

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

Case No. 10607/24

In the matter between:

**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

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**HEADS OF ARGUMENT**

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## THE DA'S INTERVENTION

### Overview

- 1 On 14 May 2024, the Democratic Alliance ("**the DA**") instituted an intervention application to be admitted as a fifth respondent in these proceedings ("**the first intervention application**").
- 2 On 27 May 2024, following the hearing on 17 May 2024, the Honourable Judge Thulare delivered his judgment in which he *inter alia* dismissed the first intervention application with costs.
- 3 On 29 July 2024, pursuant to the judgment, the DA instituted a second intervention application styled as an "application to oppose" ("**the second intervention application**"). We submit that there is no such application in our law, and the test for intervention remains the same, regardless of how the DA frames the second intervention application.<sup>1</sup>
- 4 We address the DA's purported interest to oppose the final relief on the return date, as set forth in the second intervention application. The second intervention application is premised on a ground of intervention which has already been rejected by this Court in its judgment handed down on 27 May 2024, and there is no basis on which this ground should now be upheld, for the reasons set forth below, read together with that judgment.

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<sup>1</sup> *Jansen Van Rensburg v Kitchenbrand* 2022 JDR 2258 (GJ).

### The test for intervention

5 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.

6 As the Constitutional Court held in *Gory v Kolver*,<sup>2</sup>

*"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 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".<sup>3</sup>*

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<sup>2</sup> [2006] ZACC 20; 2007 (4) SA 97 (CC).

<sup>3</sup> *Gory*, paras 12-13.

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

7.1 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".<sup>4</sup>

7.2 An indirect interest in the litigation is not sufficient (and thus a mere financial interest is insufficient).<sup>5</sup>

8 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."*<sup>6</sup>

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

<sup>5</sup> *Standard Bank of South Africa v Swartland Municipality* 2011 (5) SA 257 (SCA) para 9.

<sup>6</sup> *Gory*, para 13.

### The intervention application must be refused

9 The DA has failed to satisfy both requirements of the test for intervention.

10 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 one interest. This interest will not be adversely affected if the relief is granted in this matter.

10.1 The DA 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.<sup>7</sup> This is a non sequitur.

10.1.1 The mere fact that a person must comply with legislation does not automatically give them a direct and substantial interest in litigation dealing with the validity of that legislation. Indeed, this is the position that is clearly articulated in *Gary*.

10.1.2 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

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<sup>7</sup> The DA's supporting affidavit ("**SA**") in the second intervention application: paras 14 – 15, pp 285.

its own interpretation of events, it accepts that it is subject to the disclosure thresholds and caps.

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

11.1 First, the DA's interpretation is premised on an incorrect reading of section 11 of the Interpretation Act. At any rate, this is the same submission that the third respondent has made to the court, making the DA's submission unhelpful.<sup>8</sup>

11.2 Second, this is an application set down to be heard on an expedited basis and the DA has only belatedly sought to intervene in late July 2024, despite knowing as early as 27 May 2024 that the matter was set down on 12 August 2024, and the matter should not be derailed or become cumbersome through intervention applications.<sup>9</sup>

11.3 Third, the second intervention application essentially seeks to introduce a counterapplication at a late stage in the proceedings, in circumstances where, should it be granted leave to "oppose", this Court would likely have to allow all parties to file papers to address the relief sought by the DA.<sup>10</sup>

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<sup>8</sup> The applicant's AA in the second intervention application: para 30.1, pp 339.

<sup>9</sup> The applicant's AA in the second intervention application: para 30.2, pp 339.

<sup>10</sup> The applicant's AA in the second intervention application: para 30.3, pp 339.

11.4 Fourth, and importantly, the DA will not suffer any prejudice if the relief is granted. The DA believes it is currently as a matter of law already subject to the threshold limits and caps which the applicant seeks by way of interim relief in these proceedings.<sup>11</sup>

11.5 Fifth, 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.<sup>12</sup> 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.<sup>13</sup>

#### **Alternative relief: consolidation with the 2023 application**

12 As alternative relief, the DA is requesting that this Court postpone the determination of the *rule nisi* so that it can be heard and decided together with the pending 2023 application. The DA argues that the issues and facts in both the main application and 2023 applications overlap.

13 The DA is wrong for the following reasons:

13.1 The main application seeks to reinstate the pre-amendment disclosure threshold of R100,000 as an interim measure, ensuring continued

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<sup>11</sup> The applicant's AA in the second intervention application: para 30.4, pp 339 – 340.

<sup>12</sup> The applicant's AA in the second intervention application: para 30.5, pp 340.

<sup>13</sup> The applicant's AA in the second intervention application: paras 31 – 39, pp 340 – 342.

transparency and preventing further harm. This prayer is interim and forward-looking, aiming to preserve the status quo and ensure compliance with existing transparency requirements, and applying the interim relief test in similar types of cases without addressing the broader constitutional implications.<sup>14</sup>

13.2 The 2023 application, in contrast, seeks a comprehensive overhaul of the political funding disclosure framework. It challenges the existence of any disclosure threshold, contends for full transparency without financial limits, and seeks a reduction in the annual donation limit. The retrospective relief sought is fundamentally different from the interim measures in the main application, aiming to address past harm due to the lack of thresholds. Even if such relief is granted, it would be difficult to 'unscramble the egg' and therefore, the relief sought in this application is necessary to prevent ongoing harm.<sup>15</sup>

13.3 The relief sought in the main application is interim and was filed first. It addresses the pendente lite period, before the 2023 application will be heard. It will lapse upon the 2023 application's determination.<sup>16</sup>

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<sup>14</sup> The applicant's AA in the second intervention application: paras 52 – 53; 63, pp 346 – 347; 349 – 350.

<sup>15</sup> The applicant's AA in the second intervention application: paras 54 – 62; 64, pp 347 – 349; 350.

<sup>16</sup> The applicant's AA in the second intervention application: para 65, pp 350.

## Alternative declaratory relief

14 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*".<sup>17</sup> But this does not make any sense. If My Vote Counts' application (ie the main application) is 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

15 In the intervention application:

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

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

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

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<sup>17</sup> The DA's SA in the second intervention application: paras 21 – 22, pp 287.

## SUBMISSIONS ON THE MERITS

17 In terms of section 172 of the Constitution, My Vote Counts applies for temporary relief<sup>18</sup> to (i) prevent substantial and irreparable harm to constitutional rights and (ii) mitigate the effects of a palpably irrational decision, following the President's sudden and unexpected decision to bring into force of two provisions in the Electoral Matters Amendment Act 14 of 2024 (**Amendment Act**) on 8 May 2024.<sup>19</sup>

18 By way of brief background:

18.1 The Political Parties Funding Act 6 of 2018 (**Funding Act**) — which is a statute that aims to comply with the state's constitutional requirements, as set out in the Constitutional Court's decision in *My Vote Counts II* — imposed (i) an obligation on political parties to disclose donations above R100,000 and (ii) placed an R15,000,000 cap on the amount that a political party may receive from an individual or entity within a financial year.

18.2 On Wednesday, 8 May 2024, those limits were scrapped.<sup>20</sup> As it stands, a political party is entitled to receive as much money as a person or entity is willing to give and without any requirement to disclose that donation.

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<sup>18</sup> NoM, p1.

<sup>19</sup> The impugned provisions are s 29(g) and (h).

<sup>20</sup> FA, "FA9", pg 44.

The lack of disclosure is the exact situation that the Constitutional Court disavowed in *My Vote Counts II*.

18.3 This lacuna was created because the Amendment Act does not have a transitional mechanism.<sup>21</sup>

18.4 Instead, in terms of the amended statutory and regulatory provisions, the disclosure requirement and cap may only be re-introduced when two things happen. The National Assembly must first pass a resolution. That then triggers the powers of the President to publish regulations on the disclosure threshold and cap. This will not happen any time soon. In any event, every day that there is a lacuna poses an intolerable risk to our constitutional democracy.

18.5 The situation that has been created is in direct conflict with the Constitutional Court's express requirements in *My Vote Counts II*.

18.6 To compound matters, it is undoubtedly an irrational and unlawful decision to bring a law into force when doing so creates a lacuna. While the Amendment Act seeks to modify the legal framework (changing the process and powers for setting disclosure thresholds and cap) it has (i) not provided a transitional measure and (ii) leaves the decision to fill the gap to the bureaucratic machinery of the National Assembly and the

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<sup>21</sup> In another sign of irrationality, the new section 24(5) of the Funding Act, in its amended form, to provide that the regulation in schedule 2 will be transitional measures. The problem, however, is that the Amendment Act deletes the disclosure threshold and maximum cap, thereby eliminating the alleged transitional measures.

National Executive (which may have no incentive to fill the lacuna with expedition).

18.7 The court's urgent intervention is thus required.

19 These submissions deal with four parts:

19.1 Briefly, we outline the legislative amendments and explain that the amendments have created a lacuna.

19.2 After that, we submit that the lacuna violates the constitutional requirements and principles in the *My Vote Counts II* decision.

19.3 We explain why the matter is urgent.

19.4 Lastly, we address the issue of remedy.

20 What we set forth here must be read with the findings of this Court in respect of My Vote Counts' arguments on the merits in its judgment of 27 May 2024.

### **Legislative amendments and the lacuna**

21 Prior to the amendment:

21.1 Section 8(2) of the Funding Act 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". Parliament stipulated the "prescribed amount" 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."*

21.2 Section 9(1)(a) of the Funding Act provided that a political party must disclose every donation received "*above the prescribed threshold*". Regulation 9 of the Regulations — which too was initially set by Parliament — defines the "*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."*

22 Section 8(2) and Section 9(1)(a) of the PPFA have been preserved in the Amendment Act, merely adding that both political parties and now independent candidates disclose any donation received above a prescribed threshold and prohibit the acceptance of donations exceeding this limit. However, the Amendment Act introduces a significant change: it removes the limits and caps that Parliament previously prescribed in regulation 7 and regulation 9.

23 As a result:

23.1 In terms of section 29(g) of the Amendment Act, regulation 7 of the Funding Act (in dealing with the upper limits of donations) has now been replaced by the following:

*"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."*

23.2 In terms of section 29(h) of the Amendment Act, regulation 9 of the Funding Act (in dealing with the disclosure limit) is substituted with the following:

*"9. Disclosure limit:*

*The President must, 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"*

24 The effect of the above amendments at commencement on 8 May 2024 means that there is no upper limit to the 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 have been deleted.

25 On 16 May 2024, the National Assembly passed a resolution that requires the President to: (i) "make regulations regarding the amounts contemplated in section 8(2) and 9(1)(a) [of the Funding Act] on an urgent basis as set out in

regulations 7 and 9 of Schedule 2 of the [Funding Act]" and (ii) "within six months from the date of this resolution, table comprehensive draft regulations for consideration by the National Assembly, and for a resolution to be made in terms of section 24(1)(a) of the [Funding Act]" (**"the 16 May Resolution"**).

26 The 16 May Resolution is not a model of clarity. It is not clear if the President is required to prescribe the amounts contemplated in section 8(2) and 9(1)(a) or make regulations about how those amounts are to be determined in due course. Moreover, part (ii) of the 16 May Resolution seems to envisage the making of a further "resolution ... in terms of section 24(1)(a) of the [Funding Act]". But section 24(1)(a) of the Funding Act requires a National Assembly resolution before the President makes regulations "in respect of matters contemplated in", amongst other sections, section 8(2) and 9(1)(a) of the Funding Act (which deal with the upper limit to the donations and the disclosure threshold). This makes the 16 May Resolution is circular: at least on one reading, it is a resolution authorising the President to make regulations so that the National Assembly can one day make another resolution authorising the President to determine an upper limit to the donations and the disclosure threshold. The important point for now is that there is no upper limit or disclosure threshold in place.

27 The third respondent searches for a safe harbour in section 11 of the Interpretation Act, 1957 and section 27(5) of the amended PPFA save the legislation from unconstitutionality. Neither plug the inadvertent hole in the Funding Act.

28 Section 11 provides as follows:

*“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.”*

29 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,<sup>22</sup> stating that the repealed law will continue to apply until the president proclaims the commencement of the act.

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

30.1 On 7 May 2024, the President signed the Amendment Act into law.<sup>23</sup> 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”*.

30.2 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”*.<sup>24</sup>

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<sup>22</sup> See Devenish, Interpretation of Statutes (First Edition, 1992) at 252.

<sup>23</sup> The applicant's FA in the main application: para 45.1, pp 19.

<sup>24</sup> The applicant's FA in the main application: "FA9", pp 44.

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

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

32 This Court cannot reimagine what section 11 means just for the purposes of this case when its meaning and import is clear, and does not align with the purpose of that provision or the language used. The language cannot reasonably bear the interpretation contended for by the third respondent.

33 The third respondent also relies on the new section 27(5) of the PPFA. That section is of no assistance to the third respondent. It provides as follows:

*"(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."*

34 The new section 27(5) only came into force on 8 May 2024. It can only thus preserve thresholds which are in force on, or after 8 May 2024. On 8 May 2024, Regulations 7 and 9 did not prescribe the disclosure threshold or the upper limit for donations. Section 27(5) of the PPFA will regulate the situation going forward once there is a determination of the disclosure threshold and the upper limit for donations by the President, and not before then.

## My Vote Counts II

35 The above situation directly breaches the requirements of the Constitution, which the Constitutional Court pronounced in the decision of *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* (CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018) ("**My Vote Counts II**"). The case dealt with the right to receive information on the private funding of political parties in the context of the right to vote.

36 In *My Vote Counts II*, the Constitutional Court ordered that:

36.1 *"It is declared that information on the private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in the elections"* (order 1.1).

36.2 *"It is declared that information on private funding of political parties and independent candidates must be recorded, preserved and made reasonably accessible"* (order 1.2).

36.3 Parliament must, among other things, *"take any other measure it deems appropriate to provide for the recordal, preservation and facilitation of reasonable access to information on the private funding of political parties and independent candidates"* (order 1.4).

37 In ordering the relief, Mogoeng CJ held that:

37.1 *"The cumulative effect of these [constitutional] responsibilities yields an outcome that requires the state to pass legislation that provides for the recordal, preservation and reasonable accessibility of information on private funding. If these principles were not infused into our constitutional jurisprudence, it would be very difficult to give real meaning to the right of access to information within the context of the right to vote. The role of transparency and accountability, that are essential for rooting out the corruption that could be enabled by undisclosed private funding, reinforces the need to record, preserve and disclose. A reasonably accessible or disclosable record in this connection thus needs to be kept and not destroyed at the discretion of the holder."*<sup>25</sup>

37.2 Further, writing in the context of why the Promotion of Access to Information Act was not a suitable mechanism to facilitate private funding disclosures, but which principle finds application in this matter as well, it was held that *"[i]t does not help much that this crucial information could be freely accessible at the discretion of the Minister. Reasonable access should be institutionalised. It is not to be subject to the benevolent exercise of a ministerial discretion"*.<sup>26</sup> So too here, the funding disclosure and caps cannot be subject to the discretion of the president.

38 The amendments violate the constitutional requirements set down in *My Vote Counts II* because, among other things:

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<sup>25</sup> *My Vote Counts*, para 44.

<sup>26</sup> *My Vote Counts*, para 70.

- 38.1 Contrary to the express requirements of the declaratory relief issued in the decision, there is currently no requirement for political parties to disclose the source and scope of their private funding. Thus, (i) the voting public will be denied access to information in the context of the right to vote to which they are entitled; (ii) the scope for abuse has increased; and (iii) the obligation of the state to record, preserve and make accessible information on private funding of political parties cannot be fulfilled.
- 38.2 To make things worse, going forward, the disclosure threshold and caps will be subject to the whims of Parliament and the President, including the sole power of the President to choose those limits. This is the type of outcome that the *My Vote Counts II* decision warns against. The disclosure thresholds and caps — including when they come into force, if at all — cannot be left to the discretion of the National Assembly and the President. As the Constitutional Court explains, reasonable access to information on political funding must be institutionalised.
- 39 It is also settled law that the bringing into force of primary legislation without the requisite regulations being in place is irrational, unlawful and unconstitutional.<sup>27</sup> The lacuna is acknowledged by the President and was acknowledged by Parliament, and exists to this day, now three months later.

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<sup>27</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

It has not been fixed. The lacuna is thus plainly unconstitutional and requires an urgent remedy which only a court is constitutionally empowered to grant.

### Urgency

40 My Vote Counts — and the public in whose interest this application is brought — will be denied substantial redress if the matter is heard in the ordinary course.

40.1 For as long as the lacuna remains, political parties are entitled to receive staggering amounts without any oversight, transparency and disclosure requirements. And all of this leads to the problems identified in the *My Vote Counts II* decision: the absence of laws allows for abuse, provides an unfair advantage, and jeopardises the voters' right to an informed choice. There is no other remedy that can cure the ongoing infringement of constitutional rights and requirements.

40.2 Each passing day risks irreversibly damaging consequences for South Africa's constitutional democracy and its voters. The 16 May resolution passed by the National Assembly exacerbates the problem, as it seems to recognise the making of regulations takes time and that the President must present draft regulations to Parliament within six months. It also contemplates that only after this is done will the National Assembly then consider passing a resolution to authorise him to make regulations.

40.3 Even once these draft regulations are provided to Parliament (assuming that this is done within the six-month period), there is no assurance that Parliament will promptly pass the resolution empowering the President to establish new financial thresholds (and they have already demonstrated that they will not act expeditiously) or will agree to the President's proposed thresholds. In the meantime, there are no thresholds and limits in place. Indeed, political parties might lack the incentive to push for the resolution. And even after the National Assembly adopts such a resolution (whenever that may be), the President must still enact specific regulations, by notice, causing further delays. Considering the law-making process involved, it is highly improbable that this will be finalised before and soon after the upcoming elections.

40.4 The passing of the 2024 elections does not diminish the urgency of and need for the relief sought in this application. The reality is that political parties and independent candidates continue to receive funds from private parties beyond election periods, and without established financial thresholds, there is an ongoing risk of unregulated and undisclosed funding. This situation necessitates prompt intervention to maintain transparency and accountability in political financing.<sup>28</sup>

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<sup>28</sup> The applicant's AA in the second intervention application: para 66 – 69, pp 350 – 351.

41 Further, My Vote Counts has acted diligently in bringing this urgent application to court as soon as possible.

41.1 On 7 May 2024, the President signed the Amendment Law into law.

41.2 On 8 May 2024, the Amendment Law came into operation and effect.

41.3 On 9 May 2024, during a parliamentary session it became apparent that the National Assembly would not be able to pass the resolution in order to trigger the President's power to publish regulations. It does not appear that the National Assembly will be able to reconvene on this issue before the elections.

41.4 On 9 May 2024, this application was drafted and instituted by the applicant, the day it became clear that the lacuna would not be timeously addressed. Before the papers were served, the applicant's attorneys notified the State Attorney that the application was being prepared and would be enrolled today.

42 It is worth remarking that, more than two months before the enactment of the EMAA, My Vote Counts forewarned both the National Council of Provinces and the President of the constitutional deficiencies in the Amendment Act, and the President was informed that litigation would be instituted. The Office of the President requested My Vote Counts to hold off on possible litigation, requesting that they wait for the President to consider the matter. My Vote Counts heeded that request. The President, however, proceeded suddenly

and without prior warning to sign the Amendment Act into law and bring it into operation. With respect, the conduct of the Office of the President has contributed to the urgency of this matter.

43 The relief is interim and any interested parties have had a full opportunity to respond to this application and, if not already party to this application, to intervene. This appropriately weighs the need for a swift hearing given the circumstances of the case, the importance of constitutional principles at stake in this matter, and the procedural rights of the respondents.

44 Moreover, this matter came before the Honourable Dolamo J on 10 May 2024. The Learned Judge directed that the matter will be heard on 17 May 2024, and further directed that all the parties were to file papers timeously so as to ensure that it can be heard on that date. The court thus has prescribed the timelines in this matter, and has afforded the respondents every opportunity to participate in these proceedings fully.

### **Relief**

45 Section 172(1)(b) of the Constitution provides that a court, when deciding a constitutional matter within its power, “*may make any order that is just and equitable*”. We emphasise three principles.

45.1 First, section 172 of the Constitution grants the courts wide remedial power to order just and equitable relief in all constitutional matters. For example, *In Head of Department: Mpumalanga Department of Education*

*v Hoërskool Ermelo*,<sup>29</sup> Moseneke DCJ, on behalf of a unanimous Constitutional Court, held that:

*"It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders."*<sup>30</sup>

45.2 Second, section 172 of the Constitution allows the courts to craft an appropriate remedy to ameliorate the adverse effects of a law that was brought into effect prematurely because the supporting regulations were not yet in place. For example:

45.2.1 In *President of the Republic of South Africa v South African Dental Association*,<sup>31</sup> the court set aside a presidential

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<sup>29</sup> [2009] ZACC 32; 2010 (2) SA 415 (CC).

<sup>30</sup> Ibid para 97.

<sup>31</sup> [2015] ZACC 2; 2015 (4) BCLR 388 (CC).

proclamation that brought into force provisions in the National Health Act because the supporting regulations to the statutory provisions were still pending and thus a lacuna was created in law, leading to adverse outcomes.

45.2.2 Also, in *Pharmaceutical Manufacturers Association of SA*,<sup>32</sup> the Constitutional Court set aside a proclamation bringing into force a law given that the supporting schedules were not in place and thus the law was inoperative.

45.3 Third, section 172 allows the court to order interim orders pending the further decisions of a public actor.<sup>33</sup>

45.4 Fourth, in exercising the court's wide remedial power under the above section, "[s]o wide is that power that it is bounded only by considerations of justice and equity."<sup>34</sup>

45.5 Fifth, the separation of powers doctrine does not in any way preclude the court from granting the relief in this matter. It is apparent that any lacuna is patently unconstitutional. The third respondent does not contend otherwise. It tries to escape the inevitable consequence of that simple, but fundamental proposition by contending that there is, in fact, no lacuna and the legislation is saved from unconstitutionality by section 11

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<sup>32</sup> Op cit fn 27.

<sup>33</sup> See, for example, *Dawood v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC).

<sup>34</sup> *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC), para 53.

of the Interpretation Act. The DA's position is the same. It is thus clear that all of the respondents, and the intervening party are content with a disclosure threshold of R100,000 per annum and an upper limit of donations of R15 million per annum. This is, however, precisely what the effect of the applicant's relief will be. The respondents thus do not raise a dispute of substance, or one that trenches upon the separation of power. Their argument is one of form.

45.6 Sixth, the relief is narrowly tailored, as the National Assembly and the President can always amend the disclosure threshold and upper limit by passing the requisite resolution and regulations.

45.7 Seventh, the relief is interim, and will fall away at the earlier of: (i) a determination that has been made on the financial thresholds in terms of the Amendment Act; or (ii) the conclusion of the 2023 application.

46 In the circumstances, the court is empowered to, and should grant the relief sought in this case.

47 My Vote Counts is entitled to an effective remedy. It is respectfully submitted that the relief is appropriate in this case. It will be effective in curing the harm caused and is narrowly tailored.

47.1 The relief mirrors the position before the Amendment Act took effect. In other words, the disclosure threshold and upper limit provided for in the notice of motion are the same as the incumbent President and

Parliament had approved and signed into law. Accordingly, these parties cannot suggest that the disclosure threshold or caps are unworkable or unreasonable.

47.2 The advisors of the National Assembly proposed that the same disclosure threshold and cap remain in place.

47.3 Following the *My Vote Counts II* decision, the state has no legitimate interest in preventing the disclosure of private funding of political parties.

47.4 The relief also does not interfere with the powers of the National Assembly and the President. This is because they retain the authority to determine thresholds in terms of the Amendment Act, which would bring this interim relief to an end.

47.5 In fact, the Amendment Act appears to have wanted to retain the existing disclosure threshold and cap by stating that schedule 2 — i.e., the regulations — would remain in operation until the President publishes new regulations on a matter.<sup>35</sup> However, regulation 7 and 9 were simultaneously repealed, thereby nullifying what appears to have been an objective of Parliament. Despite the clumsy legislative drafting, this is a compelling indication that Parliament intended that (i) there should

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<sup>35</sup> See Funding Act, s 24(5), as amended.

be no lacuna and (ii) the existing disclosure threshold and upper limit would remain in place as a transitional measure.

### **Relief**

48 For these reasons, the applicant asks for the relief set out in the notice of motion, including costs on scale B. If My Vote Counts is not substantially successful, the *Biowatch* principle applies.<sup>36</sup>

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Chambers

Sandton

8 June 2024

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<sup>36</sup> In *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC) para 56:

*"I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the state that had control over its conduct."*