CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 97/24

In the matter between:

ELECTORAL COMMISSION OF SOUTH AFRICA	Applicant
and	
UMKHONTO WESIZWE POLITICAL PARTY	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MAROBA MATSAPOLA	Third Respondent
BETHUEL TERRENCE NKOSI	Fourth Respondent
and	
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First Amicus Curiae
CORRUPTION WATCH (RF) NPC	Second Amicus Curiae
AHMED KATHRADA FOUNDATION	Third Amicus Curiae
BLACK LAWYERS ASSOCIATION	Fourth Amicus Curiae

Neutral citation:	*Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* [2024] ZACC 6
Coram:	Maya DCJ, Bilchitz AJ, Gamble AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J

Judgment: Theron J (unanimous)

Heard on: 10 May 2024

Decided on: 20 May 2024

Summary: Recusal — double requirement of reasonableness — narrow and defined legal issue — no reasonable apprehension of bias

Section 47(1)(e) of the Constitution — eligibility to stand for the National Assembly — convicted and sentenced to more than 12 months' imprisonment — interpretation — section 47(1)(e) apply when no right of appeal — remission not affect sentence under section 47(1)(e) — applies to civil contempt convictions

Electoral Act 73 of 1998 — section 30(1)(a) — Electoral Commission's powers — empowered to determine qualification for membership of the National Assembly

Reasonable apprehension of bias — Electoral Commission — indirect reference-by-implication cannot result in a reasonable apprehension of bias

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ORDER

On appeal from the Electoral Court:

1. The applicant is granted leave to appeal directly to this Court.
2. It is declared that Mr Zuma was convicted of an offence and sentenced to more than 12 months' imprisonment for purposes of section 47(1)(e) of the Constitution and is accordingly not eligible to be a member of, and not qualified to stand for election to, the National Assembly until five years have elapsed since the completion of his sentence.
3. The order of the Electoral Court is set aside and replaced with the following:

   "The appeal is dismissed."
4. The counter-application is dismissed.

5. There is no order as to costs in this Court.

JUDGMENT

THERON J (Maya DCJ, Bilchitz AJ, Gamble AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J and Tshiqi J concurring):

Introduction

[1] Section 47(l)(e) of the Constitution disqualifies anyone "convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine" from being a member of the National Assembly. A disqualification under section 47(1)(e) ends five years after the sentence has been completed. In *Secretary of the Judicial Commission of Inquiry* (contempt judgment),[1] this Court found Mr Jacob Gedleyihlekisa Zuma, the second respondent and former President of the country, guilty of the crime of contempt of court and sentenced him to 15 months' imprisonment without the option of a fine.

Background

[2] On 28 January 2021, this Court ordered Mr Zuma to appear and give evidence before the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, commonly known as the State Capture Commission.[2] Mr Zuma did not comply with this Court's order.

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[1] *Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) (*contempt judgment*).

[2] Id at para 142.

[3] On 29 June 2021, this Court delivered judgment in a subsequent application brought by the State Capture Commission. These are the relevant parts of this Court's order:

> "3. It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2.
> 4. Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months' imprisonment."[3]

[4] Mr Zuma started serving his sentence on 8 July 2021. On 5 September 2021, the National Commissioner of Correctional Services released Mr Zuma on medical parole. On 15 December 2021, the High Court declared Mr Zuma's release unlawful and set it aside. On 21 November 2022, the Supreme Court of Appeal dismissed an appeal against the High Court's decision.[4] This Court dismissed an application for leave to appeal on 13 July 2023.

[5] Mr Zuma went back to prison on 11 August 2023. On the same day, the President, acting in terms of section 84(2)(j) of the Constitution, issued Proclamation Notice 133 of 2023,[5] in terms of which he granted a special remission of sentences for sentenced offenders convicted of non-violent crimes. The remission applied to more than 9 000 sentenced offenders, including Mr Zuma. He was released from prison on 11 August 2023 after having served three months of his original sentence.

[6] On 8 March 2024, the Umkhonto Wesizwe Political Party (MK Party), the first respondent in this matter, submitted its list of candidates to the

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[3] Id.

[4] *National Commissioner of Correctional Services v Democratic Alliance (with South African Institute of Race Relations intervening as Amicus Curiae)* [2022] ZASCA 159; 2023 (2) SA 530 (SCA) (*National Commissioner of Correctional Services*).

[5] Proc R133 GG 49106 of 11 August 2023.

Electoral Commission of South Africa (Commission) for the upcoming election. The MK Party included Mr Zuma in its list of candidates for the National Assembly. The MK Party's list, along with the lists of other parties contesting the election, were open for public inspection on 26 and 27 March 2024.

[7] Section 30 of the Electoral Act[6] allows any person to object to the nomination of a candidate on several grounds, including that the candidate "is not qualified to stand in the election". The Commission received 22 objections to Mr Zuma's eligibility to stand for the election based on section 47(1)(e) of the Constitution. On 28 March 2024, the Commission upheld two of those objections, including objections from Dr Maroba Matsapola (third respondent) and Mr Bethuel Terrence Nkosi (fourth respondent). The fourth respondent later distanced himself from his objection. The third and fourth respondents have not participated in these proceedings. The Commission also indicated that any aggrieved party may refer its decision to the Electoral Court in terms of section 30(4) of the Electoral Act.

[8] On 2 April 2024, the MK Party and Mr Zuma (respondents) appealed to the Electoral Court against the Commission's decision. On 9 April 2024, the Electoral Court upheld the appeal. The Electoral Court delivered its reasons for its order on 26 April 2024.[7]

[9] On 12 April 2024 and before the reasons of the Electoral Court were delivered, the Commission brought an urgent application in this Court, seeking leave to appeal to it directly. The Commission seeks leave to file a supplementary affidavit subsequent to the delivery of the reasons by the Electoral Court.

[6] 73 of 1998.

[7] *Umkhonto Wesizwe Political Party v Electoral Commission of South Africa* 2024 JDR 1712 (EC) (*Electoral Court judgment*).

Electoral Court judgment

[10] The Electoral Court set aside the Commission's decision. Three judgments were penned by the panel. Zondi JA rejected the argument advanced by the respondents that a remission of sentence cancels or extinguishes the remainder of a sentence.[8] He reasoned that it would offend the separation of powers for the President to undo what the judiciary has done through a remission. Zondi JA nonetheless concluded that this Court's sentence is not a sentence of the nature envisaged in section 47(1)(e) as Mr Zuma could not appeal against the conviction and sentence.[9] The other four members of the Electoral Court agreed with that latter proposition.[10]

[11] Modiba J wrote the second judgment, concurred in by Professor Ntlama-Makhanya and Professor Phooko. Modiba J reasoned that the effect of the remission of Mr Zuma's sentence was to reduce the sentence to three months imprisonment.[11]

[12] Yacoob AJ wrote the third judgment. She disagreed with Zondi JA's separation of powers concerns and disagreed with Modiba J's reasoning on the effect of remission. She agreed with Zondi JA's reasoning on the interpretation of section 47(1)(e) and the effect of the proviso in section 47(1)(e) concerning the availability of an appeal.[12]

[13] Despite their disagreement on the reasons for their order, all five members of the Electoral Court rejected the respondents' other arguments that: (i) the

[8] Id at paras 37-44.

[9] Id at paras 45-51.

[10] Id at paras 54 and 86.

[11] Id at paras 67-82.

[12] Id at paras 90 and 96.

Commission exceeded its powers;[13] (ii) there was a reasonable apprehension of bias;[14] and (iii) that Mr Zuma was not convicted of an offence.[15]

Issues

[14] The Commission's urgent application for leave to appeal directly to this Court is the main application. On 3 May 2024, the respondents filed an application for the recusal of Madlanga J, Majiedt J, Mhlantla J, Tshiqi J and myself, as well as an application for leave to cross-appeal. The application for leave to cross-appeal arises only if this Court finds against the respondents in the main application.

[15] The issues arising in this matter from both the application for leave to appeal directly and the cross-appeal are:

(a) the filing of a supplementary affidavit by the Commission;
(b) whether certain judges of this Court ought to recuse themselves from these proceedings;
(c) jurisdiction and leave to appeal;
(d) the proper interpretation of section 47(1)(e) of the Constitution;
(e) the effect of remission of a sentence in excess of 12 months' imprisonment to a sentence of 12 months' imprisonment or less;
(f) whether the Commission exceeded its powers;
(g) whether there was a reasonable apprehension of bias that vitiated the Commission's decision; and
(h) whether Mr Zuma was convicted for the purposes of section 47(1)(e).

[13] Id at paras 21-7, 54 and 86.

[14] Id at paras 28-32, 54 and 86.

[15] Id at paras 33-6, 54 and 86.

Analysis

Filing of a supplementary affidavit by the Commission

[16] The Commission seeks leave to file a supplementary affidavit subsequent to the delivery of reasons by the Electoral Court. The Commission dealt with the Electoral Court's reasoning in its supplementary affidavit.

[17] Due to the urgent nature of the matter, the Commission brought the main application in this Court before the Electoral Court's reasons were delivered and this necessitated the filing of a further affidavit. In the circumstances, the Commission is granted leave to file the supplementary affidavit.

Recusal application

[18] On 3 May 2024 the respondents brought a counter-application alleging that they hold a "firm view", alternatively, a reasonable apprehension, that six judges of this Court ought to recuse themselves from these proceedings because they are tainted by bias, owing to the fact that they were members of the bench in the contempt proceedings. The counter-application named Madlanga J, Majiedt J, Mhlantla J, Tshiqi J and me as being tainted by bias.

[19] The nub of the discontent of the respondents is that the judges who sat in the contempt proceedings would, in this application, be required to interpret the contempt judgment, which they argued would lead to a reasonable apprehension of bias. The respondents did not rely on actual bias. They further submit that the judges concerned are unlikely to approach the questions to be determined in this application with the requisite open mind. They say that the apprehension of bias was exacerbated by this Court's refusal of Mr Zuma's application for leave to appeal against the decision of the Supreme Court of Appeal in *National Commissioner of Correctional Services,*[16] which related to the setting aside of his medical parole by that Court.

[16] *National Commissioner of Correctional Services* above n 4.

[20] The respondents also sought the recusal of Zondo CJ on the basis that he was the complainant in the contempt judgment. This was before the respondents were aware that Zondo CJ had recused himself. Zondo CJ recused himself when the application came before this Court and was not part of these proceedings. The respondents acknowledged this at the hearing.

[21] The Black Lawyers Association was admitted as the fourth *amicus curiae* (friend of the court). It sought to provide assistance to this Court on why the recusal application should be granted. It contended that the judges should be recused and that if they are, the doctrine of necessity[17] does not apply as acting judges could be appointed to hear this matter in terms of section 175(1) of the Constitution.[18] That submission was rejected by this Court in *Hlophe*.[19] This was the sum total of their submissions.

[22] The Commission contends that there is no basis for a reasonable apprehension of bias and that the respondents fall far short of satisfying the test for recusal.

[23] At the hearing of this matter on 10 May 2024, and after the Court had adjourned to reflect on the recusal point, the individually named judges declined to recuse themselves. As a result, this Court dismissed the application and indicated that reasons would follow in the main judgment.

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[17] The doctrine of necessity permits an adjudicator, who is subject to a disqualification at common law (for example, bias), to sit if there is no other competent tribunal or if a quorum cannot be formed without them. It is applied to prevent a failure of justice. See De Smith *Judicial Review of Administrative Action* 4 ed at 276.

[18] Section 175(1) of the Constitution states:

> "The President may appoint a woman or a man to serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges who had been appointed to the Constitutional Court in terms of section 174(4)."

[19] *Hlophe v Premier of the Western Cape Province; Hlophe v Freedom Under Law* [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567 (CC) at para 42.

[24] This Court, in *Bernert*[20] set out the test for recusal, which imposes a burden of proof on an applicant for recusal based on the "presumption of impartiality and the double requirement of reasonableness". The Court said:

> "The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '[j]udges do not choose their cases; and litigants do not choose their judges.' An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias."[21]

[25] In *SACCAWU* this Court emphasised that the test is one of double reasonableness and explained that "[n]ot only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable".[22]

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[20] *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC).

[21] Id at para 35. See also *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC) (*Masuku*).

[22] *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Limited Seafoods Division Fish Processing* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) (*SACCAWU*) at para 15. See also *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC), where the Court held at para 48:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds

[26] The pleaded basis for recusal is that the judges "are bound to seek to interpret their own previous decision which now lies at the heart of the issues arising in this appeal in such a way as to automatically differ with the unanimous view of the Electoral Court". It is not uncommon for judges to interpret and apply their previous decisions. Judges do this all the time. Judges often hear different matters relating to the same applicant without that providing a justifiable basis for recusal. Leave to appeal and rescission applications are generally brought before the same judge. Further, in the main application, there is no debate that this Court convicted and sentenced Mr Zuma. The only question before this Court is whether Mr Zuma is disqualified to stand as a candidate for the National Assembly in terms of section 47(1)(e) of the Constitution. This case is about the interpretation of section 47(1)(e) of the Constitution: a narrow and defined legal issue that is capable of determination without an interpretation of the contempt judgment. There is no reason why this Court, a court of "careful conscience and intellectual discipline",[23] cannot impartially answer that legal question.

[27] It is not enough that the respondents have a "strongly and honestly felt anxiety".[24] They have failed to prove that there can be any reasonable apprehension that the judges in question would fail to bring an impartial mind to bear on the adjudication of this matter. It is for these reasons that the recusal application was dismissed.

Jurisdiction and leave to appeal

[28] This Court has constitutional jurisdiction because Mr Zuma's eligibility to stand for election turns on the proper interpretation and application of section 47(l)(e) of the Constitution in circumstances where, by law, an appeal is not available or a

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on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial".

[23] *Masuku* above n 21 at para 58.

[24] *SACCAWU* above n 22 at para 17.

custodial sentence has been remitted by the President. Further, it raises the question of the role of the Commission in deciding eligibility for membership of the National Assembly.

[29] Is it in the interests of justice to grant leave to appeal? The consequences of the contempt judgment, and in particular the effect of a conviction and sentence on eligibility for the National Assembly, is of public interest. The general public needs to know if candidates on a party list are eligible to be members of the National Assembly. The issues raised in this appeal "transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public".[25] There needs to be finality on Mr Zuma's eligibility to stand in the election to be held on 29 May 2024.

[30] An appeal to the Supreme Court of Appeal and, thereafter, possibly to this Court is not feasible before 29 May 2024. This Court also has the benefit of the judgment of the Electoral Court, a specialist court. There are no material disputes of fact and the appeal turns on narrow questions of law. As will soon become plain in this judgment, the appeal has reasonable prospects of success. In these circumstances, a direct appeal is in the interests of justice and leave to appeal must be granted.

Interpretation of section 47(1)(e) of the Constitution

[31] Section 47 of the Constitution deals with eligibility to be a member of the National Assembly. This section states:

> "47. Membership
> (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except—
> . . .

[25] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 26.

> (e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed."

[32] Section 47(1)(e) contains two elements. First, it imposes a substantive disqualification. It disqualifies anyone convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine from being eligible to be a member of the National Assembly. Second, it contains a proviso, which is procedural in nature. The purpose of the proviso is to specify the time at which the substantive disqualification becomes operational. The proviso says that the time at which a person is regarded as having been sentenced is when either: (a) an appeal against the conviction or sentence has been determined; or (b) the time for such appeal has expired. The proviso is akin to a deeming provision insofar as it deems things to be what they are not[26] – an offender is not regarded as having been convicted and sentenced for purposes of the disqualification as there is a chance of the conviction and sentence being overturned on appeal.[27]

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[26] *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari* [2018] ZASCA 34; 2018 (4) SA 206 (SCA) (*Eastern Cape Parks*) at para 29.

[27] Section 42(1)(b) of the interim Constitution contained an almost identical disqualification and provided that no person shall become or remain a member of the National Assembly, inter alia, if he or she "at any time after the promulgation of this Constitution is convicted of an offence . . . for which he or she has been sentenced to imprisonment of more than 12 months without the option of a fine, unless he or she has received a pardon". The proviso to this disqualification in section 42(2) was expressly worded as a deeming provision and provided:

> "For the purposes of subsection (1)(b) no person shall be deemed as having been convicted of an offence until any appeal against the conviction or sentence has been determined, or, if no appeal against the conviction or sentence has been noted, the time for noting such an appeal has expired."

[33] The respondents argue, and the Electoral Court held, that the conviction and sentence contemplated in section 47(1)(e) of the Constitution is one that is appealable. Since Mr Zuma could not appeal against his sentence imposed by this Court, the sentence imposed on him is not a "sentence" for the purposes of section 47(1)(e). On this interpretation, where the conviction and sentence are imposed by this Court acting as a court of first and last instance, the disqualification from standing for and holding office will never come into operation.

[34] The Commission argued that the meaning of the text of section 47 is clear: anyone "convicted of an offence and sentenced to more than 12 months' imprisonment" without the option of a fine is not eligible to serve in the National Assembly. It submitted that Mr Zuma is disqualified from standing for election, and it correctly upheld the objection against his candidacy. That was so, because he was "convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine".

[35] The submissions made by the first to third *amici* supported the interpretation advanced by the Commission that the conviction and sentence which section 47(1)(e) contemplates are those that are final. On this interpretation, where it is this Court, acting as a court of first and last instance, that has convicted and sentenced, the disqualification will come into operation immediately as the conviction and sentence are final and immune from appeal. The requirement that an available appeal process must first be exhausted is designed to ensure finality and nothing else. Premature disqualification would otherwise be a possibility. Where it is this Court that convicts and sentences, its decision is final and not subject to an appeal process. Put differently, in such an instance, the question of an appeal simply does not arise. The relevant offender is thus finally convicted and sentenced for purposes of section 47(1)(e).

[36] There is merit in the argument advanced by the Commission and the first to third *amici*. If the position were to be otherwise, the proviso would effectively

displace the substantive part of section 47(1)(e). That cannot be so. For clarity, the substantive part stipulates the basis of ineligibility. This approach accords with jurisprudence. In *Mphosi*[28] the Appellate Division considered an argument that a proviso in a statute conferred a claim for general damages, notwithstanding the fact that the general provisions of the statute precluded such a claim.[29] The Appellate Division rejected the argument:

> "This argument altogether overlooks the true function and effect of a proviso. According to Craies, *Statute Law*, 7th ed., at p. 218—
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> > 'the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect'.
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> In *R. v Dibdin*, 1910 P. 57, Lord Fletcher Moulton at p. 125, in the Court of Appeal, said—
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> > 'The fallacy of the proposed method of interpretation (i.e. to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment.'
>
> . . .
>
> The second proviso to section 11(1) cannot be construed as an independent enacting clause having the effect of imposing an obligation upon a registered company which has been precluded by the first proviso. It can only be construed as being dependent on the substantive provisions of section 11(1).
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> . . .

[28] *Mphosi v Central Board for Co-Operative Insurance Ltd* 1974 (4) SA 633 (A) (*Mphosi*).

[29] Id at 645A-B.

> The second proviso clearly cannot be construed as creating new rights of action against a registered company."[30]

[37] Based on this authority, which I endorse, the proviso in section 47(1)(e) cannot have the effect contended for by the respondents. This conclusion is buttressed by the purpose of the disqualification and the purpose of the proviso, both of which I now consider.

The purpose of the disqualification

[38] Section 47(1)(e) disqualifies persons with a conviction and a sufficiently serious sentence from membership of the National Assembly. According to the Commission and the first to third *amici*, the disqualification contained in section 47(1)(e) is aimed at maintaining the integrity of South Africa's democratic regime, which is founded on the rule of law, by ensuring that members of the National Assembly are not serious violators of the law.[31]

[39] The respondents contend that the disqualification must be interpreted and applied against the backdrop of the rights under section 19 of the Constitution, as the proviso preserves the political rights of certain lawbreakers.[32]

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[30] Id at 645.

[31] *Electoral Court judgment* above n 7 at para 50. The Electoral Court held that the purpose of section 47(1)(e) is to "maintain the integrity of the electoral process by ensuring that those that campaign for public office and elected to hold office are not serious violators of the law".

[32] Section 19 of the Constitution says the following:

> "(1) Every citizen is free to make political choices, which includes the right—
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> (a) to form a political party;
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> (b) to participate in the activities of, or recruit members for, a political party; and
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> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[40] The disqualification signifies that, in certain cases, eligibility for office should not be left to a simple majority decision by the electorate. Section 47(1) sets out the minimum criteria that a prospective parliamentarian must fulfil. Conviction and sentencing are indicators of unfitness for office for a temporary period and reinforce the high standards set by section 47(1) for members of the National Assembly. Further, the length of the sentence imposed demarcates that only sufficiently serious offences will warrant disqualification.

[41] Section 47(1)(e) recognises that the electorate's ability to "screen out" undesirable persons might also be limited by the nature of the electoral system. In a significantly closed-list proportional representation system like the one in South Africa, votes are cast for parties rather than individuals. The list of relevant individuals is determined by the party alone, not the electorate. Section 47(1)(e) therefore limits the ability of a party to foist unsuitable persons on the citizenry.[33]

[42] The European Court of Human Rights has, in a number of cases, examined the purpose of constitutional and legislative provisions of member States disqualifying persons from standing for and holding office. It has held that the disqualification from standing for office and voting, which was imposed by the judge as a collateral consequence for a conviction for a serious offence, pursued a legitimate aim, namely, the proper functioning and maintenance of the democratic regime.[34] In *Ždanoka*,[35] the Court examined a provision in electoral legislation that disqualified persons from standing for election who actively participated in political parties that were involved

[33] As the Venice Commission on the Exclusion of Offenders from Parliament, 23 November 2018, explained at para 146:

> "[T]he influence of citizens on the choice between party candidates may be limited by the internal functioning of the parties or by the electoral system. In other words, in the absence of internal party democracy, a system of closed lists would prevent voters from excluding undesirable characters."

[34] *M.D.U. v Italy*, no 58540/00), ECHR 2003 at 14.

[35] *Ždanoka v Latvia*, no 58278/00, ECHR 2006.

in a coup attempt. The Court recognised that the disqualification served the legitimate aim of protecting the democratic order.[36] It acknowledged that "in order to guarantee the stability and effectiveness of a democratic system, the State may be required to take specific measures to protect it".[37]

[43] In *Paksas*,[38] the European Court of Human Rights examined a provision in electoral legislation that disqualified a person who had been removed from office in impeachment proceedings from standing for election. In that case, the former President of Lithuania had been removed from office in impeachment proceedings following findings by the Constitutional Court that he had committed gross violations of the Constitution and breached his constitutional oath. The former President sought to stand in fresh elections following his impeachment, but was prevented by the eligibility criteria in the electoral legislation.

[44] The Court held that the measure is intended to preserve the democratic order, which constitutes a legitimate aim.[39] The Court said that it is open to a member State to impose restrictions on the electoral rights of a person who has "seriously abused a public position or whose conduct has threatened to undermine the rule of law or democratic foundations".[40]

[45] The jurisprudence of the European Court of Human Rights on the legitimate aims sought to be achieved by eligibility criteria is of salutary guidance in understanding the purpose of section 47(1)(e) of the Constitution. Similar to the eligibility criteria considered by that Court, the purpose of section 47(1)(e) of the Constitution is to protect South Africa's democracy, which is founded on the rule of

[36] Id at para 86.

[37] Id at para 80.

[38] *Paksas v Lithuania*, no 34932/04, ECHR 2011.

[39] Id at para 100.

[40] Id at para 101.

law. Section 1(c) of the Constitution provides that the founding values of South Africa's democracy include supremacy of the Constitution and the rule of law.

[46] The importance of the role played by the National Assembly in South Africa's democracy cannot be overstated. Section 42(3) of the Constitution provides:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action."

[47] This Court in the *Nkandla judgment*[41] emphasised the importance of the role played by the National Assembly. It said:

> "[T]he National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. . . . Parliament also passes legislation with due regard to the needs and concerns of the broader South African public. The willingness and obligation to do so is reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities. In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa."[42]

[48] It is accordingly essential that its members uphold the Constitution and the law. Indeed, members of the National Assembly are required to take an oath or

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[41] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC).

[42] Id at para 22.

solemn affirmation to "obey, respect and uphold the Constitution and all other law of the Republic" before they begin to perform their functions in the National Assembly.[43] The breach of the law and the commission of crime are inconsistent with the rule of law.[44] The drafters of the Constitution accordingly considered it to be of fundamental importance that members of the National Assembly are not serious violators of the law.

[49] In summary, section 47(1)(e) temporarily keeps serious violators of the law out of the National Assembly. The purpose of the disqualification is aimed at maintaining the integrity of South Africa's democratic regime, which is founded on the rule of law, by ensuring that members of the National Assembly possess the requisite respect for the rule of law.

Purpose of the proviso

[50] The respondents argue that the purpose of the proviso to section 47(1)(e) is to safeguard the right to appeal convictions or sentences. The argument continues that where convictions and sentences are not appealable, as is the case in respect of convictions and sentences by this Court, the section cannot apply. If the section was meant to apply to convictions and sentences by this Court, in making reference to appeals, the section would have added "where applicable". The respondents also submitted that the purpose of section 47(1)(e) is to preserve political rights, not to remove them.

[43] Section 48 of the Constitution read with section 4 of Schedule 2.

[44] See *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 80, where this Court said:

> "Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy."

[51] The Commission contends that the proviso in section 47(1)(e) serves a clear constitutional purpose, based on the principle of judicial hierarchy; namely, that until the final word is spoken, the consequences of the conviction and sentence should not be visited upon anyone. It says that the proviso is not a gatekeeper to determine when a sentence is a sentence. The proviso's purpose is, in other words, to regulate the time between a lower court sentencing an individual and an appellate court making a final decision. The simple point is that there is no final sentence until the final court of appeal decides or the time for an appeal has expired. Where the final court has made the decision or the time for an appeal has expired, then there is a final sentence.

[52] The first to third *amici* similarly submit that the proviso acts as a timing mechanism which qualifies the operation of the disqualification until the conviction and sentence are final. That is, until there is no possibility for the conviction and sentence being overturned on appeal. In doing so, the proviso serves a clear purpose. It is aimed at averting a specific harm, that is, where a person is denied their right to contest an election and to hold office, but their conviction and sentence are ultimately overturned on appeal. To avert the harm to such a candidate, the disqualification does not kick in where the candidate has appealed or may still appeal against the conviction and sentence.[45] The purpose of the proviso is to ensure that until a person has exhausted all available means of appeal against a conviction or sentence, he or she is deemed not to be convicted and sentenced. To disqualify a person from seeking public office before their available appeal is finally determined would frustrate this purpose.[46]

[53] The purpose of the proviso is to allow the appeal process to unfold: If the disqualification kicks in immediately, despite there being a possibility that the decision on conviction or sentence may be overturned, the harm occasioned by a

[45] *Auction Alliance (Pty) Ltd v Minister of Police* 2014 JDR 2675 (WCC) at para 35.

[46] The Venice Commission has explained in the Venice Commission on the Exclusion of Offenders from Parliament, 30 June 2015, at para 153 that it "considers that the deprivation of political rights before final conviction is contrary to the principle of presumption of innocence, except for limited and justified exceptions".

person being disqualified from standing for and holding office may not be easily undone if the appeal is ultimately successful.[47] The proviso must furthermore be understood in light of the provisions of section 321 of the Criminal Procedure Act,[48] which, unlike as is the case in civil proceedings, provides that a sentence is not automatically suspended due to the lodging of an appeal. The Legislature, plainly mindful of this provision, had as its purpose with the proviso that all appeal remedies are exhausted before the disqualification takes effect.

[54] In response to the contention by the respondents that section 47(1)(e) does not apply because a sentence imposed by this Court is not appealable, the Commission

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[47] The Supreme Court of Canada recognised that if a disqualification is not suspended and an appeal is ultimately successful, it will be difficult to undo the damage caused by having prevented a person from standing for and holding office. See *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876 at para 49.

[48] 51 of 1977. Section 321 reads:

> "When execution of sentence may be suspended.—
>
> (1) The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless—
>
> . . .
>
> (b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused be released on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided:
>
> Provided that when the accused is ultimately sentenced to imprisonment the time during which he was so released on bail shall be excluded in computing the term for which he is so sentenced: Provided further that when the accused has been detained as an unconvicted prisoner, the time during which he has been so detained shall be included or excluded in computing the term for which he is ultimately sentenced, as the court of appeal may determine.
>
> (2) If the court orders that the accused be released on bail, the provisions of sections 66, 67 and 68 and of subsections (2), (3), (4) and (5) of section 307 shall *mutatis mutandis* [the necessary changes having been made] apply with reference to bail so granted, and any reference in—
>
> (a) section 66 to the court which may act under that section, shall be deemed to be a reference to the superior court by which the accused was released on bail;
>
> (b) section 67 to the court which may act under that section, shall be deemed to be a reference to the magistrate's court within whose area of jurisdiction the accused is to surrender himself in order that effect be given to any sentence in respect of the proceedings in question; and
>
> (c) section 68 to a magistrate shall be deemed to be a reference to a judge of the superior court in question."

and the *amici* relied on the majority in the contempt judgment. This Court stated there that "the Constitution categorically allows the denial of the right of appeal by empowering this Court to entertain matters by way of direct access".[49] The majority in the contempt judgment has spoken on the lack of a right of appeal, and in terms of the principle of *stare decisis* (abide by cases already decided), that judgment constitutes the final word until set aside.[50]

[55] The proviso is not an exhaustive deeming provision.[51] Its effect is that a sentence may be considered final, and the disqualification may come into operation when any appeal has been determined or the time for an appeal has expired. It does not prevent a sentence which is final and immune from appeal, from being a sentence for the purposes of section 47(1)(e). The proviso does not require that there be a right of appeal against a conviction and sentence for the disqualification to apply. The proviso is therefore aimed at ensuring that a person is only disqualified from standing for and holding office once their conviction and sentence are final.

[56] A conviction and sentence imposed by this Court as the court of first and final instance are final and immune from appeal. This means that any suspension of the disqualification would not serve the specific purpose sought to be achieved by the

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[49] *Contempt judgment* above n 1 at para 80.

[50] I stand by my dissent in the *contempt judgment* and the reasons underpinning it, but I do respect and acknowledge the decision of the majority as the final word on this issue.

[51] See the discussion in *Eastern Cape Parks* above n 26 at paras 30-7. See, in particular, para 35, where the Supreme Court of Appeal explained:

> "It is absurd to construe the deeming provision in the manner contended for by Medbury, namely, that the certificate is a 'prerequisite for the protection afforded by the [Games Theft Act 105 of 1991 (GTA)] to apply'. This would defeat the purpose of the GTA, which is to ensure that owners of game, who had in fact taken adequate measures to enclose land in order to confine game do not lose ownership in the event of loss of control due to escape. The result of following Medbury's construction would be that even where the land is *in fact* sufficiently enclosed to confine a species to it, the protection provided for by section 2(1)(a) would be rendered nugatory. The production of a certificate was meant, in the words of Watermeyer CJ, 'to facilitate proof' that the land in issue is sufficiently enclosed to confine the species in question. It was not meant to deprive owners who had taken the necessary measures to sufficiently enclose game on land. The deeming provision in question cannot be extended to preclude another form of proof that the land was sufficiently enclosed so as to confine the relevant game. In that respect, it cannot be conclusive or indisputable."

proviso because there is no possibility of the conviction and sentence being overturned on appeal.

Conclusion on the interpretation of section 47(1)(e)

[57] The Electoral Court reasoned that because Mr Zuma could not appeal this Court's sentence, it is not a "sentence" for purposes of section 47(1)(e).[52] Zondi JA put the matter thus:

> "The drafters of the Constitution recognised the fact that a person convicted and sentenced has a right to appeal against their conviction and sentence, upon leave being granted by the trial court or, if refused, on petition to the superior court. If that fact was not important to them, they would not have inserted the proviso which seeks to preserve the status quo pending the appeal processes. In other words, the conviction and sentence do not take effect until the appeal process has taken place alternatively a convicted and sentenced person has elected to not appeal the conviction and/or sentence. In my view the sentence that was imposed on Mr Zuma cannot be said to be a sentence which the section contemplates. The Commission erred therefore to uphold an objection to Mr Zuma's candidacy on the basis that the sentence that was imposed on him disqualified him from being eligible to be a member of National Assembly."[53]

[58] This reasoning cannot be sustained. It has no support in the text of section 47(1)(e). Section 47(1)(e) applies to anyone who has been "sentenced to more than 12 months' imprisonment". The text does not qualify the words "sentence" and "sentenced" to exclude sentences imposed by this Court. Further, as mentioned, the question of the lack of an ability to appeal was dealt with by the majority in the contempt judgment.[54]

[52] *Electoral Court judgment* above n 7 at paras 49-51 and 54.

[53] Id at para 51.

[54] *Contempt judgment* above n 1 at para 80.

[59] The Electoral Court's judgment and the respondents' contentions are tantamount to equating "until" in section 47(1)(e) to "unless". The difference becomes clear when regard is had to section 42(1)(b) of the interim Constitution,[55] where the word "unless" is used in the context of a pardon.

[60] The interpretation of section 47(1)(e) of the Constitution adopted by the Electoral Court subverts the very purpose sought to be achieved by the section. The Electoral Court's interpretation means that a person convicted and sentenced by this Court as a court of first and final instance is permanently immunised from the disqualification contained in section 47(1)(e). On the Electoral Court's interpretation, the disqualification will *never* kick in because the conviction and sentence are not able to be appealed.

[61] The Electoral Court's judgment commits the fallacy of interpretation that the Appellate Division rejected in *Mphosi*.[56] It interprets the proviso to section 47(1)(e) as an independent enacting clause, the function of which is to alter the meaning of the principal substantive clause to which it stands as a proviso, instead of being dependent on the main enactment. Finally, the Electoral Court's reasoning undermines the authority of this Court, the apex court of the country. It means that had the same sentence been imposed by the Magistrate's Court, Mr Zuma would be disqualified (because there are appeals), but since he was sentenced by this Court, he is not disqualified (because there is no appeal).

[62] There is nothing in section 47(1)(e) to suggest that only a sentence that can be appealed leads to ineligibility to be a member of the National Assembly. The context and purpose indicates that the provision does not render the right of appeal a necessary condition before being constitutionally disqualified. Rather, the provision

[55] See fn 27 above.

[56] *Mphosi* above n 28 at 645.

reflects the position that where an appeal is available, the timing of any disqualification would be aligned with the appeal's success or otherwise.

[63] In summary on this question: properly interpreted, section 47(1)(e) of the Constitution provides that a person who is finally convicted and sentenced to more than 12 months' imprisonment is not eligible to contest elections or hold office as a member of the National Assembly. The effect of the proviso is to suspend the disqualification only temporarily to mitigate the possible harm which may arise if the disqualification operates immediately and the conviction or sentence are later overturned on appeal. It does so for only so long as is necessary (hence the use of the word "until") for there to be no chance of the conviction and sentence being overturned on appeal. Section 47(1)(e) does not say that no one may be regarded as having been sentenced "unless" they have a right to an appeal. The proviso is concerned with ensuring that there is finality in the conviction and sentence before the disqualification takes effect.

[64] Carving out an exception for persons like Mr Zuma on the basis that they did not have the right to appeal their conviction and sentence subverts the purpose sought to be achieved by section 47(1)(e) and threatens to undermine our democracy. It threatens the integrity of the National Assembly – a body that ought to comprise of individuals who can be trusted to promote and advance the rule of law and constitutional values – and it undermines the confidence that the public holds in the National Assembly. Further, it would threaten the legitimacy of this Court's findings as the apex court.

Remission of sentence

[65] The question for determination is the legal effect of the Presidential remission on the sentence imposed on Mr Zuma by this Court. Section 84(2)(j) of the Constitution empowers the President to grant pardons, reprieves, and remissions.[57]

[57] Section 84(2)(j) of the Constitution says:

[66] The respondents submit that the remission of Mr Zuma's sentence by the President effectively reduced the sentence to three months. They say that as at the date of the Presidential remission of the sentence, Mr Zuma had served less than three months of the original sentence. By the act of remission, the remaining 12 months of the sentence was extinguished. Therefore, his effective and ultimate sentence was reduced to approximately three months, which is less than the 12 months' yardstick prescribed in section 47(1)(e) of the Constitution.

[67] According to the Commission, the remission did not expunge Mr Zuma's conviction or sentence. He was still, in the language of section 47(1)(e), "convicted of an offence and sentenced to more than 12 months' imprisonment".

[68] In my view, section 47(1)(e) focuses on the length of the sentence imposed, not the length of the sentence served. It uses the words: "convicted of an offence and sentenced". If the focus of the section were time served, the text would have said, for example, "convicted of an offence and served a sentence".

[69] The purpose of the section confirms the text. Section 47(1)(e) recognises that not every offence should disqualify someone from being a member of the National Assembly. Only offences that warrant a sentence of more than 12 months' imprisonment are sufficiently serious to warrant disqualification. The sentence component in section 47(1)(e) is there to indicate the severity of the offence. That signal of seriousness applies – and gives effect to the purpose of section 47(1)(e) – no matter how long the offender ultimately serves (in prison).

"(2) The President is responsible for—

. . .

(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures;"

[70] Modiba J, joined by Professor Ntlama-Makhanya and Professor Phooko, incorrectly held that remission reduces a sentence.[58] On this interpretation of section 47(1)(e), what matters is the "effective sentence", not the sentence that was imposed.[59] The text does not support that interpretation: the text says "convicted . . . and sentenced", without regard for how much of that "sentence" is served.

[71] This reasoning undermines section 165(1) of the Constitution, which vests judicial authority in the courts. It is the role of the judiciary to sentence offenders. As the Supreme Court of Appeal explained in *Mhlakaza*, "[t]he function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served".[60]

[72] The term of imprisonment imposed by the judiciary can be reduced by the President through a remission of sentence, but it does not alter what has been done judicially. Remission of a sentence has the consequence of reducing the sentence to be served.[61] The distinction between the sentence imposed by a court and the actual term served is elided by the approach taken by Modiba J. It is the fact of a conviction and sentence that matters for section 47(1)(e), and that fact cannot be altered by the Executive. On these facts, the President could not have imposed a three-month sentence, indirectly through a remission. Modiba J incorrectly reasoned that "since Mr Zuma completed serving his sentence on 11 August 2023, the conclusion that the

[58] *Electoral Court judgment* above n 7 at paras 67-82.

[59] *Electoral Court judgment* above n 7 at para 74.

[60] See *S v Mhlakaza* [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) (*Mhlakaza*) at para 17 and *Makhokha v S* [2019] ZACC 19; 2019 (2) SACR 198 (CC); 2019 (7) BCLR 787 (CC) at para 11.

[61] In *State of Haryana & Ors v Jagdish* 2010 (4) SCC 216, the Court said the following about remission:

> "The act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon."

This principle was affirmed by the Indian Supreme Court in the case of *Rajendra Mandal v The State of Bihar & Ors* [Writ Petition 9 Criminal No 252 of 2023].

legal effect of the remission was that his sentence was reduced is unavoidable. His effective sentence was no longer 15 months but 3 months".[62]

[73] In understanding the current provision, it is useful (but not determinative) to consider evidence about how the drafters of the Constitution intended the prerogative powers to interact with section 47(1)(e) of the Constitution. Section 42(1)(b) of the interim Constitution, the predecessor to section 47(1)(e), expressly provided that the disqualification from seeking office could be lifted through a pardon.

[74] The Draft Framework for the New Constitution[63] (Draft Framework) explains that the Technical Advisers to the Constitutional Assembly raised a query about whether it was redundant to include this proviso. This was because a pardon relieves a person of all civil disqualifications, and thus would remove the disqualification from office even without the proviso.[64]

[75] The Draft Framework responded to this query as follows:

> "Pardon has three possible meanings. First, a free pardon expunges the conviction and sentence (in terms of section 327 of the Criminal Procedure Act of 1977). A person receiving a free pardon would thus not be disqualified by section 7(2)(c) [from seeking office] as there is no conviction or sentence. Second, a pardon may wipe out the sentence only (section 325 of the Criminal Procedure Act). Where there is no sentence, the disqualification does not apply either. Third, a pardon may reduce a sentence (usually referred to as remission of sentence of imprisonment). For example, a person's 20-year sentence may be reduced to 10 years. The judicially imposed sentence is not reduced, merely the length of execution. Whether a person is disqualified would depend on the length of the original sentence of imprisonment."[65]

[62] *Electoral Court judgment* above n 7 at para 74.

[63] Constitutional Assembly "Draft Framework for the New Constitution" (30 August 1995) at fn 18, available at https://www.justice.gov.za/constitution/history/DRAFTS/LFRAME30.PDF.

[64] Id.

[65] Id.

[76] The drafters could not have been clearer that they intended it to be the *original* sentence that would determine disqualification under section 47(1)(e) of the Constitution, not the length of execution. From its inception, therefore, it was understood that remission of sentence was irrelevant to section 47(1)(e).

[77] This Draft Framework is also the type of "[b]ackground evidence" that is "useful to show why particular provisions were or were not included in the Constitution".[66] As mentioned, in order to be taken into account by a court in interpreting the Constitution, the background evidence must be clear, not in dispute and relevant to showing why the particular provisions were included in the Constitution. These requirements are satisfied here.

[78] The background evidence confirms the text and purpose of section 47(1)(e): that the focus is on the length of the sentence imposed.

[79] Modiba J in the Electoral Court relied on *Smith*[67] and *Boshego*,[68] two High Court judgments, to arrive at the contrary view that remission of sentence is relevant to section 47(1)(e). She held:

> "The Court in both cases rejected the contention that the remission only applies to their parole. It held that it also applies to their sentence. In both cases, the Court held that the remission reduced these parties' *effective* sentences. In the result, not

[66] See *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 19. Chaskalson P held the following at para 17:

> "Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process. The final draft adopted by the forum of the Multi-Party Negotiating Process was, with few changes, adopted by Parliament. The Multi-Party Negotiating Process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the travaux préparatoires [official record of a negotiation], relied upon by the international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it."

[67] *Smith v Minister of Justice and Correctional Services* [2022] ZAGPJHC 60 (*Smith*).

[68] *Boshego v Correctional Supervision and Parole Board: Kgosi Mampuru II* 2023 JDR 2026 (GP) (*Boshego*).

> only did they qualify for parole earlier, but their imprisonment sentences would also, as a result of the remission, expire earlier."[69] (Emphasis added.)

[80] This finding, which lay at the centre of Modiba J's judgment, begs the question. It only tells us that remission of sentence has the result that a person's effective sentence is reduced and that the period of imprisonment expires earlier. However, this does not answer the central question here, which is whether remission of sentence operates retrospectively to alter the sentence *imposed* by a court. Neither *Smith* nor *Boshego* answer that question.

[81] In *Smith*, in 2018, the applicant was sentenced to three 15 year periods of incarceration, which would run concurrently, and a further three year term, which would commence after completion of the 15 year sentence.[70] Along with various other offenders, in 2020, the applicant received a 24 month remission of sentence from the President.[71] In order to address the spread of Covid-19, the President had also empowered the prison authorities to consider for parole, inter alia, persons who would reach their minimum detention period within a period of 60 months from 27 April 2020.[72] In order to qualify for parole, the applicant's minimum detention period thus had to fall on or before 26 April 2025.[73]

[82] The applicant's minimum detention period for his 15-year sentence was seven and a half years. His minimum detention period for his three-year sentence was six months.[74] Contrary to the operative guidelines, the prison authorities had calculated the effect of the remission by deducting eight months from each of the applicant's three sentences. On this calculation, the applicant's minimum detention

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[69] *Electoral Court judgment* above n 7 at para 74.

[70] *Smith* above n 67 at para 27.

[71] Id at paras 4-5.

[72] Id.

[73] Id at para 6.

[74] Id at para 27.

period would only expire after 26 April 2025, and he was thus not eligible for parole.[75]

[83] The High Court's limited finding was that this was incorrect. It held that the 24-month remission should be applied to the full effective sentence (18 years) and that the concurrent sentences should not have been treated separately.[76] The High Court said nothing to suggest that remission of sentence meant that the applicant had not been sentenced to a cumulative 18 years' imprisonment.

[84] The facts in *Boshego* were substantially the same: the prison authorities had again calculated the relevant minimum detention period by treating concurrent sentences separately.[77] The High Court held that this was incorrect. It said nothing to suggest that remission operated retrospectively to alter the sentence imposed by the court.

[85] The effect of a remission of sentence is to bring forward a person's date of release. It is a mechanism designed to facilitate the execution of sentences and administration of prisons. Whether or not remission is granted is no reflection on the gravity of the relevant person's offence. Instead, it is generally used for other public policy objectives or practical purposes such as reducing prison overcrowding or incentivising meritorious conduct during a period of incarceration. These considerations fall within the prerogative of the Executive.

[86] Section 47(1)(e) focuses on the length of the sentence imposed, not the length of the sentence served. Remission of sentence concerns the execution of the sentence and does not retrospectively alter the sentence imposed.

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[75] Id at para 32.

[76] Id at paras 42-6.

[77] *Boshego* above n 68 at paras 13 and 23.

[87] For these reasons:

(a) The Electoral Court erred in its interpretation of section 47(1)(e). The meaning of a criminal sentence in section 47(1)(e) does not depend on whether the sentence may be appealed or not. The proviso to the section does not have the result that it does not apply to a conviction and sentence handed down by this Court.

(b) Remission of a sentence by the President does not have the legal effect of a retrospective alteration of that sentence, but its earlier expiration. Remission of sentence is irrelevant for purposes of section 47(1)(e).

(c) By virtue of the provisions of section 47(1)(e), Mr Zuma is disqualified from being a candidate for the National Assembly.

Issues in the cross-appeal

The Commission exceeded its powers

[88] The respondents argue that the Commission does not have the power and authority to implement the provisions of section 47(1)(e) of the Constitution. They say that section 30(1)(a) of the Electoral Act[78] does not make any reference to eligibility for membership of the National Assembly, a matter which falls under the exclusive domain of the National Assembly. They further argue that in terms of section 57 of the Constitution,[79] read with rule 13 of the Rules of the

[78] I deal with the provisions of the section shortly.

[79] Section 57 reads:

> "(1) The National Assembly may—
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
>
> (2) The rules and orders of the National Assembly must provide for—
>
> (a) the establishment, composition, powers, functions, procedures and duration of its committees;
>
> (b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

National Assembly and other provisions of Chapter 4, eligibility for membership of the National Assembly, for the Speakers Office and for the Office of the President, are solely determined by the National Assembly. According to the respondents, the first order of business in the National Assembly should be the election of the Speaker and her Deputy, followed by the election of the President. It is thereafter that the eligibility for membership of the National Assembly arises for determination.

[89] The Commission, in turn, relies on section 30, read with section 27 of the Electoral Act, as the source of its powers to determine eligibility for membership of the National Assembly. Section 30(1)(a) of the Electoral Act allows an objection to the nomination of a candidate if "[t]he candidate is not qualified to stand in the election".[80] Section 30(3) of the Electoral Act requires the Commission to "decide the objection".

[90] The Electoral Act requires the Commission to satisfy itself that each candidate on a party's list is eligible to be a member of the National Assembly. Section 27 of the Electoral Act[81] deals with a party's list of candidates. A list must, in terms of

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(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and

(d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition."

[80] Section 30 reads:

"Objections to lists of candidates—

(1) Any person, including the chief electoral officer, may object to the nomination of a candidate on the following grounds:

(a) The candidate is not qualified to stand in the election;

. . .

(3) The Commission must decide the objection, and must notify the objector and the registered party that nominated the candidate of the decision in the prescribed manner by not later than the relevant date stated in the election timetable."

[81] Section 27(1) and (2) reads:

"Submission of lists of candidates—

(1) A registered party intending to contest an election must nominate candidates and submit a list or lists of those candidates for that election to the chief electoral officer

subsection (2)(b), include an undertaking from a representative of the party that "each candidate on the list is qualified to stand for election in terms of the Constitution". The only provision in the Constitution that addresses eligibility to become a member of the National Assembly is contained in section 47(1). This means that the party must demonstrate, through the undertaking, that its candidates are eligible in terms of that section of the Constitution.

[91] The form for a candidate list is prescribed in Appendix 1 to the Regulations concerning the Submission of Lists of Candidates, 2004.[82] The party's list must include, amongst other things, an undertaking from a party representative that "each candidate on the list is qualified to stand for election in terms of section 47 . . . of the Constitution". Each candidate on a party's list must then sign an acceptance of nomination in the form prescribed in Appendix 4 to those Regulations. The acceptance includes a declaration that the candidate is "qualified to be elected as a member of the National Assembly . . . in terms of section 47 . . . of the Constitution".

[92] These provisions indicate that the criteria to be utilised by the Commission in determining objections to a candidate's eligibility relate specifically to the requirements of section 47(1). In terms of these provisions of the Electoral Act, therefore, the Commission is empowered to determine, before the election, qualification for membership of the National Assembly.

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in the prescribed manner by not later than the relevant date stated in the election timetable.

(2) The list or lists must be accompanied by a prescribed—

(a) undertaking, signed by the duly authorised representative of the party, binding the party, persons holding political office in the party, and its representatives and members, to the Code;

(b) declaration, signed by the duly authorised representative of the party, that each candidate on the list is qualified to stand for election in terms of the Constitution or national or provincial legislation under Chapter 7 of the Constitution and has signed the prescribed acceptance of nomination;"

[82] Regulations concerning the Submission of Lists of Candidates, GN R14 *GG* 25894, 7 January 2004.

Reasonable apprehension of bias

[93] The respondents submit further that there was a reasonable apprehension of bias on the part of the Commission, to the extent that the Commission as a whole, was legally excluded from deciding the question of Mr Zuma's eligibility to stand as a candidate in the elections. They point to a statement made by one of the Commissioners, Ms Janet Love, regarding Mr Zuma's eligibility to stand as a candidate in the elections. They allege that although the statement was made by Commissioner Love, she was speaking on behalf of the Commission and her statement was endorsed by its silence. They contend that Commissioner Love's failure to recuse herself from participating in the determination of the objection lodged against Mr Zuma's candidacy renders the decision by the Commission a nullity.

[94] The Commission denies that it prejudged Mr Zuma's eligibility to stand in the elections. It says that, whilst the statement made by Commissioner Love was in response to a question from the media about Mr Zuma's eligibility, it was simply a restatement of the law in which she emphasised that if Mr Zuma were ineligible, it would be as a result of the law and not as a result of the Commissioners' personal views. It says that Commissioner Love was not expressing a view on Mr Zuma's eligibility, but simply paraphrasing, in the abstract, the effect of section 47(1)(e).

[95] After the hearing of this matter, this Court issued post-hearing directions to the applicant and the respondents, raising pointed questions in respect of this issue.[83]

[83] The directions read:

> "The Deputy Chief Justice has issued the following directions:
>
> 1. The parties (not *amici*) must file written submissions . . . on the following issues:
>
> (a) The Electoral Commission says that the statement it describes as the expression of a legal position by Commissioner Love "was made in response to a question about Mr Zuma's eligibility" for membership of the National Assembly. If the question was specifically about Mr Zuma's eligibility for membership of the National Assembly, was the expression of the legal position not also about that eligibility and to the effect that the expressed legal position disqualified Mr Zuma?

[96] This Court will decide the question of bias based solely on the evidence that was before the Electoral Court, excluding any further evidence that the parties sought to place before us.

[97] The test for bias is objective. A reasonable suspicion of bias "is tested against the perception of a reasonable, objective and informed person".[84]

[98] The facts upon which bias is raised are largely common cause. On 24 January 2024, at a press briefing, a question was asked specifically about Mr Zuma's eligibility to stand as a candidate. Commissioner Love responded to the question in the following terms:

> "That excludes anybody who has been given a sentence that was not the subject of any deferral, and in that sense, it is not ourselves, but the laws of the country that would stand as an impediment for that candidacy."

(b) Ought Commissioner Love not reasonably to have realised that the legal position might be contested by uMkhonto weSizwe Political Party and Mr Zuma?

(c) In the event that she would reasonably have realised what is referred to in paragraph (b), ought she not reasonably to have realised that the Electoral Commission might have to pronounce on Mr Zuma's eligibility for membership of the National Assembly?

(d) In the event that she would reasonably have realised that the Electoral Commission might have to pronounce on Mr Zuma's eligibility for membership of the National Assembly, ought she not to have refrained from expressing a view about the eligibility?

(e) Having not refrained from expressing a view about Mr Zuma's eligibility, ought she to have recused herself from participating in the Electoral Commission's determination of the eligibility?

(f) If she ought to have recused herself, what is the effect of her participation in the determination by the Electoral Commission of Mr Zuma's eligibility?

(g) If Commissioner Love's participation vitiated the determination by the Electoral Commission of Mr Zuma's eligibility, is it open to this Court to substitute the determination by the Electoral Commission?"

[84] *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 30.

[99] At the heart of this issue is whether the statement made by Commissioner Love was an expression about Mr Zuma's eligibility for membership of the National Assembly. This question must be answered from the perspective of a reasonable, objective and informed person.

[100] Although Commissioner Love was asked about Mr Zuma, she did not answer the question about Mr Zuma directly. She spoke generically about the application of the law to a case such as that of Mr Zuma, and, to "anybody" else. The Electoral Court correctly found that the context in which Commissioner Love was speaking for the Commission was "ambiguous" and "without specificity". Zondi JA reasoned as follows:

> "What is clear to this Court is that the statement made by Commissioner Love, in a context in which she was speaking for the Commission, is ambiguous and without specificity. All it says is that a person who falls into a category defined by the law would be excluded from standing as a candidate. This is in fact the case. Without more there is no basis for a conclusion of bias. The submission by the MK Party that the reference to 'that candidacy' refers directly to Mr Zuma and can only refer to Mr Zuma and shows bias against Mr Zuma has no merit. The words in the context of the statement refer clearly to a person whose candidacy is affected by a provision of the law. The words refer to any such person and not specifically to Mr Zuma."[85]

[101] There is nothing in the statement about Mr Zuma's eligibility. The statement does not say that Mr Zuma is not eligible. The opening phrase of the statement, "[t]hat excludes anybody" makes clear that Commissioner Love was speaking in generic terms about the operation of the law on any candidate.

[102] The respondents bear the onus to establish the existence of bias, and they have failed to do so. There is no merit in this point and it must fail.

[85] *Electoral Court judgment* above n 7 at para 31.

Conviction on the merits

[103] The respondents contend that the conviction against Mr Zuma is not a "conviction" as contemplated by section 47(1)(e). This is for the following reasons: Mr Zuma was not charged with an offence by a criminal court; he was not involved in any criminal trial proceedings; and was not afforded fair criminal rights in terms of section 35(3) of the Constitution. The conviction is not a "conventional" conviction as envisaged in section 47(1)(e), read with sections 35 and 12 of the Constitution. The respondents further contended that the Electoral Court ought to have found, like it did in respect of the sentence, that the conviction is not a "conviction" contemplated by section 47(1)(e), for the same reason that it cannot be appealed. They said this followed as a matter of logic.

[104] There is no difference between a conviction following criminal proceedings and a conviction following civil contempt of court proceedings. Our courts have held that contempt of court, even civil contempt of court, is a criminal offence.[86] Civil contempt is a crime.[87] The only distinction is procedural. Civil contempt is instituted in relation to disobedience of an order made in civil proceedings. Both species of contempt are criminal offences.

[105] There is no difference in the type of conviction since a person is convicted of committing a criminal offence in both civil and criminal contempt proceedings. In *Fakie N.O.*,[88] Cameron JA held that "the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction".[89] Therefore, the sanction of a conviction for contempt of court is a criminal sanction, even in civil contempt proceedings.

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[86] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* [2003] ZASCA 38; 2004 (2) SA 611 (SCA) at para 18, citing *S v Beyers* 1968 (3) SA 70 (A).

[87] See *Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) and *Pheko v Ekurhuleni Metropolitan Municipality* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC).

[88] *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (*Fakie N.O.*).

[89] Id at para 8.

[106] Section 47(1)(e) generally refers to the conviction of an offence. It draws no distinction between convictions for civil contempt and other convictions. The ordinary meaning of an offence should be given to the word: that it is a criminal offence. A differentiation between types of criminal offences is unjustified and unfounded and would undermine the purpose of the disqualification under section 47(1)(e). It is not for a court to limit the scope of the provision when it has been framed in wide and general terms.

[107] Section 47(1)(e) simply says "convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine". Mr Zuma was "convicted" in that this Court "found" him "guilty. . . of the crime of contempt of court".

Order

[108] In the result, the following order is made:

1. The applicant is granted leave to appeal directly to this Court.
2. It is declared that Mr Zuma was convicted of an offence and sentenced to more than 12 months' imprisonment for purposes of section 47(1)(e) of the Constitution and is accordingly not eligible to be a member of, and not qualified to stand for election to, the National Assembly until five years have elapsed since the completion of his sentence.
3. The order of the Electoral Court is set aside and replaced with the following:
   "The appeal is dismissed."
4. The counter-application is dismissed.
5. There is no order as to costs in this Court.

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