

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

Case No. 10607/24

In the matter of:

THE DEMOCRATIC ALLIANCE

Applicant in the intervening application

In re:

MY VOTE COUNTS NPC

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Second Respondent

MINISTER OF HOME AFFAIRS

Third Respondent

ACTING SPEAKER OF THE NATIONAL ASSEMBLY

Fourth Respondent

MY VOTE COUNT'S CONCISE SUBMISSIONS ON THE INTERVENTION APPLICATION

OVERVIEW

- 1 My Vote Counts opposes the DA's intervention application. It also disputes the DA's (i) non-joinder point and (ii) application of section 11 of the Interpretation Act to the Amendment Act.

2 In these brief submissions:

2.1 We set out the test for intervention applications dealing with section 172 of the Constitution.

2.2 We submit that the DA does not meet the test for intervention;

2.3 We contend that the non-joinder point lacks merit;

2.4 We explain why the DA is wrong to submit that section 11 of the Interpretation Act applies to the Amendment Act.

2.5 We outline why the alternative declaratory relief is a non-starter.

2.6 Lastly, we deal with the issue of costs.

THE TEST FOR INTERVENTION

3 In matters dealing with relief sought under section 172 of the Constitution, as is the case here, an intervening applicant must demonstrate that (i) they have a direct and substantial interest in the relief that is sought in the matter and (ii) it would be in the interests of justice to allow the intervention.

4 As the Constitutional Court held in *Gory v Kolver*,¹

“The common-law principles relating to intervention of parties applied by the courts in respect of Uniform Rule 12 deal primarily with disputes in personam, whereas an order under section 172 is an order in rem. In disputes concerning the constitutional validity of a statute, it would - so it was submitted - be

¹ [2006] ZACC 20; 2007 (4) SA 97 (CC).

impractical if 'the test of a direct and substantial interest in the subject-matter of the action is again regarded as being the decisive criterion' (emphasis added). This Court would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity.

This submission is a convincing one. In every case this Court must ultimately decide whether or not to allow intervention by considering whether it is in the interests of justice to grant leave to intervene. Thus, in cases involving the constitutionality of a statute, while a direct and substantial interest in the validity or invalidity of the statute in question will ordinarily be a necessary requirement to be met by an applicant for intervention, it will not always be sufficient for the granting of leave to intervene. Even if the applicant is able to show a direct and substantial interest, the Court has an overriding power to grant or to refuse intervention in the interests of justice".²

5 On the first component of the test, the threshold for establishing a direct and substantial interest is well-established:

5.1 The intervening party must demonstrate a "legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought".³

5.2 An indirect interest in the litigation is not sufficient (and thus a mere financial interest is insufficient).⁴

² Gory, paras 12-13.

³ *SA Riding for the Disabled Association v Regional Land Claims Commissioner* [2017] ZACC 4; 2017 (5) SA 1 (CC) para 9.

⁴ *Standard Bank of South Africa v Swartland Municipality* 2011 (5) SA 257 (SCA) para 9.

- 6 As for the second requirement, the Constitutional Court has outlined the factors that should be considered in deciding whether it would be in the interests of justice to allow a party — who has a direct and substantial interest — to intervene in a case:

*"Other considerations that could weigh with the Court in this regard include the stage of the proceedings at which the application for leave to intervene is brought, the attitude to such application of the parties to the main proceedings, and the question whether the submissions which the applicant for intervention seeks to advance raise substantially new contentions that may assist the Court."*⁵

THE INTERVENTION APPLICATION MUST BE REFUSED

- 7 The DA has failed to satisfy both requirements of the test for intervention.
- 8 First, the DA has no direct and substantial legal interest in this matter. None of its rights or legal interests will be adversely affected by the order granted. Indeed, in its affidavit, the DA pegs its application on only two interests. But neither of them will be adversely affected if the relief is granted in this matter.
- 8.1 The DA *firstly* says that it must comply with legislation that imposes limits and thresholds on political parties. And since the relief pertains to these limits and thresholds, it asserts that it has direct and substantial interest.⁶ This is a non sequitur.
- 8.1.1 The mere fact that a person must comply with legislation does not automatically give them a direct and substantial interest in litigation

⁵ Gory, para 13.

⁶ The DA's FA in the intervention application, para 11.1, pp 70.

dealing with the validity of that legislation. Indeed, this is the position that is clearly articulated in *Gary*..

8.1.2 So, too then, when the relief seeks to plug temporarily the lacuna in the legislation, that does not give the DA a direct and substantial interest because it would not affect any of their rights. Indeed, in this case, the DA cannot complain about a prejudice to its rights, to the extent that it has any, because, on its own interpretation of events, it accepts that it is subject to the disclosure thresholds and caps.

8.2 *Secondly*, the DA claims that it has a direct and substantial legal interest because it “*seems*” that MVC wants to make a “broad arguments” on the extent to which the Constitution prohibits large donations and requires disclosure of small donations. And these are the issues to be dealt with in an application filed by MVC in 2023, which the DA opposes. The DA says that “*[a]ny findings this Court makes in respect of these argument will be marshalled by MVC in other litigation which the DA is opposing*”.⁷ This is just wrong.

8.2.1 The factual premise of the interest is incorrect. In this matter, My Vote Counts does not want to make “broad argument” that may be relevant to the 2023 application. Indeed, the subject matter and the relief sought in the 2023 application are completely different to that of this application.⁸ The basis for this alleged interest is factually wrong, and thus can be summarily dismissed.

⁷ The DA's FA in the intervention application, para 11.2, pp 70.

⁸ The applicant's AA in the intervention application: para 42-46, pp 103–105.

8.2.2 In addition, this is not a legal interest. My Vote Counts is concerned that “*broad arguments*” made in this application will be used in the 2023 application. Even if this were the case, so what? This would not adversely affect the DA’s ability to put forward their defence in the 2023 application.

9 Second, it is not in the interests of justice to grant the intervention application.

9.1 First, the DA’s interpretation is premised on an incorrect reading of section 11 of the Interpretation Act, which has led it to make a manifestly wrong, misleading, and unhelpful submission to the court. At any rate, this is the submission that the third respondent also wants to make the court, making the DA’s submission unhelpful.

9.2 Second, this is an urgent application, and the matter should not be derailed or become cumbersome through intervention applications.

9.3 Third, the DA will not suffer prejudice. In addition to the fact that the DA believes it is subject to the threshold limits and caps, it will not suffer any prejudice if the relief is granted. In addition, since a *rule nisi* is sought, the DA may be able to seek to discharge the interim arrangement on the return date.

9.4 Fourth, the DA’s application is not *bona fide*. It has only sought to intervene in this case in a misguided attempt to safeguard its interests in the 2023 application, which (i) deals with a different subject matter and (ii) has yet to be heard. Nothing will happen in this application that will prevent it from making any argument and from the court hearing that application being precluded from considering that submission (even if the relief sought by the MVC is granted).

In fact, the non-bona fide's of the DA is clear when regard is had to the fact that the DA's Member of Parliament who has had oversight of this law has accepted that (i) the Amendment Act has created a lacuna and (ii) the lacuna is a problem.⁹

NON-JOINDER

10 The DA submits that there is a case of non-joinder because all registered political parties and independent candidates contesting the 2024 elections, and the Electoral Commission, has not been joined.¹⁰ It is wrong.

11 The right of a defendant to raise a defence of non-joinder is limited. In *United Watch & Diamonds*, this court held that:

*"It is settled that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder ... are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make."*¹¹

12 And as the Supreme Court of Appeal has stated:

*"The mere fact that a party have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceeds, has thus been held to be a limited one."*¹²

13 For the same reason that the DA has no right to intervene in this application, (i) the other registered political parties and independent candidates do not have a direct and

⁹ The applicant's AA in the intervention application: para 32-35, pp 100–102.

¹⁰ The applicant's AA in the intervention application: para 21, pp 74.

¹¹ *United Watch & Diamonds Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415E.

¹² *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA).

substantial legal interest in the outcome of this case, and (ii) it would be against the interests of justice to require such joinder. The application — which seeks narrow relief on a temporary basis in the form of a *rule nisi* — would be too cumbersome, costly and time-consuming if joinder on all parties and independent candidates would be required, effectively denying My Vote Counts the relief that it urgently seeks.

14 The Electoral Commission also does not have a direct and substantial interest in the outcome of the matter. The relief, if granted, does not curb or jeopardise its powers and ability to exercise its constitutional and statutory powers and functions.

15 Nor should sight be lost of the fact that My Vote Counts has crafted its relief as a *rule nisi* (which is often granted on an *ex parte* basis, in which interested parties are allowed to show cause why the order should not be made final on the return date). Thus, even if the court upholds the non-joinder point (contrary to My Vote Count's stance), it would not be impermissible for the court to grant the *rule nisi* relief.

THE MERITS: SECTION 11 OF THE INTERPRETATION ACT

16 The DA is mistaken when it submits that there is no lacuna in the law because of section 11 of the Interpretation Act. The provision provides:

“When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.”

17 The express text of this statutory provision clearly states that it only applies in situations where (i) the President has signed the (substituted) law but (ii) has yet to bring the (substituted) law into operation. Section 11 applies to this interim period to prevent a

hiatus,¹³ stating that the repealed law will continue to apply until the president proclaims the commencement of the act.

18 But section 11 of the Interpretation Act does not assist in this case:

18.1 On 7 May 2024, the President signed the Amendment Act into law.¹⁴ But the law did not immediately come into operation. Section 46 of the Amendment Act provides that it only “*takes effect on a date to be determined by the President by proclamation in the Gazette*”.

18.2 But the wait was not long. The next day, 8 May 2024, the president proclaimed in the government gazette that, in terms of section 46 of the Amendment Act, “*I hereby determine 08 May 2024 as the date on which the (whole of) the said Act shall come into effect*”.¹⁵

18.3 Thus, the “*substituted provisions*” have come into effect and operation.

19 As a result, section 11 of the Interpretation Act does not find application in this matter, so a lacuna exists in the law.

ALTERNATIVE RELIEF

20 The DA’s prayer for alternative relief is a non-starter. It requests the court to grant declaratory relief “*in the event that the main application is not dismissed*”.¹⁶ But this does not make any sense. If My Vote Count’s application (ie the main application) is

¹³ See Devenish, *Interpretation of Statutes* (First Edition, 1992) at 252.

¹⁴ The applicant’s FA in the main application: para 45.1, pp 19.

¹⁵ The applicant’s FA in the main application: “**FA9**”, pp 44.

¹⁶ The DA’s AA in the main application: para 22, pp 74.

not dismissed, it would mean that (i) the court has granted the relief sought by My Vote Counts and (ii) the court would have granted the relief based on the lacuna that had to be temporality remedied. In other words, if the condition that the DA prescribes for its relief is met, it would mean that the DA's application of section 11 of the Interpretation Act to this matter is wrong, and thus, it would not be entitled to the declaratory relief.

COSTS

21 In the intervention application:

21.1 If My Vote Counts successfully opposes the intervention application, it is entitled to its costs.

21.2 If the court grants the DA's intervention application, the costs should be the same as the main application.

22 In the main application, the *Biowatch* principle applies.

PRAYER

23 My Vote Counts prays for an order that the DA's intervention application be dismissed with costs, including the costs of counsel on Scale B.

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17 May 2024