

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

CASE NO: 7630/20

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

INDEPENDENT ELECTORAL COMMISSION

Fourth Respondent

AFRICAN NATIONAL CONGRESS

Fifth Respondent

DEMOCRATIC ALLIANCE

Sixth Respondent

ECONOMIC FREEDOM FIGHTERS

Seventh Respondent

INKATHA FREEDOM PARTY

Eighth Respondent

NATIONAL FREEDOM PARTY

Ninth Respondent

UNITED DEMOCRATIC MOVEMENT

Tenth Respondent

FREEDOM FRONT PLUS

Eleventh Respondent

CONGRESS OF THE PEOPLE

Twelfth Respondent

AFRICAN CHRISTIAN DEMOCRATIC PARTY	Thirteenth Respondent
AFRICAN INDEPENDENT CONGRESS	Fourteenth Respondent
PAN AFRICANIST CONGRESS	Fifteenth Respondent
AFRICAN TRANSFORMATION MOVEMENT	Sixteenth Respondent
GOOD PARTY	Seventeenth Respondent
AL JAMA-AH	Eighteenth Respondent
ACTION SA	Nineteenth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Twentieth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Twenty-First Respondent

FILING NOTICE

DOCUMENTS FILE HEREWITH:

Second and Third Respondents Answering Affidavit of Minister L A Schreiber

DATED AT CAPE TOWN THIS 15th DAY OF NOVEMBER 2024.

STATE ATTORNEY



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MY VOTE COUNTS NPC

Applicant

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First Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Respondent

MINISTER OF HOME AFFAIRS

Third Respondent

and 22 other respondents

SECOND AND THIRD RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

LEON AMOS SCHREIBER

declare under oath:

- 1 I am the Minister of Home Affairs, cited as the third respondent in this application.
I oppose this application in my official capacity.
- 2 I am also authorised to oppose this application on behalf of the second respondent, the Minister of Justice and Correctional Services.

L.J.H LAS

- 3 The facts contained in this affidavit are within my personal knowledge, save where the contrary is stated or apparent from the context, and are all, to the best of my belief, true.
- 4 Where I make legal submissions, I do so on the advice of my legal representatives.

INTRODUCTION AND OVERVIEW

5 The applicant (“**My Vote Counts**”) challenges the constitutionality of the Political Funding Act 6 of 2018 (“**the Act**” or “**the Funding Act**”) and the Promotion of Access to Information Act 2 of 2000 (“**PAIA**”). I am of the member of the executive responsible for the Funding Act. The Minister of Justice is responsible for PAIA. We oppose this application.

6 This case has a drawn-out history.

6.1 In its original notice of motion, My Vote Counts asked for an order declaring invalid sections 8(2), 9(1)(a), 9(2), 12(2)(d)(ii), 12(3)(c), 22 and 24(1) of the Act and regulations 7 and 9 in Schedule 2 to the Act as well as provisions of PAIA concerning the disclosure of information pertaining to private funding of political parties. The Funding Act was amended in April 2024 by the Electoral Matters Amendment Act 14 of 2024 (“**the Amendment Act**”).

6.2 My Vote Counts then amended its notice of motion and filed supplementary papers. It now seeks orders to declare invalid,

sections 27, 29(g) and 29(h) of the Amendment Act. It also attacks certain conduct of the first respondent, the President.

7 My Vote Counts' case is wide-ranging and over-ambitious.

7.1 Having established the broad constitutional principle that political parties must disclose private funding (in the earlier litigation), My Vote Counts now wishes that Parliament adopts its specifically preferred policy choices. But those are choices properly left to Parliament by the Constitution as confirmed by the Constitutional Court.

7.2 Its patent goal is to limit, and ultimately abolish, the ability of political parties and independent candidates to raise funding from *private* sources. It is important upfront that I highlight that the private funding of political parties is vital for South Africa's democratic politics to function effectively.

7.3 Parties quite simply need money from public and private sources to operate. This is amply demonstrated by the affidavits filed by the DA, the EFF and ActionSA.

7.4 My Vote Counts' case, unfortunately, ignores this reality.

8 The application, as amended and supplemented, takes issue with the following specific aspects of the Act:

8.1 First, My Vote Counts complains that the Act only requires that private donations above a threshold amount by a single donor be disclosed by

political parties – it is contended that all donations no matter how small should be disclosed;¹

8.2 Secondly, if a disclosure threshold is permissible:

8.2.1 it originally argued that the originally chosen disclosure threshold – of R100 000 – was too high and contended that it was arbitrarily chosen by Parliament without proper research or analysis;²

8.2.2 it now argues that the Amendment Act has resulted in a *lacuna* in the Funding Act and that there is no disclosure threshold,³ and argues that the President has the “sole discretion” to set the threshold;⁴

8.3 Third, it complains that the disclosure threshold can be determined by the President as Head of the National Executive⁵ and contends that this is done without proper guidelines;⁶

8.4 Fourth, it takes issue with the non-regulation of cumulative donations by donors that are related to one another;⁷

¹ Founding affidavit paras 30.1 and 33.1.

² Founding affidavit paras 30.2 and 33.2.

³ Supplementary founding affidavit para 52.

⁴ Supplementary founding affidavit para 86.3.

⁵ Founding affidavit paras 30.2 and 33.2.7; Supplementary founding affidavit paras 63-76.

⁶ Founding affidavit para 33.2.8.

⁷ Founding affidavit paras 30.2 and 33.2.6 and 33.3.2.

8.5 Fifth, it contends that because political parties are required to record all donations in their books of account, there can be no administrative burden in requiring the disclosure of all donations;⁸

8.6 Sixth:

8.6.1 it originally complained about the amount chosen for the donation limit from single donors of R15 million per year,⁹ and contended:

(a) it was determined without any consideration as to the appropriateness of the limit;¹⁰ and

(b) that the limit permits wealthy donors to have undue influence over political parties;¹¹

8.6.2 it now argues that the Amendment Act has resulted in a *lacuna* in the Funding Act and that there is no donation limit;¹²

8.7 Seventh, it takes issue with the Act empowering the President to determine the donation limit¹³ – which it argues allows the “majority party” in Parliament and the National Executive to regulate the limit;¹⁴

⁸ Founding affidavit para 30.2.

⁹ Founding affidavit paras 30.3 and 33.3.

¹⁰ Founding affidavit para 33.3.5.

¹¹ Founding affidavit para 33.3.6.

¹² Supplementary founding affidavit para 52.

¹³ Founding affidavit para 30.3.

¹⁴ Founding affidavit paras 33.3.7 and 34.

8.8 Eighth, it contends that the Act impermissibly only requires juristic persons to report donations above the threshold and not natural persons;¹⁵ and

8.9 Ninth, it complains that the Act only requires political parties to account for the expenditure of public funding received by them, and does not require political parties to account for the expenditure of private donations they receive.¹⁶

9 PAIA is challenged to the extent that it relies on the impugned provisions of the Funding Act.¹⁷

10 My Vote Counts also seeks to argue before *this* Court that Parliament failed to facilitate reasonable public participation in the processes leading to the passage of the Amendment Act.

11 This is not a competent case to make in the High Court as the issue falls squarely within the Constitutional Court's exclusive jurisdiction as that Court has held on numerous occasions.

12 As I explain in addressing each of the issues raised by My Vote Counts, it has not demonstrated that the provisions of the Funding Act violate the Constitution.

13 In truth what is going on, is that My Vote Counts seeks to impose its subjective beliefs about various policy choices on how to regulate political funding and its

¹⁵ Founding affidavit para 30.4.

¹⁶ Founding affidavit paras 32 and 35.

¹⁷ Founding affidavit para 27.

disclosure. But these policy choices are for Parliament to make; not *My Vote Counts*.

- 14 As I have said, My Vote Counts also ignores the reality that running a political party and campaigning costs money. Without private funding, political parties would not be able to operate effectively. That would undermine our democracy. The recent 2024 National and Provincial Elections are a strong reminder of the need for political competition amongst a variety of different parties. This can only happen if parties are able to raise funds, operate and run election campaigns.
- 15 My Vote Counts also entirely discounts the constitutional rights of political parties, their members and supporters, and donors – including to privacy and to associate freely.
- 16 And as will become apparent, My Vote Counts does not provide objective evidence to support its speculations of the issues that it says arises from the Funding Act. Instead, it relies on the say-so of its Executive Director who claims no personal knowledge of how political parties actually operate in reality and their funding needs.
- 17 I shall expand on these matters below. I have kept this affidavit as succinct as possible, since the whole case is effectively founded on legal argument. This will be addressed fully by my counsel in written and oral submissions.

THE SUSTAINABILITY OF THE CONSTITUTIONAL CHALLENGE TO THE ACT

18 Before answering each complaint, I make some overarching submissions.

Parliament's broad mandate to make policy choices

19 The first is that the Constitutional Court has already recognised that Parliament has a broad mandate to make various policy choices in implementing the broad principle that requires disclosure of funding of political parties and independent candidates.

20 My Vote Counts is well-aware of this: indeed, the Constitutional Court said as much in *My Vote Counts II* where it succeeded in that Court. The minority judgment in the first case brought by *My Vote Counts* made similar observations (*My Vote Counts I v Speaker of the National Assembly* 2016 (1) SA 132 (CC)).

21 So, the Constitution gives Parliament a wide margin of appreciation in giving effect to the broad principles identified in the judgments of the Court.

22 This is consistent with the Constitutional Court's jurisprudence governing electoral legislation generally. Full submissions will be made by my counsel at the hearing of this matter

The need to balance constitutional rights and interests

23 The second point is that in establishing whether legislation violates the Constitution, it is trite that the Court is obliged to balance and consider various rights and interests.

24 In this case there are numerous rights at stake:

24.1 Of course, the rights of access to information and the principles of transparency are implicated.

24.2 My Vote Counts' entire case emphasises only these issues.

24.3 But, I say respectfully, there are other constitutional rights and interests.

24.4 Section 19 gives citizens political rights, including to campaign and stand for public office and to form and participate in political parties. All people also have the right of freedom of association.

24.5 In order for these rights to mean anything, citizens – whether in political parties or as independent candidates – need money. In order to rent offices, print materials, hold campaigns and inform citizens, parties and independent candidates need money.

24.6 Then there are also privacy rights at stake, including of citizens participating in politics and of donors.

25 The Constitutional Court recognised these intersecting rights and interests in its analysis in the two *My Vote Count* cases. I shall return to them below in addressing each of the complaints in this case.

Different open and democratic societies regulate political funding differently

26 The third point to emphasise upfront is that other open and democratic societies regulate the funding of political parties and disclosure of funding in a myriad of

different ways. This has important implications for the analysis of My Vote Counts' arguments:

26.1 First, these approaches – of open and democratic societies – inform the interpretation of the myriad rights in issue under section 39(1)(a) and (c) of the Constitution in determining whether they are even limited in the first place; and

26.2 Second, even if there is a limitation of the rights, the justification therefor must consider approaches to the same issue in open and democratic societies.

27 What a brief analysis of the regimes of other democracies demonstrate, is that there is no “one-size-fits-all” approach to the issues of donation limits and disclosure thresholds. This, in my respectful submission, further underscores that there are a number of legitimate policy choices that can be made in respect of these matters – and these are of course for Parliament to make in our system of separation of powers.

28 I refer to the following examples of donation limits or no such limits:

28.1 First, close to home Namibia also has a donation limit. A single citizen may not donate more than N\$4 million to a political party in a financial year.

28.2 Second, in Kenya, under section 28(2) of the Political Parties Act 2011, no person may in a year contribute an amount exceeding 5% of the total expenditure of a political party.

28.3 Third, in the United States, while there are limitations to amounts that may be donated to political parties and politicians, an individual may donate an unlimited amount to “independent expenditure-only political action committees”, which support parties and campaigns but may not coordinate with them.

29 In relation to disclosure thresholds:

29.1 India has no requirements for the disclosure of private donations.

29.2 By contrast, England, Australia and Canada have a threshold under which donations need not be disclosed.

Any limitation is justifiable

30 I do not accept that the Act limits any rights as My Vote Counts baldly contends. Properly interpreted, the various aspects of the regime in the Act challenged in these proceedings fall within the legitimate scope of Parliament’s margin of appreciation within the Constitution.

31 But even if rights are limited, such limitations are justifiable. In the proportionality analysis in section 36 of the Constitution, the different aspects of the regime balance the various different interests and rights and any limitation is thus justifiable.

32 I now address the individual complaints made by My Vote Counts. Bearing in mind that My Vote Counts’ challenge is largely a legal one, I do so thematically.

THE CHALLENGES TO THE ACT

FIRST COMPLAINT: The disclosure threshold *per se* is unlawful

33 My Vote Counts' first argument is that disclosure thresholds are *per se* impermissible.¹⁸

34 This argument is flat-out incorrect and does not get out the starting blocks.

35 In *My Vote Counts II*, the Constitutional Court explicitly rejected this line of reasoning by holding that whether political parties "should be required to record and disclose any and every help, is a matter best left to Parliament to reflect and decide on."¹⁹

36 Our highest Court has thus already recognised that Parliament has a margin of appreciation in determining whether to adopt a threshold under which donations need not be disclosed.

37 In doing so, Parliament has to consider not only the interest sought to be advanced by My Vote Counts in this case; it also needs to address the other constitutional rights and interests in issue. Plainly, requiring parties and candidates to disclose *any* donation would be administratively burdensome.

38 Another important fact which is demonstrated by the DA's answering papers is that full disclosure will reduce the overall funding that political parties will have

¹⁸ Founding affidavit paras 30.1 and 33.1.

¹⁹ At para 75.

access to. The same would logically apply to other political parties and independent candidates. This can only be detrimental to our democracy.

SECOND COMPLAINT: R100 000 disclosure threshold / the *lacuna*

39 The second complaint as originally formulated was that the chosen threshold of R 100 000 is too high and contends that it was arbitrarily chosen by Parliament without proper research or analysis.²⁰

40 Following the passage of the Amendment Act, My Vote Count contends that Parliament has left a *lacuna* in the Funding Act by repealing regulation 7 to Schedule 2 and that there is no disclosure threshold until the President makes new regulations on the matter.²¹

41 I address the second point first . It is primarily a matter for the President and Parliament to answer. But I note that the issue was also raised in the 2024 litigation and has already been considered by the Court. In his judgment (*My Vote Counts NPC v President of the Republic of South Africa* [2024] ZAWCHC 205 (16 August 2024) at para 8), Mr Justice Thulare made the following findings:

“Upon the Electoral Matters Amendment Act, 2024 (Act No. 14 of 2024) (the EMAA) taking effect on 8 May 2024 there was no upper limit to donations in Regulation 7(1), and there was no disclosure threshold for donations in Regulation 9. The old regulations were repealed and had been substituted by the new regulations. The President required a resolution of the NA to determine the new upper limits and the disclosure thresholds. There was no resolution of the NA that authorized the

²⁰ Founding affidavit paras 30.2 and 33.2.

²¹ Supplementary founding affidavit para 7.1

President to determine the upper limit and the disclosure threshold. When the EMAA took effect on 8 May 2024, it created an unfilled space, or a gap, or lacuna in the law as regards the amounts in the upper limit and disclosure threshold for donation.”

42 As an interim measure, pending the finalisation of these proceedings or the President making regulations, the Court ordered that the disclosure threshold would R100 000 per financial year.

43 This requires me to address My Vote Counts' originally argument that the original chosen limit of R100 000 is somehow too high. It makes three arguments.

43.1 First, it contends that donations below R100 000 can have a material impact on the operations of political parties. Of course they can, but with respect, that does not mean that any individual donor can have some outsized and material influence on the party receiving those donations. While My Vote Counts appears to believe that section 9(2) only applies to individual donations,²² this is plainly a self-serving interpretation of the provision. Properly understood, the donation threshold applies to all donations from any single donor during a financial year.

43.2 Second, My Vote Counts cherry-picks from the disclosure made by individual political parties to advance an argument that cumulative donations lower than R 100 000 have formed the majority of donations made to them.²³ These matters are properly dealt with by the political

²² Founding affidavit para 33.2.5.

²³ Founding affidavit para 33.3.

parties, some of whom are participating in these proceedings. But I want to emphasise that My Vote Counts merely speculates about such influence.

43.3 Third, there is a complaint that Parliament chose the R100 000 threshold without “regard to any studies, data or analysis as to the appropriateness of that limit”.²⁴ Parliament in legislating and the executive in making subordinate legislation can take into account any number of factors in determining such a threshold. Selecting a number is not an exact science in any event (My Vote Counts does not offer any such “studies, data or analysis” itself). The Constitution gives Parliament and the President a margin of appreciation to determine the threshold. Unless it can be shown to be arbitrary or unreasonable – which My Vote Counts fails to do – there is no basis for the Court to interfere with the chosen amount.

43.4 Fourth, the underlying premise of My Vote Counts’ application is that transparency requires the disclosure of the identities of donors and thus, so the argument goes, expose those who may have influence over political parties and or independent candidates. It thus not apparent what purpose “minor donations” of for example, R10 000 would achieve, because that amount (although not paltry) would not be enough to “buy favours” as My Vote Counts insinuates.

²⁴ Founding affidavit para 33.2.4.

44 Finally, it is important to note that in the 2024 case this Court had no difficulty re-introducing the R 100 000 disclosure threshold as an interim measure. The Court was thus satisfied that the amount was not inappropriate or unconstitutional in anyway.

THIRD COMPLAINT: President's determination of the disclosure threshold

45 The third complaint is that Parliament has delegated to the President the power to set the threshold without guidelines.²⁵

46 This complaint about delegating certain subordinate legislative powers to the President represents a myopic view of the separation of powers, and the realities of modern governance, which is out of kilter with the approach of the Constitutional Court to these matters. As a matter of principle, it is permissible for Parliament to delegate these sorts of matters to the executive – especially because the disclosure threshold and donation limit will require ongoing adjustments due to a myriad of factors. This safety-valve therefore allows for flexibility, without having to go through the normal legislative Parliamentary amendment process.

47 In its supplementary founding affidavit, My Vote Counts contends that the Amended Funding Act gives the President a "sole discretion" to do so.²⁶ But this is simply wrong: there is direct Parliamentary oversight over the President, as he

²⁵ Founding affidavit para 33.2.8.

²⁶ Founding affidavit para 7.2.

can only make regulations with a resolution of the National Assembly in terms of section 24(1)(a) of the Act.

48 The specific complaint is that Parliament has delegated the function to make a determination in respect of the disclosure threshold to the President, who happens to be a politician and the head of a political party. My Vote Counts does not suggest that there is any other person who is appropriate to make such determination. (It refers to the Electoral Commission, but with respect the Commission needs to maintain independence and cannot be drawn into determining matters which are essentially policy questions properly for the elected branches). My Vote Counts also sought to make much of the fact that the President's party has a majority in Parliament. But generally, this will usually be the case that the President is a member of the majority party in Parliament. However, of course, this is no longer true – there is enhanced accountability now in light of the current make-up of the National Assembly because a resolution will need to be supported by a number of different political parties in order to be passed.

49 In relation to the question of guidelines for the exercise of this power, it is obviously one where the factors relevant to the determination are so numerous and varied that it is inappropriate for the legislature to identify them in advance. The President and Parliament also has special expertise – indeed quintessential expertise – in determining these matters.

50 Finally I note that in 2024 litigation, His Lordship Mr Justice Thulare, held that “[i]t is Parliament’s responsibility to resolve the upper limits and disclosure

thresholds, and the President's responsibility to make the determination" (para 8). This Court has thus already found that the President does not have a free discretion.

FOURTH COMPLAINT: Cumulative donations

51 The fourth complaint is that the Funding Act does not prevent donations from so-called "related persons/entities" in excess of the donation limit.

52 I deny that the Constitution requires Parliament to prevent donations by "related persons".

53 I note that My Vote Counts does not give a definition of related persons. It does not, for example, explain how persons must be related to fall within its proposal, the degree of such relation, and the like. These are, of course, crucial questions to answer first before imposing a rule that donations by "related persons" should be added together.

54 As a basic principle of law, different persons are treated as different entities. A company is not the same person as its shareholders or directors – even if it only has one such shareholder or director. There is no reason in principle that all persons who may be related – to some or other extent – should be treated together in reaching the donation limitation.

55 Of course, if an individual uses various different entities he or she has some relation to, to circumvent the donation cap that would be unlawful. It would be fraudulent and the separate juristic entities could be disregarded by a Court due

to the abuse thereof. The Commission in this regard has monitoring powers and could institute proceedings if such conduct is committed. Furthermore, the media and civil society (including the applicant) can investigate and uncover such issues, including through the disclosures that are required to be made in terms of the Funding Act. But plainly, the potential of this arising does not render the impugned provisions objectively unconstitutional (which is the threshold test) and should this arise, then such a challenge should be brought on those facts and at that time.

56 This demonstrates that the complaint by My Vote Counts has a solution already in our law – it is to attack individual instances of circumvention and abuse, and importantly on specific tangible facts. It is not necessary to challenge or amend the Act to do so. The mere fact that a legislative provision is open to abuse is not a basis for its constitutional invalidation.

FIFTH COMPLAINT: Disclosure of some donations

57 My Vote Counts then contends that there is no administrative burden for the disclosure of all donations because parties have to record them in any event.

58 This argument also does not get out the starting blocks; it has already been addressed in the jurisprudence.

59 My Vote Counts ignores the clear recognition of the Constitutional Court in *My Vote Counts II*,²⁷ that requiring the disclosure of all donations can and will cause

²⁷ At para 75.

administrative burdens and so Parliament has a margin of appreciation in determining a threshold. The Court also noted that what is important is the disclosure of large donations (and not smaller donations which the threshold concerns).

SIXTH COMPLAINT: Donation limit of R15 million / *lacuna*

60 The sixth complaint concerns the donation limit of R15 million.

61 In its supplementary founding affidavit, My Vote Counts alleges that the Amendment Act leaves a *lacuna* because it repealed regulation 9 in Schedule 2. This Court has already addressed the issue in the 2024 case (see above in paragraphs 41 and 50).

62 Before I address My Vote Counts' case on this issue, it is important that I emphasise that the Constitution does not require Parliament to enact a donation limit from any one donor. Our Courts have never made a finding to the contrary. Parliament thus of its own accord decided to adopt a donation limit, which it was entitled to do. My Vote Counts has not made out any case that this is constitutionally required.

63 The crux of My Vote Counts' argument is that the R15 million limit (which the Court has ordered applies) is too high, because it assumes that a single donation of this amount would make a party "beholden" to the interests of a signal large donor. This argument however is divorced from reality. Most political party's costs – detailed in their affidavits – far exceed R 15 million. The EFF, ActionSA

and DA (and no doubt other parties) could never become beholden to one donor of this amount.

64 It again argues that Parliament did not give regard to any “studies, data or analysis” in choosing this amount. I say the same thing I did earlier in relation to the threshold: choosing such amount is not an exact science; and the focus is on the larger amounts and not smaller ones.

65 My Vote Counts’ assertions that R15 million is unreasonably or unjustifiable too high, are simply not borne out by any evidence whatsoever.

66 Finally, as in relation to the disclosure threshold, it is important to note that in the 2024 case this Court had no difficulty re-introducing the R 15 million limit as an interim measure. The Court was thus satisfied that the amount was not inappropriate or unconstitutional in anyway.

SEVENTH COMPLAINT: President’s determination of donation limit

67 The seventh complaint is similar to the third: it is that Parliament should not have delegated to the President the power to determine the donation limit. Many of the arguments are the same: I have already addressed them above. I emphasise again that the President cannot act alone in determining the limit, but is supervised directly by the National Assembly in doing so.

68 My Vote Counts also complained that the President was given no guidance in determining the amount by the Act.

69 Parliament plainly considered this argument because the Amendment Act specifically enunciated factors that must be considered by when the donation limitation is amended. Section 24(1)(b) requires the President to take into account the following factors when making such determination:

“(i) The amount of money previously appropriated by Acts of Parliament for the Political Representatives Fund within the previous five financial years;

(ii) the effects of inflation on the value of money over time; and

(iii) the costs associated with participating as a political party, independent representative or independent candidate in elections and the democratic process in South Africa.”

70 These are plainly relevant factors to be taken into account. The less money made available to political parties by the *Fiscus*, the more money that they will need from private sources to be able to operate effectively. The time value of money is also relevant.

71 In its supplementary papers, My Vote Counts now takes issue with the factors enumerated by Parliament. It claims that they are “*overly broad*” and “*lack specificity*”.²⁸ Its contentions can be stated simply to be rejected. These factors plainly guide the President’s discretion.

²⁸ Supplementary founding affidavit para 71.

72 Furthermore, My Vote Counts believes that the factors are not relevant contending that they are “*unmoored from the constitutional rationale for the [Act], include the right to vote and the right of access to information*”.²⁹

73 The question of access to information is a curious one to raise in this context, since this is about the donation limitation (not the disclosure threshold). The right to vote is actually facilitated by these factors. They guide the President in ensuring that political parties and independent candidates are able to fund themselves. This is necessary to have a healthy political competition amongst different parties and gives voters choice; and thus enhances democracy.

74 Finally, it is worth repeating what this Court found in the 2024 case. His Lordship Mr Justice Thulare, held that “[i]t is Parliament’s responsibility to resolve the upper limits and disclosure thresholds, and the President’s responsibility to make the determination” (para 8). This Court has thus already found that the President does not have a free discretion in determining the upper limit.

EIGHTH COMPLAINT: No disclosure obligation for natural persons above the threshold

75 My Vote Counts then contends that the Act impermissibly only requires juristic entities to disclose donations above the threshold but not natural persons.³⁰ It contends that the distinction is “arbitrary”.³¹

²⁹ Supplementary founding affidavit para 72.

³⁰ Founding affidavit para 30.4.

³¹ Founding affidavit para 48.

- 76 But there is rational reason for the distinction: generally, juristic entities have a greater ability to meet the administrative burden of making disclosures themselves than natural persons do. This is the reason why only the former are required to disclose donations themselves.
- 77 But this does not render donations by natural persons opaque. Parties and independent candidates and representatives must still account concerning the details of their donations under sections 12 and 12A of the Act.
- 78 The requirement on juristic persons to themselves disclose their donations is thus an added-extra by Parliament – the Constitution does not require it to be extended also to natural persons.

NINTH COMPLAINT: No accounting for expenditure of private donations

- 79 My Vote Counts' final complaint is that the Act only requires political parties and independent candidates to account for their expenditure of funds they receive from the Funds (that is public funding) and not from private donations.
- 80 But nothing in the Constitution requires political parties and independent candidates to account publicly for how they spend money provided to them by private donors.
- 81 There is of course a difference between public money: the Act restricts the use for which public money can be put to by political parties in section 7. In order to ensure that these restrictions are complied with, the Act requires parties and independents to disclose how such monies are expended.

82 The Act does not similarly restrict the use of private donations by parties and independents. It thus does not require them to account for such expenditure.

83 My Vote Counts does not contend that the Constitution requires Parliament to enact restrictions for the expenditure of private donations by political parties and independent candidates. It does not do so – this in my respectful submission is fatal to its argument on this point.

SERIATIM RESPONSE

84 I now address the founding and supplementary founding affidavits sequentially. Any matter which I do not address specifically should be taken as denied.

85 In any event, as My Vote Counts acknowledges in paragraph 3 of its founding affidavit, much of the case turns on legal argument that will be addressed by my counsel fully at the hearing of this application.

The founding affidavit

Ad para 13

86 Since the 2024 National elections, there are new political parties represented in the National Assembly.

87 These parties too ought to be joined to the application by My Vote Counts and the relief it seeks should not be determined in their absence as it directly affects them.

Ad para 14

88 The Constitutional Court has already held that Parliament does not need to require parties to disclose all donations.

89 In relation to the issue of "*controls on the private funding of political parties*", I deny that the Act is in anyway inadequate from a constitutional perspective.

Ad para 15

90 My Vote Counts regrettably has a blinkered view of all the rights and issues at stake. The very purpose of this application is to constrain the ability of political parties and independents to raise necessary funding from private sources.

91 While private funding can have problematic impacts in certain instances, it is not *per se* insidious and is not *per se* prohibited by the Constitution and thus unlawful. The reforms adopted by Parliament in the Funding Act and its recent amendment *facilitate* access to information about the funding of political parties.

92 The reforms also facilitate the exercise of political rights by citizens to form and stand for public office through political parties and as independent candidates. They do so because they acknowledge that politics costs money and at the same time require that the public be informed about who is funding politics. The reforms strike an appropriate balance between the various interests and rights at stake.

Ad para 17

93 The vague references to “corruption” and “state capture” are with respect unhelpful.

94 The fact of the matter is that over the past three years since 2021, when the Act came into effect, the public has had access to information about the funders of South Africa’s largest political parties. The transparency has undoubtedly improved South Africa’s democracy.

Ad para 28

95 My Vote Counts correctly commends Parliament for adopting reforms that:

“acknowledge[] (i) the vitality to democracy of ensuring transparency in the funding of political parties; (ii) the fact that certain direct and private donations must be prohibited altogether; and (iii) that the disclosure of donations is beneficial and in fact essential.”

96 However, where it goes wrong is to contend that Parliament’s choices about the manner in which to pursue these principles are unconstitutional. My Vote Counts plainly wants the Court to substitute the views of My Vote Counts on these specific matters, for the views of Parliament. Again, this emphasises why Parliament must be joined to these proceedings.

Ad para 30

97 I deny that the Funding Act does not give effect to its preamble. I refer to what has been stated above. Furthermore, to the extent necessary, this will be addressed more fully in legal argument in due course.

Ad para 33.1

98 The argument that a donation threshold *per se* is unconstitutional was already answered in the negative by the Constitutional Court in *My Vote Counts II*.

Ad para 33.2.1

99 That only limited parties disclosed donations since 2021 is not necessarily the result of issues in the Act; it is likely that the issues arose in the implementation of the Act.

100 Of the 1540 registered political parties in South Africa, a very small minority are actually represented in Parliament. Many of these parties may simply not have the resources to comply fully with the Act as a result of them receiving very little by way of political donations.

101 The amended Act takes this into account since section 12 now requires that the more extensive accounting and reporting obligations are imposed on the political parties independents represented in Parliament, as opposed to those who are not.

Ad para 33.2.3

102 The EFF's non-disclosures are a matter of public record. That party should answer this issue.

103 What I can say is that if the EFF has failed to comply with its obligations in the Act (by not disclosing donations it has received) then the law must take its

course. That is not an indictment on the validity of the Act. At best, it is an enforcement issue. But that does not render the Act unconstitutional.

Ad para 33.2.7

104 My Vote Counts suggests that the Electoral Commission should decide the disclosure threshold or be consulted when this is done.

105 But that would bring the Commission into the realm of highly political issues. That would undermine its necessary independence.

106 I note again that My Vote Counts does not suggest that any person other than the President acting with Parliament should make such determination.

Ad para 33.3.1

107 My Vote Counts speculates as to the influence of a R 15 million donation on political parties.

108 The DA has demonstrated with evidence that this amount is a small fraction of its total costs in any given year.

Ad para 33.3.2

109 To the extent that an individual abuses the separate corporate personality of different entities to circumvent the donation limit, that can be addressed through the ordinary application of law (including piercing the corporate veil of such entities, or the *in fraudem legis* doctrine).

Ad para 33.3.3

110 The examples given by My Vote Counts of related persons do not assist its case.

111 Just because Mr Motsepe is a director or leader of various large and listed corporation entities, does not mean that he alone controls them. This is far from the reality.

Ad para 33.3.6

112 My Vote Counts speculates about how a single donation of R 15 million may or may not influence a party. It gives no concrete examples of a large donor receiving some kind of favour or benefit from the State at the instance a party it supported.

113 The law also already outlaws and criminalises corruption. If party donations are leading to corruption activities in the affairs of the State, then this must be investigated and prosecuted by the numerous authorities responsible for this in our State. And herein lies the disjunct in My Vote Counts' case – it has it backwards. If the issue is corruption and malfeasance, then that must be the target. But that does not make the Act *per se* unconstitutional and unlawful.

Ad paras 33.3.7 and 34

114 There is of course no longer a majority party. In order for the donation limitation and disclosure threshold to be amended, there will need to be consensus amongst the many different parties represented in the National Assembly.

115 If the President's decisions are irregular, then My Vote Counts has a remedy: judicial review of that decision. This does not render the Act objectively unconstitutional.

Ad para 35

116 My Vote Counts has not demonstrated why political parties and independents should be required to account for the expenditure (as opposed to the receipt) of private donations. They remain private persons and should be able to do with their funds as they please.

117 The disclosure of private funding serves all the purposes which My Vote Counts wishes to achieve, including giving effect to the right of access to information,

118 Of course the funds received from the Funds (which is mostly public money and some private money) has restrictions, and thus parties and independents have to account for that expenditure to ensure that those restrictions are complied with. That is why there is an obligation to account for *that* expenditure (but not for the expenditure of direct private donations).

Ad paras 37-39

119 I reiterate that My Vote Counts leaves out of its analysis the other constitutional rights and interests at stake which I have already addressed above.

Ad paras 42-52

120 I have already explained that the very judgment relied on by My Vote Counts, confirms that Parliament does not need to require that all donations be disclosed by political parties and independents.

Ad para 53

121 Parliament was entitled to adopt a disclosure threshold and in doing so was *required* to take into account privacy considerations of parties and donors, as well as administrative burdens. This again is recognised in *My Vote Counts II*.

Ad para 54

122 Cherry-picking comments made by members of the Ad Hoc Committee at one or another meeting, does not assist My Vote Counts.

123 In challenging the constitutionality of legislation, the ultimate consideration is of course whether it is objectively constitutional. The ultimate determination by Parliament – the National Assembly and NCOP – in passing the Act is what is considered.

Ad para 55

124 The contentions in this paragraph reflects My Vote Counts' superficial understanding of our constitutional law. Of course transparency is important, but it is not some super value that trumps all other rights and interests.

Parliament appropriately considered questions of privacy and administrative burdens in adopting the Act.

Ad para 56

125 I deny My Vote Counts' argument that because it is *possible* for political parties to disclose donations, it is constitutionally *required* for them to do so. There is limited need to disclose smaller donations, and forcing their disclosure will undermine various other rights and interests.

Ad paras 59 to 62

126 In these paragraphs, My Vote Counts seeks to argue that a donation limit per person per year is a constitutional requirement.

127 It speculates and argues effectively that private funding is necessarily corrupt. But this misunderstands: (a) that private funding may be made for good or bad reasons; and (b) that parties and independents need private funding in order to meaningfully compete and participate in South Africa's politics.

128 That Parliament has adopted a donation limit was not required by the Constitution. It could have adopted other mechanisms to mitigate these kinds of concerns but chose a donation limitation.

Ad paras 64-67

129 The references to the finding of the Zondo Commission demonstrate that corruption is a problem. The Funding Act counteracts these issues.

- 130 The corrupt granting of tenders is – of course – a serious problem and is criminalised by our law. The Funding Act can only do so much in addressing the issue – which is one of enforcement of existing laws.
- 131 The disclosure requirements of the Funding Act aid in the enforcement of those laws to root out corruption.
- 132 I should also note that My Vote Counts does not take into account the fact that persons who are willing to donate money to illicitly obtain procurement contracts are likely not only to breach procurement prescripts, but also the requirements of the Funding Act.
- 133 The proposal to limit the donation limitation does not address these problems.
- 134 Finally, regarding the Zondo Commission's reference to the Funding Act, it was not a comment on policy matters and making policy recommendations. Furthermore, it was not (and indeed could not) decide whether the Act is constitutionally compliant.
- 135 My Vote Counts also ignores (and fails to mention) what the Zondo Commission recommended to address the policy in the Act it identified. In recommendation 9, the Commission proposed that *"the Act be amended to criminalise the making of donations to political parties in the expectation of or with a view to the grant of procurement tenders or contracts as a reward for or in the recognition of such grants having been made."*

136 Parliament responded. The Amendment Act substituted section 19(3) of the Act which now provides expressly:

“Any person who makes a donation to a political party, a member of a political party, an independent candidate or an independent representative in the expectation that the party, member, independent representative or candidate concerned will influence the awarding of a tender, licence, approval, consent or permission, or the relaxation of a condition or restriction in relation thereto, in the said person's favour, commits an offence and may be sentenced to a fine as prescribed or to imprisonment for a period not exceeding five years or both.”

Ad para 71

137 The disclosure of the donation by Batho Batho Trust to the ANC had the desired effect of drawing attention to the issue. My Vote Counts does not argue that there was a direct correlation between the donation and decisions made relating to Shell.

138 If there was a direct correlation, then it can (and indeed should) be investigated because of the disclosure requirements of the Funding Act.

Ad para 74

139 I deny that there is sufficient public funding for political parties. The facts of the scale of funds needed to operate a political party effectively in South Africa are fully demonstrated by the parties, including the DA.

140 My Vote Counts' attempt to draw conclusions to the contrary through speculation stands to be rejected.

Ad para 79

141 My Vote Counts does not put forward a convincing reason why political parties and independents should be required to disclose the expenditure of direct private funding.

142 The expenditure of monies from the Funds (which is a mix of public and limited private money) must be accounted for because the Act imposes limitations for what such monies can be used for. The Act does not impose such limitations on private funding (which My Vote Counts does not challenge) and so there is no basis to require parties and independents to account for such expenditure.

Ad paras 80-81

143 The financial circumstances of parties are well-known. Certain parties have had notorious troubles with meeting their financial obligations. Voters have been fully aware of this information when marking their ballots.

144 This information has all been available because of the Funding Act, as well as South Africa's investigative media – who have not needed to see the expenditure of private funds to investigate such matters.

Ad para 87

145 The question of whether a declaration of invalidity should be suspended is an order that only the Constitutional Court can make.³² But quite clearly even if (despite what is stated above) My Vote Counts succeeds on any aspect of its application any declaration of invalidity would need to be suspended for Parliament to have an opportunity to address such shortcomings.

Ad para 88

146 Again, the question of retrospectivity is one only the Constitutional Court can decide according to its jurisprudence.

147 In my submission, it would be patently unfair to require retrospective compliance with any amendment to the Act that may be necessitated by an order of invalidity. It would also be impossible to enforce against the many persons who may have donated since the Act came into effect in 2021.

The supplementary founding affidavit

Ad para 7

148 I deny that the Amendment Act "*suffers from significant and novel constitutional defects that were not present in the PPFA*".

³² See *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* 2018 (6) SA 393 (CC) at para 2.

149 I have already explained that it does not grant the President sole discretion over the issues.

150 I also deny that Parliament failed adequately to facilitate public participation. This is in any event a matter within the exclusive remit of the Constitutional Court.

Ad paras 53, 55-59

151 If there is a lag of many months, that does not matter because the old limit and threshold remain in place in the interim in light of the Court's order.

Ad para 54

152 My Vote Counts here introduces an argument that the Act is vague.

It does not however even attempt to interpret the Act sensibly (which it can be). The doctrine of vagueness in any event does not require perfect lucidity in Ad para 63

153 My Vote Counts ignores the clear language of section 24(1) of the Funding Act. It provides: "The President, *acting on a resolution of the National Assembly*, may by proclamation in the Gazette make regulations in respect of matters contemplated in sections 6 (2), 7 (2) (e), 7 (3) (d), 8 (2), 8 (5) and 9 (1) (a)."

154 Without a resolution of the National Assembly, the President cannot lawfully make regulations. Thus he does not have the sole discretion to address these matters.

155 And this Court has found that it "*is Parliament's responsibility to resolve the upper limits and disclosure thresholds.*"

Ad para 68

156 I do not understand how the President's determination could favour his own interests and not that of other political parties.

157 But if it did, the principles of public law provide an ample remedy: judicial review.

Ad para 69

158 There is no impermissible concentration of powers. The President is supervised directly by the National Assembly.

159 Parliament itself could at any time intervene and repeal any regulation made by the President. And Parliament is responsible to resolve the upper limits and disclosure thresholds.

Ad paras 71-72

160 The arguments in these paragraphs betray a fundamental misunderstanding of the proper meaning of the provision as well as a lack of appreciation of the elementary principles of our public- and administrative-law.

161 First, the reference to "may" is the empowering part of the provision: it provides that the President "may" exercise a power (and indeed might have to in certain circumstances). When exercising the power, he is obviously required to take into

account the listed factors. The provision does not say that when he exercises the power, he may at his own choice consider the factors, or not.

162 Second, the factors themselves are necessarily framed broadly because they are intended to capture a number of important considerations. There is nothing impermissible about this approach.

163 Third, My Vote Counts appears to believe that the President can take into account any factor he pleases in exercising the power. But of course he cannot. He is constrained by the rule of law and principle of legality to act rationally, reasonably and consider relevant considerations only. That the list is open-ended is a good thing. It will mean that the President can consider the issues that My Vote Counts raises in its application when he exercises the power.

164 Fourth, the three factors listed – monies from the *fiscus*, inflation and the costs of running a party – are plainly relevant and important. Other questions, such as reducing the undue influence of private money on politics must also be considered and given proper weight.

Ad para 73

165 My Vote Counts has a habit of complaining that guidance is not given to the President (and as I have explained, it complains when guidance is in fact provided in the Act), but gives no concrete example of what such guidance would entail.

166 The Act necessarily recognises that the determination of the limit and threshold are highly polycentric matters that will require the exercise of a wide discretion and a measure of judgment. There is nothing per se problematic in giving the President the duty to do so – particular since, as the Court has found, Parliament is responsible to resolve the upper limits and disclosure thresholds.

Ad para 74

167 Parliament did not consider it necessary to set factors for the determination of the threshold. It did not need to do so.

Ad para 75

168 This paragraph does not accurately reflect the jurisprudence of the Constitutional Court on the question of delegating broad powers and the doctrine of vagueness which will be addressed in argument.

Ad para 76

169 The question of delegating legislative power is treated in a nuanced manner in our law.

170 The Constitutional Court has upheld broad delegations of law-making power to the executive, particularly if there is oversight by the legislature as is the case here.

Ad paras 77-78

171 These are matters within the Constitutional Court's exclusive jurisdiction. I refer My Vote Counts to the well-known judgment of *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

Ad paras 94-97

172 In relation to the further relief, I refer to the President's explanatory affidavit.

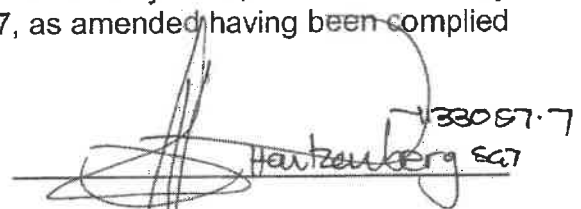
CONCLUSION

173 For all these reasons, I submit that the application should be dismissed. I do not seek costs.



LEON AMOS SCHREIBER

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at CAPE TOWN on this the 14th day of NOVEMBER 2024, the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended by Government Notice No. 1648 of 17 August 1977, as amended having been complied with.



COMMISSIONER OF OATHS

DESIGNATION

SGT. L.J. HARTZENBERG

