension

[61] It is trite that court orders must be complied with. As this Court has previously stated, "[i]t is imperative to the rule of law and the functioning of our constitutional

[19] *Minister of Justice and Correctional Services v Ramuhovhi* [2019] ZACC 44; 2020 (3) BCLR 300 (CC) (*Ramuhovhi*) at para 9.

[20] *Electoral Commission of South Africa* above n 17 at para 69.

[21] *Teddy Bear Clinic* above n 15 at para 12.

[22] *Ramuhovhi* above n 19 at para 9.

democracy that court orders are respected".[23] It has now become clear that Parliament will not be able to comply with the order.

[62] There is much to be said for the characterisation offered by New Nation and Ms Revell in their submissions that Parliament and the Minister are engaged upon an exercise to blame each other and thereby shift accountability. The Minister provides no explanation for what transpired from June 2020 to February 2021 when the MAC was appointed. As a result, the Minister did not in fact take all reasonable measures to give effect to the order. Parliament awaited the Minister's introduction of the Bill. When it was so long delayed, Parliament should have taken steps to introduce a bill, without reliance on the Minister. This it failed to do. However, I do note the steps taken by Parliament to comply with the order.[24] Although the order was directed to Parliament to cure the unconstitutionality of the Electoral Act, one cannot ignore the belated proposals by the Minister which evidently added to the delay. However, Parliament should have done more. Having recognised the delay caused by the Minister, Parliament could have, and indeed should have, introduced the Bill itself. Naturally, it follows that it was also incumbent on Parliament to file an extension application in a timeous fashion.

[63] I do not, however, agree with New Nation and Ms Revell that Parliament's reasons are vague. In fact, the detailed timelines and actions taken by Parliament from June 2020 to November 2021 evidences that it sought to give effect to this Court's order. However, Parliament still attempts to escape accountability by alleging that it did not introduce the Bill because it was waiting for the Minister to do so. Compliance with this Court's order rests with Parliament. If the Minister is dilatory, Parliament will not be excused from its duty to meet the deadlines imposed by a court order.

[23] Id at para 12.

[24] See [29].

[64] However, the inadequacy of Parliament's explanation for failing to introduce the Bill and to file the extension application in a timeous fashion are not the only factors to consider so as to decide whether to grant the extension sought. The overarching consideration in exercising this power is the interests of justice. Therefore, the extension application ought to be decided, not simply on the basis of past failures, but what might yet be done to bring about compliance and secure the opportunity for independent candidates to offer themselves for office at the next general election.

Potential prejudice

[65] Parliament, the Minister and the Commission have indicated that no prejudice will arise if the six-month extension is granted, because there will still be sufficient time to finalise the Bill in time for the elections in 2024. On the other hand, if the extension is refused, Parliament will not be able to comply with the order.

[66] The Commission qualifies its submissions regarding the potential prejudice that may arise. The Commission has indicated that, provided that the Bill is adopted in its current form, it will not suffer any prejudice. However, if the Bill introduces new sub-provincial constituencies, then the legislative process ought to have been finalised in October 2021, so as to have allowed the Commission sufficient time to prepare for the 2024 elections. Neither Parliament nor the Minister has indicated whether the Bill will make provision for sub-provincial constituencies.

[67] New Nation submits that it is not confident that the Bill will be passed into law within the additional six months. Ms Revell submits that her right to stand as an independent candidate will, in all probability, be prejudiced. Additionally, she submits that the public participation process has been constitutionally wanting and an extension would result in a flawed process being followed.

[68] Parliament would do well to note the concerns that have been raised. Parliament has confirmed that a six-month extension will suffice to pass the remedial legislation into law. It gives that assurance, alive to the requirements of proper public participation and that, on no account, may the next election take place without independent candidates being able to offer themselves for elected office. We may take this assurance as the basis for the extension that Parliament now seeks. But should it fail in its efforts, within the further time afforded to it, then the more sombre prognostications of New Nation and Ms Revell will have considerable purchase. Parliament may then expect warranted scepticism as to its further assurances. The Commission, as the entity responsible for planning the 2024 elections, considers, save for one caveat, that the extension will permit of compliance. We place some store by the Commission's evaluation. The more dire predictions of Ms Revell are, at this point, speculative.

[69] I note however the Commission's estimation that if the Bill introduces new sub-provincial constituencies, then the legislative process ought to have been finalised in October 2021. The Commission communicated this to the Portfolio Committee last year. Therefore, Parliament is well aware of this fact. It is not for this Court to dictate to Parliament how it will legislate to demarcate constituencies. We proceed on the basis that Parliament has given the assurances it has to this Court, well knowing the position of the Commission.

The prospects of curing the constitutional defects within the new deadline

[70] It is necessary first to assess the extent of Parliament's compliance with the *New Nation Movement II* order before determining whether there are prospects of reaching compliance, if an extension is granted.[25]

[25] See *Electoral Commission of South Africa* above n 17 at para 72.

[71] I have already indicated the steps taken by Parliament in the legislative process. Furthermore, Parliament avers that there was an extensive public participation process, including deliberations and advice from bodies such as Parliament's Legal Services, the Portfolio Committee and the Department of Home Affairs. Parliament also provided a list of the actions to be taken, and their deadlines. These actions appear to be achievable within the extended period sought, based on Parliament's assurances. I am thus satisfied that, on the evidence before us, Parliament has met its burden to show that it will be able to finalise the Bill's legislative process by 10 December 2022.

[72] In the circumstances, it is in the interests of justice that an extension of the period of suspension be granted.

Relief sought by the first and second respondents

[73] I now turn to deal with the relief sought by New Nation and Ms Revell, not on the basis of their counter-applications, which we decline to entertain, but rather because that relief falls within our remedial powers and was raised in their submissions.

[74] This Court found in *Teddy Bear Clinic I*[26] that potential remedies, including severance and reading-in, might have unintended consequences. There may be cases in which a reading-in is warranted so as to provide Parliament with the incentive to act promptly and to provide for a remedial outcome if Parliament does not do so. I am unpersuaded that this is such a case. Parliament and the Commission consider the extension adequate to permit Parliament to carry out its legislative duty. What a reading-in should contain would require extensive submissions from the parties; it would entail careful deliberation by this Court; and all in a time period entirely inadequate for the purpose.

[26] See *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 108. This was reiterated by this Court in *Teddy Bear Clinic* above n 15 at para 18.

[75] New Nation and Ms Revell contend that if this Court agrees with them regarding the reading-in remedy, it should direct the parties to file written submissions and set the application down for a hearing as to an appropriate reading-in order. This relief is not warranted in this case at this point of the Parliamentary process.

[76] Parliament's description of the research and actions undertaken to amend the Electoral Act indicate just how policy-laden the legislative choices that Parliament must make are. It is a process that requires not just the parties that are before us to provide submissions, but also to allow other interested parties and the public to have their say. Furthermore, the amendments to the Electoral Act may also require amendments to other legislation. In these circumstances, a reading-in is not, at present, a warranted remedy.

[77] New Nation and Ms Revell also seek supervisory relief from this Court. If this Court grants the extension, they seek an order directing Parliament to file monthly reports on the legislative process.

[78] This Court's power to grant mandatory relief includes the power, where it is appropriate, to exercise supervisory jurisdiction to ensure that its orders are implemented.[27] Supervisory orders of this kind should not become a routine part of this Court's exercise of its remedial powers. Such orders may in particular cases be necessary. But they add to the significant burdens this Court already carries. In this case, Parliament has indicated, in detail, the steps it has taken to give effect to the order and those steps it plans to take. Although Parliament is not free of blame, it has not acted in disregard of the order. It needed to do more, and there is more to be done. But there is reason to think it will do so. A supervisory order is not, on balance, warranted in these circumstances.

[27] *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 103 (CC) at para 104.

[79] I also do not see the need to declare that Parliament and the Minister have failed to comply with the order granted in *New Nation Movement II*. Parliament has not been able to comply within the time permitted by our order. To declare that to be so would serve no purpose. The application to extend the period of suspension is to save Parliament from breaching our order after 10 June 2020. And since that extension should, in my view, be granted, there is no failure of compliance for us yet to declare.

Costs

[80] Ms Revell asks this Court to order Parliament, alternatively the Minister to pay the costs of the principal application and her counter-application. Ms Revell has brought matters of importance to the attention of this Court, but in light of the assessment we make of the principal application and the fate of her counter-application, it is appropriate that no order is made as to costs.

Order

[81] In the result, the order set out in paragraph 3 was then made on Friday, 10 June 2022.

For the Applicants:	N Maenetje SC and M Vassen instructed by Walkers Attorneys
For the First Respondent:	T Ngcukaitobi SC, J Mitchell and K Premhid instructed by Maphalla Mokate Conradie Incorporated
For the Second Respondent:	A Nelson SC and C Brown instructed by Marais Muller Hendricks Incorporated
For the Sixth Respondent:	State Attorney, Cape Town
For the Seventh Respondent:	L Gcabashe SC and R Molefe instructed by Moeti Kanyane Incorporated