Response
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Independents Get Their Day

Yesterday's Constitutional Court judgement paving the way for independent candidates to stand for seats in the National Assembly and provincial legislatures is the second in just under two years to assert the rights of the citizenry against the power of political parties. In June 2018 the Court ruled that people have the right to information about the funding of parties; now, it has ruled that the electoral monopoly hitherto enjoyed by parties is unconstitutional.

Parliament will have two years in which to amend the Electoral Act, meaning that individual citizens will be able to contest the general election scheduled for 2024 as independent candidates without party affiliation. The ruling does not apply to the municipal elections due in 2021.

It is strange, in a way, that it has taken so long to reach this point. Section 19(3)(b) of the Constitution lays down that "[e]very adult citizen has the right to stand for public office and, if elected, to hold office." That seems clear enough, but section 46 of the Constitution says that national legislation must prescribe the system whereby people are elected to the National Assembly. And when Parliament adopted that 'national legislation', the Electoral Act of 1998, it decided – or perhaps just assumed – that membership of a political party, and nomination on that party's election list, would be the sole method whereby an individual could acquire a seat in the National Assembly or a provincial legislature.

Since Parliament consisted then, as now, exclusively of political party appointees, it is perhaps not too surprising that it did not choose to accommodate the aspirations of prospective independent candidates. But one of the glories of our system is that the courts can be asked to check that Parliament has got things right, and if they find that it has not, they can require it to correct the mistake. This is what the ConCourt has done, and it is worth noting that this is the umpteenth time that it has done so as a result of litigation initiated and enriched by civil society organisations.

Will this decision make a noticeable difference to the composition of Parliament, and to the way our politics is conducted? The answer depends on whether any independent candidates succeed in winning a seat, and on how effective they manage to be once elected.

There are 400 seats in the National Assembly, which means that a candidate must win 0.25% of the vote in order to win a seat. In fact, rounding down can sometimes mean that 0.2% or even slightly less can earn a seat. Depending on how many votes are cast in total, 0.25% usually translates into about 40 000 votes (44 182 in last year's election).

Are there individual South Africans who could pull in that number of votes? One can think of three groups who might potentially succeed. Firstly, people with a strong, but geographically limited, support base. We have already seen a few tiny parties with roots in particular districts winning a seat or two, and it is quite possible that there are a few traditional leaders who could win 40 000 votes from their followers.

Secondly, celebrities from the worlds of sport or entertainment might find it easy to cross the electoral threshold. They will likely have high name-recognition and good media coverage, and possibly also enjoy the trust of a lot of voters. It is also possible to envisage pastors from some 'mega-churches' deciding to try their hand at politics.

Thirdly, there are some well-known and well-respected public figures who would have little difficulty in attracting the required number of votes. People like the former Public Protector, Thuli Madonsela, for example, or the educationalist Prof Jonathan Jansen (neither of whom, it must be noted, have expressed any such interest) come to mind.

On the other hand, our electorate has shown deep party loyalty over the years, and it might well be that even highly credible and popular independent candidates would struggle to overcome that built-in advantage that parties enjoy.

If a handful of independents managed to secure seats, they would find themselves facing a number of obstacles. They would have no party back-up and support staff, researchers or assistants – this is something that has constantly handicapped some of the smaller, less resourced parties. They would also lack access to the mentoring and tutoring that senior party MPs can provide for tyro colleagues.

Most importantly, each of them would be able to sit on only a handful of portfolio committees, and thus be limited to dealing with just a few areas of legislation. Again, this has been the experience of some of the two- and three-member parties, and while some have elevated committee-hopping to a fine art, and have wielded influence well beyond their numbers, others have tended to fade into obscurity.

We should probably not expect, therefore, that after 2024 Parliament will look and work very differently from the way it does now. Nevertheless, if the right kind of independent candidate makes it to the benches, they might just add a spark or two.

Lastly, this decision presents the legislature and the Electoral Commission with the challenge of amending the Electoral Act to accept independent candidates. It can easily be envisaged that a number of 'no-hoper' independents might be prepared to gamble their deposit on the chance of a lucrative seat in Parliament. If even 30 or 40 do so, their names, added to the 48 parties that contested the 2019 election, would make for a cumbersome and confusing ballot paper. Raising the deposit fee in order to discourage no-hopers would, of course, be against the whole tenor of the recent judgement, and would probably be ruled unconstitutional.

It has already been suggested that a shift towards a partial constituency system might help to accommodate independents. That might be so, but there has not been much of an appetite among the larger parties up to now for such a move. Either way, how Parliament goes about legislating this important change in our electoral system will be interesting to watch.

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