

# WEBBER WENTZEL

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Date

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27 March 2024

Dear Mr President

## My Vote Counts – Electoral Matters Amendment Bill

1. We act on behalf of My Vote Counts NPC ("**our client**"). Our client is a non-profit organisation with the aim of campaigning for a more inclusive, transparent and accountable political and electoral system in South Africa.
2. We refer to the Electoral Matters Amendment Bill (B42-2023) ("**the EMAB**"), which seeks to amend the Political Party Funding Act, 2018 ("**the PPFA**").
3. Our client understands that the EMAB, having been amended and approved by the National Assembly on 12 March 2024 was later passed in the same form by the National Council of Provinces ("**the NCOP**") on 26 March 2024. As such, the EMAB has been sent to the President for his assent and signature and fixing a date for implementation.
4. As indicated in our client's submissions to Parliament, our client is of the view that the EMAB, in its current form, is unconstitutional, and undermines the constitutional duties in respect of transparency and accountability in political party funding legislation, contrary to the requirements set forth in case law. Specifically, the EMAB is unconstitutional for, *inter alia* the reasons set forth below.

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**Chief Operating Officer:** SA Boyd

*It has not been subject to a public participation process*

5. The NCOP has not facilitated any public participation in relation to what is one of the most important pieces of electoral legislation in South African history. There are important ramifications for all South African and all provincial and national elections as a result of the changes proposed by the EMAB.
6. Public participation was critical at the NCOP level in its own right, but it is also important to facilitate public participation in relation to the EMAB as amended by the National Assembly. The version of the EMAB, that has been passed, has not been subject to public participation at all at any level.
7. In all the circumstances, the failure by the NCOP to facilitate any public participation is plainly in breach of section 72 of the Constitution. This renders the process before the Parliamentary process and the legislation presented to the President stillborn and plainly invalid.
8. This means that not just the process before the NCOP, but the entire enactment of the EMAB, including the President's assent, could be deemed invalid due to this fundamental breach of constitutional procedure.

*It gives the President the sole discretion to establish important financial thresholds*

9. The EMAB, and specifically the amendments to regulation 7 and 9 of schedule 2 of the PPFA, provide that the President has the sole discretion to determine: (i) the upper limit of donations made by private parties in terms of section 8(2) of the PPFA ("**the upper limit**"); and (ii): the minimum amount required for political parties to disclose donations received from private parties, in terms of section 9(1)(a) of the PPFA ("**the disclosure threshold**").
10. Entrusting the President with the discretion to establish the upper limit and the disclosure threshold places a substantial amount of political influence within the grasp of one individual, who is a political actor and would typically be the head of a political party who would be disadvantaged or benefited by the changes. This is unconstitutional because the President, as the leader of a political party, inherently possesses a vested interest in the outcomes of such decisions. The ability to influence the financial dynamics of political competition, including the flow of private donations, can significantly impact the political landscape to favour the President's party. This arrangement essentially allows the

President to set rules that could disproportionately benefit their political interests, creating an unequal playing field for other political entities.

11. The apprehension of personal and institutional bias is palpable and plainly gives rise to a subversion of the rule of law. It is also irrational to vest these powers in the President.
12. Moreover, there are not even meaningful guidelines provided for the exercise of this critical power by the President. It is a requirement of the rule of law, as underscored by a number of Constitutional Court judgments, that the law be free of vagueness and speak with clarity. This is plainly not achieved by the EMAB and this is a further reason why the EMAB is unconstitutional.

*It creates a lacuna in the law*

13. As set out in paragraph 9 above, the amendment to regulations 7 and 9 gives the President the sole discretion to determine the upper limit and the disclosure threshold, and the amounts in respect thereof are passed by way of a proclamation by the President. Clause 26 of the EMAB, which is intended to replace Section 24 of the PPFA, provides that the enactment of regulations by the President (including setting the upper limit for donations and the disclosure threshold by way of a proclamation) can only proceed following a resolution by the National Assembly.
14. Upon the promulgation of regulations 7 and 9 as they appear under the EMAB, there will be no upper limit or disclosure threshold at all, as the current limit of R 15 million and threshold of R 100,000 will be deleted. This means that donations in any amount may be given and need not be reported. This is an untenable and unconstitutional situation.
15. Moreover, there is presently no National Assembly resolution authorising the President to determine the upper limit and disclosure threshold and any such resolution is unlikely to be passed before the elections scheduled for 29 May 2024. This places South Africa's constitutional democracy and party accountability in peril, and would facilitate the undue influence by certain companies and actors in South Africa's political and governance system.
16. The National Assembly will be in recess for the Easter constituency period starting on 2 April 2024, and will reconvene only on 21 May 2024.
17. In particular, if the President assents to and brings into force the EMAB, and the amendments to regulations 7 and 9 are adopted without the simultaneous proclamation of

the upper limit and disclosure threshold by the President (which he is currently not empowered to do), there would be no upper limit (meaning that any amount may be donated) and there would be no disclosure requirement as a threshold had not been determined.

18. During this period, the core aim of the PPFA will be significantly undermined. Without these critical boundaries in place, private entities are able to contribute unlimited amounts to political parties, and none of these transactions is required to be disclosed. This lacuna essentially nullifies the purpose of the legislation.
19. In light of the constitutional defects as aforementioned, the President should not sign the EMAB into law. Instead, the President should exercise his powers in terms of section 79(1) of the Constitution and refer the EMAB back to the National Assembly and the NCOP for reconsideration.
20. If the reconsidered EMAB does not cure the constitutional defects, then, in terms of section 79(4) of the Constitution, the President should refer the EMAB to the Constitutional Court. The President can only sign the EMAB into law after the Constitutional Court determines it to be constitutional.
21. Our client respectfully requests that the President provide confirmation in writing by no later than **Wednesday, 3 April 2024**, regarding his intentions in respect of the EMAB, and whether he will be referring it back to the National Assembly and the NCOP for reconsideration, or will be assenting and implementing the legislation.
22. Should the President decide to assent to and implement the EMAB, our client will have no choice but to launch an application to challenge the constitutional validity of the EMAB, and to obtain interdictory relief to prevent its implementation, and may do so on an urgent basis.
23. All our client's rights are reserved.

Yours faithfully

**WEBBER WENTZEL**

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*Letter sent electronically without signature.*