



Oral Submission on the Promotion of Access to Information Act Amendment Bill to the Committee of Justice & Correctional Services (18 September 2019)

Organisation: My Vote Counts (MVC)

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1. Introduction

1.1. MVC appreciates the opportunity to make an oral submission to Honourable members of the Committee of Justice and Correctional Services (“the Committee”) on the Promotion of Access to Information Act (PAIA) Amendment Bill (“the Amendment Bill”).

1.2. We are aware that Parliament’s 18 month deadline to amend PAIA is nearing, but the haste at which these public hearings were organised will surely allow the Committee to fulfill Parliament’s obligations in terms of the Constitutional Court judgement (“the judgement”), confirming the Western Cape High Court (WCHC) ruling in MVC’s favour on 21 June 2018 on the matter between *MVC vs. the Minister of Justice & Others*.

2. Overview: Political Party Funding Developments in the last two years

2.1. MVC & Courts: Constitutionality of PAIA challenged in terms of Section 32(1b) of the Constitution, read with Section 19.

2.2. Parliament: Parliamentary Committee drafted and passed the then Political Party Funding Bill in Parliament.

2.3. These developments occurred independently of one another, but at concurrent time periods.

2.4. Question that arose in the Parliamentary Committees: How would the WCHC judgement and/or Constitutional Court judgement affect the role of Parliament in drafting the then Political Party Funding Bill?

2.5. In 2017, a legal advisor from the Parliamentary Legal Association (PLA) stated that the Political Party Funding Act (PPFA) would not fulfill the WCHC Order, and that PAIA would need to be amended. The National Assembly Committee agreed that the Political Party Funding Bill is complementary to the WCHC order to amend PAIA. Parliament's Legal advisor stated that the PPFA dealt more with *how* to fund political parties as opposed to the matter in the Courts, which dealt with *access to information*. In 2018, after the confirmation by the Constitutional Court of the WCHC judgment, the PPFA was before the NCOP and the PLA's Legal Advisor informed the NCOP Committee that the PPFA gives effect to Section 236 of the Constitution and that the matters were quite distinct, because the judgement sought to make a determination on whether access to information pertaining to Section 32 (1b) is appropriately regulated.

2.6. The Court respects the separation of powers and allows Parliament to craft and shape the manner, form and extent of accessing information on political parties and independent candidates private funding.

2.7. However, in its current form, the draft amendments of PAIA, limits recordal and accessibility to the confines of the PPFA. As mentioned, the PLA's legal advisor, stated that the Constitutional Court matter and the PPFA deals with distinct matters, in relation to access to information on the one hand and how parties are funded on the other hand. Secondly, despite the Court's respect of the "separation of powers," the Court surely did not envision the arguable partial fulfillment of the recordal and access to private funding information of political parties and independent candidates to amounts of more than R100 000, which drastically exceeds how much the average voter earns and/or could afford to donate. Further, various other arguments brought forward by the Court stressed the value in ensuring the right to access is respected and fulfilled to uphold South Africa's democratic principles espoused in the Constitution through:

- 1) Ensuring transparency and accountability of such private funding information to effectively exercise the right to vote and participate in elections through making informed political choices (Paragraph 15 of the judgement);
- 2) Ensuring transparency and accountability of political parties' private funding to reduce the unfair advantage donors have, over the average South African, to access political leaders through their wealth (Paragraph 40 of the judgement); and
- 3) Ensuring transparency to detect, reduce and deter acts of bribery, corruption, fraud, and any undue influence on political parties and independent candidates through the transfer of private funding, to further hold relevant persons accountable for engaging in such activities (Paragraph 8 & 51 of the judgement).

2.8. Whether the Amendment Bill remedies the defects of PAIA in terms of the Court's declaration 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," must be reconsidered by this Committee.

3. Recordal

3.1. In **Clause 52B** of the Amendment Bill, pertaining to “Recording, preservation and disclosure of records on the private funding of political parties,” the creation and keeping of records is limited to amounts above R100 000.

3.2. In Paragraph 75 of the judgement, the Court acknowledges the tediousness involved in recording and disclosing all donations. The “disclosure threshold” of R100 000 in the PPFA exempts the reporting of information on donations under the threshold in one financial year, thereby reducing any laborious or strenuous reporting of donor information. The “quarterly basis” disclosure requirements also reduces the burden on political parties to disclose each donation of which the Independent Electoral Commission (IEC) is expected to manage. However, the PPFA reporting and disclosure requirements not only relaxes reporting requirements on political parties and the IEC, but can also easily be manipulated for donors and the recipients to enjoy secrecy while gaining favour from political leaders.

3.3. To illustrate the risks involved in the PPFA, the following examples are useful:

3.3.1. A donor who donates more than R100 000 within one financial year must disclose, but a donor who donates the same amount within one year, yet allocates portions of its donations over two financial years, will not be recorded.

3.3.2. A donor who seeks to donate for favourable political treatment can donate under R100 000 under different names.

3.4. To avoid the secrecy afforded in the aforementioned examples, all donations made must be recorded. Further, paragraph 71 of the judgement states that “It is intrinsic to its proper enjoyment and its essentiality that all information, that could reveal the potential disadvantage that private funding could bring about, be recorded and easily or reasonably accessible.”

3.5. Some have argued that R100 000 is a trivial amount, however MVC believes that this is an arbitrary amount as it was chosen without any evidence of records of donations to show, for example, the average amount of donations allocated to political parties. However, there is existing evidence to show that donations under R100 000 can “buy” influence and exclusive access to senior public officials and/or party leaders. For example, the African National Congress’s (ANC) Progressive Business Forum (PBF), invites businesses or businessmen to engage in a dialogue with the ruling party, but only if such businesses pay for membership. In exchange, these businesses or businessmen have access to high-ranking ANC officials, Ministers and are offered the opportunity to accompany the ANC on business and foreign trade delegations. In the table on page 4, one can see the price range for membership.

Table of Membership Options to the party's PBF (Source: <http://www.pbf.org.za/join.php>)

Main categories	Sub-Categories	Cost
Classic Participation	Silver	R 5500 p.a.
	Gold	R 7500 p.a.
	Platinum	R 10 000 p.a.
Premium Participation	Diamond	R 30 000 p.a.
	Titanium	R 60 000 p.a.

3.6. Therefore, very large and powerful corporations have donated under “R100 000” and therefore one cannot pass off amounts of R100 000 or less as trivial. Reportedly, representatives of large corporations, including Investec Banking, Goldman Sachs, BMW, and Sasol, are some of the companies who attended PBF breakfast events (Brown, 2017). To what extent each company has benefitted from their PBF membership is not known, however, one cannot ignore these party-business relationships and pass it off as mere party-business “dialogue.” MVC must stress that by merely referring to the ANC, we in no way are ruling out the possibility that other political parties have similar funding vehicles or we are in no way referring to this as a problem particular to the ANC. However, by referring to such an example, our submission is able to illustrate real scenarios and concerns, as opposed to our input being deemed as mere potentialities in the absence of examples to refer to.

3.6. Lastly, there is no limitation on Parliament to draft legislative provisions for political parties and independent candidates to record all donations. Paragraph 1.4 of the Court order, only qualified “access to information” with reasonableness, but not to recordal and preservation.

4. Access to information

4.1. Requests for political party funding information should not be limited to information made available through the PPFA, otherwise the Amendment Bill risks not fully giving effect to “make political choices” and to participate in elections, as is ordered in Paragraph 1.1 of the judgement’s order (or Paragraph 91 of the judgement).

4.2. As illustrated in Section 3 of this submission, the ANC’s PBF is one example of how some of South Africa’s wealthiest and biggest corporations have the option of being members at a range of prices, below R100 000, in exchange for access to political leaders and the opportunity to accompany the party on foreign delegations.

4.3. The reference to “reasonable access” is aimed towards avoiding the “laborious” and “cumbersome” requirements under Section 18 and 54 of PAIA. Further, the PPFA does not contain tedious and laborious requirements for political parties to disclose of every single donation. However, the Amendment Bill can provide the option for requests to be made of

private funding below R100 000. To reiterate, it is possible for a donor to avoid disclosure if a donation of R100 000 is made over two financial years, but within a single year. At the very least, PAIA should provide the option to access records of donors who donate more than R100 000 within a single year, even if that single year cuts through different financial years.

4.4. MVC would also like to point to the Court's point made that requests for political party funding information should not be charged, as many South Africans cannot afford the costs, as particularly the unemployed "need every Rand they earn to meet their basic necessities" (Paragraph 72 of the judgement). To extend on the earlier point raised of the "arbitrariness" of the R100 000 disclosure threshold, it is important to stress that the arbitrariness is also apparent as the threshold amount appears to have been selected in absence of factoring in South Africa's socio-economic context.

5. Donations in cash and kind and other sources of private funding

5.1. The Court ordered information on **private funding** to be recorded, preserved and to be made reasonably accessible.

5.2. The PPFA only requires donations to be disclosed and Chapter 1 of the PPFA defines a donations as follows:

‘ “Donation”— “(a) includes a **donation in kind**; but (b) does not include—(i) a membership fee of the political party or any levy imposed by the party on its elected representatives; or (ii) any funds provided to the political party by the National Assembly and provincial legislatures respectively in terms of sections 57(2)(c) and 116(2)(c) of the Constitution;”

AND

A “donation in kind” — “(a) includes— (i) **any money lent to the political party** other than on commercial terms; (ii) **any money paid on behalf of the political party** for any expenses incurred directly or indirectly by that political party; (iii) the **provision of assets, services or facilities** for the use or benefit of a political party other than on commercial terms; or (iv) a **sponsorship** provided to the political party; but (b) does not include services rendered personally by a volunteer;”

5.3. “Donation” should be given a wider definition to cover any form of private funding so as to cover the recordal and access to information of all means by which a benefit, economic or otherwise, is allocated to a political party.

5.4. The biggest concern is that means of indirect giving can be concealed if the definition of private funding is not broadened in the Amendment Bill to go beyond the definition of a donation included in the PPFA. For example, funds can be given to foundations or associations affiliated with or linked to a political party and such funding will not be subjected to

transparency and accountability requirements. For example, investments made into a party's investment arm, funding allocated to party affiliated associations, or funding allocated to attain membership of a party affiliated association does not fall under the definition of a donation, however such funds allocated is still for the benefit of a party and easily falls under the definition of private funding.

5.5. Provisions should be included in the Amendment Bill on the deferral of access or grounds for refusal by accountants and/or information officers of a political party.

6. Publishing information

6.1. Access for information on political parties and independent candidates private funding should not be limited to accounting officers uploading information on social media. The Amendment Bill should ensure provisions to apply for access to information and political parties should be obligated to load the relevant records on their websites and make hard copies available, especially due to the fact that not every South African can afford access to the internet and there may be areas where there is limited or no access to the internet.

6.2. Clause 52B(1b) of the Amendment Bill makes it clear that political parties need to make information available on a quarterly basis, but there needs to be direction as to when records from a given financial quarter must be made available after the precise date in which a quarter has lapsed. It would seem prudent to ensure that the records of donations made in a given quarter are made available as soon as possible after that quarter has ended so that information is provided as timeously as possible and that a time period is stipulated as to when the accountant is obligated to publish this information.

7. Preserving Records

7.1. MVC proposes that records are viewed as being part of an annual financial year (all 4 quarters). This means that records of the same financial year will potentially contain some that are essentially 6 years old, and some that are essentially 5 years old when the time comes that the onus falls away for them to be preserved. Only when the most recent record of a given financial year becomes 5 years old, will it be appropriate to no longer have to maintain all the records of that financial year. The reason is that more recent records essentially rely on older records for them to be viewed cumulatively.

8. Other Comments

It may be worth considering the need to make an addition to the General Provisions of PAIA, in Section 90 of PAIA on "Offences", to insert a fourth paragraph that speaks directly to the role of accounting officers and/or information officers and what sanctions they may be subject to should they act as described in subsections 1, 2 and 3 of S90.

9. Conclusion

In conclusion, MVC thanks the Committee for the opportunity to present an oral submission. This Committee is playing an integral role in order to ensure that PAIA too, allows for access to information on political parties and independent candidates private funding information. MVC would like to stress that the voter, particularly those whose access to influence decision-making is limited to the vote every few years, is at the centre of the Committee's considerations in terms of how the Amendment Bill fulfills the right to access information on political parties private funding.

Useful References:

Brown, J. 2017. "Corporate SA buys into ANC's influence peddling scheme," *Financial 24*. 24 December. Available: <https://www.fin24.com/Economy/corporate-sa-buys-into-ancs-influence-peddling-scheme-20171224-3>.

Progressive Business Forum (PBF), Available: <http://www.pbf.org.za/join.php>.