IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 10607/24

In the matter between

MY VOTE COUNT NPC APPLICANT

AND

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1st
RESPONDENT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 2nd
RESPONDENT

MINISTER OF HOME AFFAIRS 3rd
RESPONDENT

ACTING SPEAKER OF THE NATIONAL ASSEMBLY 4th
RESPONDENT

And
In the application for intervention of

THE DEMOCRATIC ALLIANCE INTERVENING
APPLICANT

In re the matter between

MY VOTE COUNTS NPC
APPLICANT

AND

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1st RESPONDENT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 2nd RESPONDENT

MINISTER OF HOME AFFAIRS 3rd RESPONDENT

ACTING SPEAKER OF THE NATIONAL ASSEMBLY 4th RESPONDENT

Date of Hearing: 17 May 2024

Date of Judgment: 27 May 2024 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an opposed application wherein the applicant (MVC) sought a *rule nisi* calling upon any interested person to show cause on a return date to be determined by the court why an order in the following terms should not be made final:

1.1. pending the earlier of:

(i) the finalization of proceedings to declare sections 29(g) and (h) of the Electoral Matters Amendment Act, 2024 (Act No.14 of 2024) (the EMAA) and amended regulations 7(1) and 9 of schedule 2 to the Political Parties Funding Act, 2018 (the PPFA) inconsistent with the Constitution and invalid, and other relief, which must be instituted within 20 days of the order, and

(ii) the determination of the upper limit in the amended regulation 7(1) of schedule 2 of PPFA (the upper limit) and the disclosure threshold in the amended regulation 9 of schedule 2 of the PPFA (the disclosure threshold):

1.1.1. The upper limit shall be deemed to have been determined at R15 million per annum;

1.1.2. The disclosure threshold shall be deemed to have been determined at R100 000 per annum.

1.2 Pending the return date, the relief sought in 1.1, 1.1.1 and 1.1.2 immediately to operate as an interim order.

The applicant further prayed that the costs of the application be borne by the first to third respondents, together with any other party which opposed the relief sought herein, jointly and severally, to be taxed on the basis of Scale B and also granting the applicant such further or alternative relief as the court may deem reasonable and necessary.

[2] The Democratic Alliance (the DA) applied to intervene in the application as the fifth respondent, praying for the dismissal of the application and the order that MVC pay for its costs on scale B. In the alternative in the event that the application was not dismissed and with retrospective effect from 8 May 2024, the DA sought the court to declare that the upper limit was R15 million per annum and the threshold limit was R100 000-00 for as long as the President did not set a different disclosure threshold in terms of Regulation 6 and 9 respectively, of schedule 2 to the PPFA. Only the applicant

opposed the intervention application by the DA. The second and fourth respondent did not oppose the main application. The fourth respondent, however, filed an explanatory affidavit and also made submissions at the hearing.

APPLICATION FOR INTERVENTION

[3] The starting point in considering the DA's application, is what is before me in this urgent application. An inductive consideration of the DA's application for intervention as well as its submissions showed that the DA is already dealing with what MVC clearly said should be left for later determination. MVC said in this application that any interested person, referring to parties like the DA, should be called upon for the return date, to deal with what MVC is raising, and to show cause why the terms sought by MVC in this application should not be made final. The matter before me was the founding application, and not the return date of the *rule nisi.* Against this background, the question whether the DA was 'any interested person' 'called upon' to 'show cause on the return date', in the interests of justice, is best left for the court of the return date, if the application succeeds. The interests of justice do not permit that a judge sitting alone in an urgent court should pronounce on a matter which may be the subject of proper ventilation, maybe even before a full bench, on a return date, perhaps with even more parties who may be interested in joining the litigation, exposing the return date court to an expanded festival of ideas as we enrich our jurisprudence in construction of the new South Africa. The DA was well within its right to exercise its right to join the process at this stage, and did so well-advised of the consequences of the exercise of its rights to join. However, the stage at which it decided to join, as an early bird, did not change the nature of the application it sought to oppose.

[4] The Supreme Court of Appeal (SCA) dealt with the exposition of a *rule nisi* in *Member of the Executive Council for the Department of Health, Eastern Cape v BM* (213/2021) [2022] ZASCA 140 (24 October 2022). At paras

"The rule nisi procedure

[12] A rule nisi is an order issued by a court, at the instance of a party, calling upon another party or parties to show cause on a stipulated date before that court why relief, as claimed, should not be granted. The procedure, which derives from English law, has been employed by our courts for well over a century [3] [*Setlogelo v Setlogelo* 1914 AD 221; see also *Grant-Dalton v Win and Others* 1923 WLD 180 at 185.] Its use and development is underpinned by the principle that a court will not grant relief which impacts or constrains the rights and interests of a party without affording that party an opportunity to be heard (*audi alteram partem*). It is also premised on the acceptance that the interests of justice require the balancing of rights and interests to ensure that what is worthy of immediate protection is not prejudiced by the time it takes to hear all interested parties.

[13] The *rule nisi* is generally used in ex parte applications. Van Zyl[4] [G B Van Zyl, *The Judicial Practice of South Africa* Vol 1 4 ed at 401.] explains that,

'This rule, or order, for after all it is really an order, is granted only on an ex parte application. This application should be by petition setting forth fully all of the circumstances of the applicant's cause of complaint, so as to induce the Court to grant his prayer. He must [show] a good prima facie cause to entitle him to this rule, and a good reason must be assigned, or [shown] for the urgency of the application, and why it should be ex parte instead of serving the respondent with the notice of motion.'

[14] Since those observations were made, the practice relating to *rules nisi* has been used in various contexts. The essential character and purpose of the procedure, however, remains to ensure that (a) notice is given to an affected party; (b) a prima facie case is made out for the relief sought; and (c) such relief may be granted unless cause is shown why it should not be granted.[5] [*Safcor Forwarding (Johannesburg) (Pty (Ltd) v Chairman, National Transport Commission* 1982 (3) SA 654 (AD) at 674H-675A; *National Director of Public Prosecutions v Mohammed* 2003 (4) SA 1 (CC) para 29; *Du Randt v Du Randt* 1992 (3) SA 281 (E) at 289E-F; *Ex parte St Clair Lynn* 1980

(3) SA 163 (W) at 164E-H. It should be noted that Du Randt was overruled by this Court in *MV Snow Delta: Serva Ship Ltd v Discount Tonnage* 2000 (4) SA 746 (SCA) para 6. *Du Randt* held that an interim interdict remains operative in the event of an appeal noted against an order discharging the rule on the return date. This court held that this is incorrect. The proposition, that a *rule nisi* should only be granted where there is sufficient justification in the evidence placed before the court, was not disturbed. See also Ex parte Saiga Properties (Pty) Ltd 1997 (4) SA 716 (E) at 720G -721A].

[15] The authorities demonstrate that the use of the rule nisi procedure and its adaptation to new circumstances has occurred in a manner consistent with the principles of procedural law. In each instance, it has occurred in the context of application proceedings, requiring the granting of a *rule nisi* to be supported by evidence which warrants the granting of the rule."

The SCA said set out the nature, scope and content of a *rule nisi,* and this exposition also indicated why the DA was wrong in the test it sought this court to apply at this stage. The question before the court was not to determine whether there was a *lacuna* in the legislation. At this stage, all that was required for the court to decide was whether MVC placed before it sufficient justification, or as it is sometimes referred to, a *prima facie* case to claim a *lacuna,* and therefore a case for an order in the terms sought. The DA's own arguments suggest that it grudgingly accepted that MVC may have a *prima facie* case. At para 25.3 of its heads of argument, the DA under the heading "THE ALTERNATIVE DECLARATORY RELIEF", said:

"25.3. As MVC's application illustrates, whether the donation limit and disclosure threshold remain in effect is a live issue, both in this litigation and in government circles."

I use the term grudgingly because the DA submitted, in the preceding paragraphs of the same heading, (that is para 23 to 25.2) that should the court not dismiss MVC's application, it was urged to grant declaratory relief which had the same effect as what

MVC asked for in its application. It went further, and prayed for a declaratory relief retrospective to 8 May 2024.

[5] Until proper notice was given to all affected parties, it was simply premature to make a final decision on this matter, and dismiss it, as the DA urged this court to do. The affected parties, if any others join, as determined by the return date court, may support or oppose the application, and they have a right to be heard in fulfilment of our sacred principle of *audi alteram partem.* The DA also rightly referred the court to *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite* 2013 (6) SA 499 (SCA). At para 2 and 3 of that judgment it was said:

[2] As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.

[3] The plea bears an affinity to the plea of *res judicata*, which is directed at achieving the same policy goals. Their close relationship is evident from the following passage fromVoet 44.2.7:2

'Exception of *lis pendens* also requires same persons, thing and cause.-The exception that a suit is already pending is quite akin to the exception of res judicata, inasmuch as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of res judicata in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial

proceeding has once been taken up is also the place where it ought to be given its ending.'

The decision whether the DA was ‘any interested person’ in the context of the issues in this matter, its engagement with the issues including whether the applicant had proved the *lacuna* and the DA’s prayer for dismissal of the application, are simply ahead of their times, which time was on the return date. The DA’s application for intervention and its arguments are premature. They belong to the return date, as that court is the appropriate court to make those determinations. The DA should simply hold its horses. Its excitable steed cannot be the reason why other horses should not join the race. Other interested persons should have an opportunity to join.

NON-JOINDER

[6] Although the DA raised this issue in its founding papers, it did not pursue it in its heads of arguments. Both the first and third respondents persisted with their non-joinder, in that MVC failed to join political parties as well as the Independent Electoral Commission (the IEC). Neither the first nor the third respondent indicated how the alleged non-joinder prejudiced them. The respondents do not share responsibilities and resources, in particular governing jurisdiction, legal relationships and shared responsibility for another’s actions with political parties or the IEC. In fact, their constitutional responsibilities and rights are sometimes in tension with, if not outright opposed to, those of some or sometimes all political parties and sometimes even the IEC. In *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) it was said at para 12:

“The non-joinder issue

…

“[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may 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 proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) para 7; and Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited).”

I am persuaded that political parties may have a direct and substantial interest in this litigation. However, having regard to the nature of the application now before me, for a *rule nisi,* that is not the only enquiry. In contested elections like the one the country is faced with on 29 May 2024, with the number of parties contesting the elections, including independent candidates who will be doing so for the first time, I am not persuaded that the interests of justice permit that the applicant should be burdened with the responsibility, at this stage, to join every political party and candidate registered with the IEC to contest in the elections, or all political parties already represented in Parliament. The parties themselves and the candidates would have an opportunity to consider whether they elect to join the litigation or not. I am unable to comprehend how the granting of a *rule nisi* would necessarily prejudice the interests of third parties that have not been joined, in circumstances where the rule prayed for, called upon them to show cause, before the rule was made final. What I think may be necessary, is notice of both the application for the *rule nisi,* as well as the order that follow, before the return date, to be publicly displayed at the courthouse.

PRIMA FACIE CASE

[7] The crisp issue raised by MVC was whether the upper limit and the disclosure threshold survived the EMAA. MVC's case was that EMAA removed the R15 million annual limit on donations a political party may receive from a single donor, and the R100 000 thousand threshold over which individual donations to political parties must be disclosed. MVC's argument was that there was since 8 May 2024 no upper limit and disclosure threshold and that political parties could now receive these amounts without disclosing this to the public. It is against this premise that MVC sought an interim interdict that would revive the upper limit and the disclosure threshold.

[8] On 8 May 2024 the EMAA came into effect by Proclamation Notice 165 of 2024 by order of the first respondent. In terms of the preamble, the EMAA amended the PPFA to *inter alia* "amend the powers of the President to make regulations on certain matters, and to amend Schedule 2 in respect of the formula for the allocation of money in the Funds on a proportional and equitable basis, in respect of the upper limit of donations and the disclosure limit for donations." Previously section 8(2) of the PPFA provided that "a political party may not accept a donation from a person or entity in excess of the prescribed amount within a financial year". The "prescribed amount" was previously stipulated in regulation 7 of the Regulations, as follows:

"7. Upper limits of donations

The amount contemplated in section 8(2) of the Act is fifteen million rand within a financial year".

Section 9(1)(1) of the PPFA provided that a political party must disclose every donation received "above the prescribed threshold". Regulation 2 of the Regulations defines "prescribed threshold" as

"9. Disclosure limit

The threshold referred to in section 9(1)(a) of the Act is R100 000-00 within a financial year."

[9] Sections 8(2) and 9(1)(a) of the PPFA have been largely preserved in the EMAA, which required that both political parties and now independent candidates disclose any donation received above a prescribed threshold and prohibit the acceptance of donations exceeding the limit. The significant change introduced by EMAA granted the President the discretion to determine the upper limit and disclosure thresholds amounts after a National Assembly (NA) resolution. In terms of section 29(g) of the EMAA, Regulation 7 of the PPFA now read:

"7(1) Upper limit of donations

The president may, from time to time after a National Assembly resolution and by notice in the Gazette, determine the amount contemplated in section 8(2) of the Act."

In terms of section 29(h) of the EMAA, regulation 9 of the PPFA now read:

"9. Disclosure limit

The President may from time to time after a National Assembly resolution and by notice in the Gazette, determine the threshold referred to in section 9(1)(a) of the Act."

Without the resolution of the NA, the power to determine the respective amounts did not vest in the first respondent. This was also made clear by section 27 of the EMAA which amended section 24 of the PPFA and provided that the enactment of regulations by the first respondent, which included the setting of the upper limit and the disclosure threshold, could only proceed following a resolution by the NA. As at 15 May 2024, the NA had not passed such resolution.

[10] It is what this means that the parties were not agreed. MVC says this meant that upon commencement of the EMAA on 8 May 2024 there was no upper limit to donations in regulation 7(1) or disclosure threshold for donations in regulation 9, as the previous limit of R15 million and the threshold of R100 000-00 had been deleted. Moreover there was no NA resolution authorizing the first respondent to determine the upper limit and the disclosure threshold. This, according to MVC, meant that any amounts might be given and need not be reported. According to MVC this was an untenable and unconstitutional situation, invidious to the right to make an informed vote, the right to vote more generally and the very purpose of the PPFA. The applicant also referred to an order paper of the NA dated 9 May 2024 whose relevant parts read:

"No 18 -2024 SIXTH SESSION, SIXTH PARLIAMENT

…

NATIONAL ASSEMBLY
ORDER PAPER

THURSDAY, 9 MAY 2024

Meeting of House: 10:00

MOTIONS

1. Draft resolution (Chief Whip of the Majority Party): That the House –

   (1). Notes that section 24(1) of the Political Party Funding Act, 2018 (Act No. 6 of 2018) ("Political Party Funding Act") requires that the President, acting on a resolution of the National Assembly, may by proclamation in the Gazette make regulations in respect of amongst others"

(a) the maximum amount of a donation that may be accepted from a person or entity, within a financial year as contemplated in section 8(2); and

(b) the threshold amount which all donations received must be disclosed as contemplated in section 9(1)(a);

(2) further notes that with the Electoral Matters Amendment Bill, 2024 [B42B-2023], being assented to and specifically with the operation of section 29(g) or (h), a gap in the law will exist unless the amounts contemplated in section 8(2) and 9(1)(a) respectively have been set by resolution of the Assembly to empower the President to make regulations as contemplated in section 24 of the Political Part Funding Act, and

(3) resolves in terms of section 24 of the Political Party Funding Act –

(a) to set the amount contemplated in section 8(2) of the Act at fifteen million rand within a financial year, and the threshold amount referred to in section 9(1) of the Act at one hundred thousand rand within a financial year, and

(b) that the amounts contemplated in paragraph (a), inform regulations to be made by the President under the Political Part Funding Act."

The discussions of the resolutions did not take place on 9 May 2024 and were postponed to the next week, 16 May 2024. The applicant held the view that the need for consultation which informed the NA's postponement, had the risk of a postponement potentially indefinitely, and launched this application 0n 10 May 2024."

[11] The developments in the NA on 16 May 2024 are somewhat problematic, if not confusing. Up until that date, it is safe to accept that the NA would have shared the view

with MVC that there was a lacuna and that the NA needed to begin the filling of the gap in the law by resolving on the amounts to be forwarded to the President to consider determining for purposes of regulations of the upper limit and the disclosure threshold. In other words, the NA was to write on a new slate of the new legislation regulating upper limits and disclosure threshold from 8 May 2024. However, what the NA did, now suggested that the NA shared in the view that there were amounts contemplated in section 8(2) and 9(1)(a) set out in Regulations 7 and 9 of Schedule 2 of the PPFA. A reading of the Regulation 7 and 9 since 8 May 2024 does not provide one with the amounts, which would enable the President to determine the amounts on the advice of or after a resolution of the NA. The resolution of the NA, to make sense, must be a resolution on an amount for purposes of regulations 7 and 9 of schedule 2 of the PPFA. The only way that the NA resolution may not be confusing, is if the NA still relied on regulation 7 and 9 as it read before 8 May 2024. If the NA did not rely on the regulations before 8 May 2024, and sought to rely on them as they read after that day, then the NA had not been helpful to the first respondent with its resolution of 16 May 2024. The first respondent still did not know what the amounts for the upper limit and the disclosure threshold which were resolved by the NA for his consideration were.

[12] With this problem on his desk, I do not understand how the first respondent arrives at a conclusion that reading section 11 and 12 of the PPFA is helpful to resolve the problem that MVC is complaining about in this application. Especially sections 12 and 12A are long and the sections are not repeated in this judgment to avoid an unnecessary long judgment. Suffice it to state that there is still room for the first respondent and the fourth respondent to better articulate their case to the return date court. If the NA still believed as it did on 9 May that there was a lacuna, then the NA unfairly created more problems for the first respondent in respect of his determination of the upper limit and the disclosure threshold. To illustrate the point, I will just refer to the submission which Civil society formations submitted to the members of the Select Committee on Security and Justice, of the NCOP, on 19 March 2024. The organisations included the Ahmed Kathrada Foundation, Alliance of NPO Networks, Amabhungane Centre for Investigative Journalism, Ambassadors for Change, Centre for Civic and

Democracy Education, Centre for Good Governance and Social Justice, Council for the Advancement of the South African Constitution, Defend our Democracy Movement, Direct Democracy South Africa, media Monitoring Africa, My Vote Counts, Organisation Undoing Tax Abuse, Progressive Tamil Movement, Rising Stars Youth Development Netowrk, Sekunjalo Health and Poverty Alleviation, South African Conversations, The Southern African Institute for responsive and Accountable Governance, Westside Park Community Crisis Centre and Youth Empoering Initiative Democracy. Bullet 2 and 3 of those submission read:

"Why EMAB is unconstitutional

The EMAB is plainly unconstitutional for *inter alia,* the reasons set forth below.

1. The EMAB and specifically the amendments to regulation 7 and 9 if schedule 2 of the PPFA, provides 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, 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. Entrusting the President with the discretion to establish these financial thresholds 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. 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.

2. Moreover, there are not even meaningful guidelines provided for the exercise of this critical power by the President. It is a rule of law requirement, as underscored by several Constitutional Court judgments, that the law be free of vagueness and speak with clarity. This is clearly not achieved by the EMAB."

These submission were made when the EMAA was still a Bill. These submission not only indicate that the circle for interested persons may be bigger than just political parties registered or in Parliament and independent candidates, as it may attract civil society organisations and others, but also highlight the vulnerability to which the first respondent is exposed by the NA not resolving on the amounts, but leaving him to determine the amounts without the NA duly processing the amounts resolved.

[13] Reliance on section 27(5) of EMAA is basically on the same footing as reliance on section 11 of the Interpretation Act, 1957 (Act No. 33 of 1957) (the IA). Section 27(5) of EMAA amends section 24 of the PPFA and reads:

"(5) Each regulation in schedule 2 is a transitional regulation and shall become inoperative on the date that a regulation replacing the said regulation made by the President in terms of subsection (1) becomes effective."

Section 11 of the IA reads:

"11 Repeal and substitution

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."

The new Regulation 7 and 9 came into operation on 8 May 2024. In other words, the substituted provisions came into operation. I am persuaded by the applicant's case that

the old regulations have been repealed and substituted. The upper limits and threshold have been repealed. The legislation, the PPFA, since the amendment through the EMAA, no longer has the upper limit and the disclosure threshold. It seems to me that by the time section 27(5) came into operation, the R15 million in regulation 7 and the R100 000-00 in regulation 9 had already left the stable, and the NA had to pass a resolution and the first respondent had to determine the amounts in the respective regulations. Section 27(5) upon which the third respondent relied may save the day in each regulation in schedule 2 from 8 May 2024, but not before then in my view. The applicant has established a prima facie case. The first and third respondents, and having regard to the views I expressed in this judgment the fourth respondent as well, had extremely truncated times within which to consider the matter and fairly engage with it. For instance, the first and third respondents did not in their answering papers or in argument deal with their position on the resolutions of the NA on 16 May 2024 and what their position thereto was. A careful reading of their answering affidavits left me with the impression that they may have pinned their hopes on that the NA would “advice on or recommend” amounts to the first respondent through a resolution on the amounts to be determined, to enable the first respondent to apply his mind to the figures and numbers resolved. The opportunity of a return date allows the first and third respondents, in the interests of justice, an opportunity to help fully ventilate the applicant’s cause of complaint, including by supplementing tneir papers. It may well be that the return date court is convinced otherwise.

REMEDY

[14] In *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC), the Constitutional Court said at para 45 to 52:

“Transparency, accountability and corruption

[45] Secrecy enables corruption and conduces more to a disposition by politicians that is favourable towards those who funded them privately once elected into public office.

This is likely to flourish even where I information on private funding is 'held' at the discretion of the funded and unlikely to be exposed to 'the light of publicity'. For this reason, information on private funding must be compulsorily 'held'. PAIA captures 'record' in sufficiently broad terms to ensure that as much information as possible in the envisaged categories is 'held'.

[46] Because the right of access to information cannot be exercised in a vacuum, s 32(1)(b) alludes to the need to explain that the purpose for seeking information 'held' by another person is for the exercise or protection of any rights. If it were not an implicit constitutional requirement for information relating to the proper exercise of certain constitutional rights to be 'recorded' and 'held', it is conceivable that 'another person' could easily cave in to the temptation not to hold some sensitive and potentially revealing information, or having 'held' it to destroy it, so that there would be nothing available to disclose. But, even apart from disclosure being an aid that could discourage corruption, information does help one to know more about an entity or person.

[47] The loophole or leeway 'not to hold' or not to preserve information, and the consequential non-disclosure of information relating to private funding or quantifiable support in kind, constitutes fertile ground for undermining or even subverting the real 'will of the people' that is expressible through voting. If the door is left open to potentially or actually compromised political parties or independent candidates to be voted into and hold public office, then the government birthed by such flawed political players could hardly be described as truly based on the 'will' of the people. That government or legislative body would not find it easy to implement the good governance and efficiency-enhancing practices prescribed by s 195 of the Constitution.

[48] The foundational values of our constitutional democracy — like openness, responsiveness, accountability and the realisation of the constitutional vision of building a united nation and improving the quality of life of all — could thus be at the mercy of unknown and even unscrupulous funders. For, there is indeed no free lunch. This is not to say that all funders are, without more, intent on furthering selfish or sectional interests

at the expense of national interests. But some big political campaign funders, even in old democracies, have been exposed as being inclined 'to use money for improper purposes'. They reportedly tend to determine or influence, in a meaningful way, the policy direction to be pursued by those in whose political life or fortunes they 'invested' their resources. And when elected public office bearers are illegitimately dictated to, that is likely to poison the broader political landscape and governance, thus weakening or throttling our shared values and constitutional vision. Lack of transparency on private funding provides fertile and well-watered ground for corruption or the deception of voters.

[49] Unsurprisingly, the United Nations Convention against Corruption, which our Parliament has duly ratified, enjoins state parties to —

'consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties'.

[50] In the same vein, the African Union Convention on Preventing and Combating Corruption, which we have also ratified, says:

'Each State Party shall adopt legislative and other measures to:

(a) Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and

(b) Incorporate the principle of transparency into funding of political parties.'

[51] Transparency in the area of the private funding of political parties and independent candidates helps in the detection or discouragement of improper influence and the fight against corruption. Both the African Union and the United Nations have come to this

realisation and have taken appropriate steps to help inject transparency and root out corruption in relation to private funding. Politicians who use public office in the furtherance of the agendas of benefactors, at the expense of the best interests of all, are very likely to be found out where there is transparency. The recordal, preservation and disclosure of information on the private funding of political players will thus keep voters better equipped to make out the real interests these politicians are likely to serve.

[52] Access to this information helps voters and contestants to speak against and expose the corrupt 'pay-back-time' political practices. The known possibility of voters and political rivals being able to make the necessary connection between private funding and the likely or actual stance of political parties and independent candidates on policy matters of importance, does have the predictable effect of discouraging the pursuit of corrupt or selfish sectarian agendas. And, it also frees our public representatives to do what they promise and are obliged to do, unencumbered by potentially corrupt deals that could be enabled by undisclosable private funding. If secrecy thrives, then our constitutional project would be at risk of being betrayed or shipwrecked."

At para 58 the court continued:

[58] Section 16(1)(b) guarantees 'everyone' the right to 'freedom to receive or impart information or ideas'. This is an omnibus provision so wide that it appears incapable of leaving any willing passenger behind. In a political environment like elections, information on funding is needed by party members or supporters of a political cause to recruit, campaign and generally impart information or ideas. All of them, including NGOs, the media and academia, need to 'receive' information relevant to voting to in turn be able to 'impart' and cause others to 'receive' processed information from them. These are rights open to them to exercise or protect. The state's constitutional obligation, to ensure that this information is not deceptively or selectively recorded, is preserved and reasonably accessible to voters, also extends to all, especially information-disseminating and public-interest-advancing establishments.

At para 72 to 74 it was said:

“[72] It is enough to lay down a principle that requires the state to ensure that the information be recorded, preserved and disclosable in a reasonably accessible manner and that it is not to be paid for. Millions of voting South Africans are unemployed. And even those who are employed need every rand they earn to meet their basic necessities. Those who stand to benefit from these people's vote or participation in the elections ought to be agreeable to a regulatory framework that facilitates the recordal, preservation and reasonable access to information that could shed more light on who they really are and whose favours they might have to return. That information is indeed essential for voting and imparting information.

[73] More importantly, it remains the primary duty of the state to ensure that it facilitates access to information that would enhance the enjoyment of fundamental rights. For this reason, the nature of the information on private funding is such that Parliament might, if so advised, impose on the state or any of its organs the duty to hold, preserve and disclose that information, so that voters may have ready or reasonable access, as envisaged by s 32(1)(a) of the Constitution. Be that as it may, whatever Parliament might decide to do, the state is obligated by a proper reading of s 32 with ss 19 and 7(2) to make this information reasonably accessible to the public.

[74] The consequence of all this is that political parties and independent candidates are constitutionally obliged to record, preserve and disclose information on private funding. But, because s 7(2) imposes the obligation on the state to facilitate the enjoyment of rights in the Bill of Rights, and s 32(2) requires the enactment of national legislation to essentially provide for the recordal or 'holding' and disclosure of required or needed information, it thus falls on the shoulders of the state to honour its s 7(2) obligations.

[75] How best to fulfil that obligation should be left to Parliament which bears the legislative authority of the Republic.”

In concluding the heading, ‘What is to be done’ under which para 72 to 74 fell, the court said at para 76:

“[76] It does not fall within the remit of this court to prescribe to Parliament whether the recordal, preservation and disclosure of all information relating to private funding should be regulated in terms of PAIA, or PAIA and another legislation or PAIA and other measures. Again, that is a decision to be taken by Parliament itself. Our duty is to articulate the unfulfilled obligation in broad terms, but with sufficient clarity to give Parliament a fair sense of what is required of it. We are required to provide broad guidelines on what could be considered by parliamentarians in developing a fitting regulatory framework in this connection. The fundamental principle that must be underscored here is that information on the private funding of political parties and independent candidates must be 'held' or 'recorded', preserved and be reasonably accessible.”

The applicant’s case was that the PPFA was a statute through which Parliament aimed to comply with the constitutional requirements as set out in this Constitutional Court judgment, with specific reference to impose an obligation on political parties to disclose donations above R100 000-00 and the limit on an amount that a political party may receive from an individual or entity within a financial year, which placed a cap at R15 million. That was the law until Tuesday 8 May 2024. After 8 May 2024 a political party was entitled to receive as much money as a person or entity was willing to give without any requirement to disclose that donation. This, according to the applicant, was what the judgment said should be avoided. The EMAA did not have a transitional mechanism. The upper limit and the disclosure threshold now waited for the NA to pass a resolution of the amount, which would trigger the powers of the first respondent to determine and publish the regulations on amounts. The resolution was now stuck in the bureaucratic machinery of the NA, and the first respondent had no power to fill the gap on his own.

[15] This court is not seized with the proceedings to declare sections 29(g) and (h) of EMAA and amended regulations 7(1) and (9) of Schedule 2 of the PPFA inconsistent with the Constitution and invalid. It seems that those proceedings are yet to be instituted. The reliance by the applicant on section 172 of the Constitution, in my view, is simply misplaced. The section reads:

"172. Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2)(a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[Para. (a) substituted by s. 7 of the Constitution Seventeenth Amendment Act of 2012 (wef 23 August 2013).]

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

This court is not making an order of constitutional invalidity and it follows that this court cannot rely on section 172(2)(b) to grant the temporary interdict which the applicant prayed for, pending the return date. Furthermore, an ample and flexible remedial jurisdiction, for purposes of section 172(2)(b) to forge an order that placed substance over form can follow once the court makes findings on the dispute, not before. It is only following its findings that a court is best placed to determine whether the matter called for structural interdicts or just supervisory orders, in its quest to require parties to take steps directed at substantive resolution of the dispute.

[16] *Prima facie,* the determination of the upper limit in the amended regulation 7(1) and the disclosure threshold in the amended regulation 9 are pending. The responsibility to resolve the upper limit and disclosure threshold was with Parliament, and the determination thereof with the President. If the return date court found that the determination was indeed pending, it would be best positioned to decide on what was to be done. Persons in the position of the applicant who sought access to information on private funding of political parties with specific reference to the highest limit donated at or beyond R15 million within one financial year and/or any donations beyond R100 000-00, which was previous threshold, had sections 32(1)(b) of the Constitution, the provisions of PAIA and the other provisions of the PPFA as amended by EMAA, some of which the first respondent referred to in this application, to exhaust in the interim. They are not totally without recourse. The stage of the process in this matter did not justify this court to usurp the legislative functions of the Legislature and the political

judgment of the first respondent. Whilst seized with a *rule nisi,* it would be wrong to clothe myself with powers of review. For these reasons I make the following order:

(a) The application to intervene, by the Democratic Alliance, is dismissed with costs on the basis of scale B.

(b) The prayer of non-joiner by the opposing respondents is dismissed with costs on the basis of scale B.

(c) The application is heard on an urgent basis and the applicant's non-compliance with the rules relating form, service and time period and hearing is condoned.

(d) The issue of a *rule nisi* is authorized calling upon any interested person to show cause on 12 August 2024 (the return date), why an order in the following terms should not be granted.

1.1. pending the earlier of:

(i) the finalization of proceedings to declare sections 29(g) and (h) of the Electoral Matters Amendment Act, 2024 (Act No.14 of 2024) (the EMAA) and amended regulations 7(1) and 9 of schedule 2 to the Political Parties Funding Act, 2018 (the PPFA) inconsistent with the Constitution and invalid, and other relief, which must be instituted within 20 days of the order, and

(ii) the determination of the upper limit in the amended regulation 7(1) of schedule 2 of PPFA (the upper limit) and the disclosure threshold in the amended regulation 9 of schedule 2 of the PPFA (the disclosure threshold):

1.1.1. The upper limit shall be deemed to have been determined at R15 million per annum;

1.1.2. The disclosure threshold shall be deemed to have been determined at R100 000 per annum.

(e) The prayer for the terms of the order set out above, to immediately operate as an interim order, is dismissed with costs on the basis of Scale B.

(f). The first and third respondent, together with the Democratic Alliance, are to pay the costs of the *rule nisi* jointly and severally, to be taxed on the basis of Scale B.

(g) The applicant should assist the Registrar to ensure that a copy of this order is publicly displayed on a prominent notice board where members of the public have access, in the courthouse building.

DM THULARE
JUDGE OF THE HIGH COURT