IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 121/14

In the matter between:

MY VOTE COUNTS NPC	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
AFRICAN NATIONAL CONGRESS	Seventh Respondent
DEMOCRATIC ALLIANCE	Eighth Respondent
ECONOMIC FREEDOM FIGHTERS	Ninth Respondent
INKATHA FREEDOM PARTY	Tenth Respondent
NATIONAL FREEDOM PARTY	Eleventh Respondent
UNITED DEMOCRATIC MOVEMENT	Twelfth Respondent

FREEDOM FRONT PLUS	Thirteenth Respondent
CONGRESS OF THE PEOPLE	Fourteenth Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Fifteenth Respondent
AFRICAN INDEPENDENT CONGRESS	Sixteenth Respondent
AGANG SA	Seventeenth Respondent
PAN AFRICANIST CONGRESS	Eighteenth Respondent
AFRICAN PEOPLE'S CONVENTION	Nineteenth Respondent

APPLICANT'S WRITTEN ARGUMENT
ADDRESSING THE DIRECTIONS DATED 30 SEPTEMBER 2014

INTRODUCTION

1. Private funding of political parties is currently not subject to any regulation in South Africa. The prevailing position, consequently, is that there is no legislation requiring disclosure of the sources and sums of money donated privately to political parties, whether before, during or after any election.

2. For present purposes, the applicant advances three submissions:

2.1 Section 32(2) of the Constitution imposes an obligation on Parliament to enact the lacking legislation;

2.2 Parliament has failed to fulfil this obligation; and

2.3 Section 167(4)(e) of the Constitution reserves for this Court exclusive jurisdiction to make an order declaring that Parliament has failed to fulfil the above obligation, and directing that it do so.

3. The latter relief is directed at Parliament, and Parliament alone, cited under the titles of the Speaker of the National Assembly ("**the Speaker**") and the Chairperson of the National Council of Provinces, the presiding officers of the two Houses of Parliament, as the first and second respondents (together referred to as "**Parliament**").

4. The other parties to this application have been cited only by virtue of the interest that they may have in its outcome. No relief is sought against them and no constitutional obligation is attributed to them.

5. Parliament opposes this application, for reasons set out by the Speaker in a lengthy and colourful affidavit. The application is, apparently, otherwise unopposed, as the only other parties who noted their intention to oppose it, the Minister of Justice and Correctional Services, and the African National Congress, have not filed affidavits doing so.

6. For present purposes, it is significant that Parliament does not dispute that this Court has exclusive jurisdiction over this application. It is therefore common cause. Parliament also does not dispute that the relief sought by

the applicant would be competent and appropriate if the applicant prevails on the merits.

7. Parliament's grounds for opposing the application are, in short, that:

7.1 Parliament bears no obligation to enact the lacking legislation, as the Constitution does not create any right to access information about the private funding of political parties;

7.2 Parliament has already adequately discharged its obligation under section 32(2) of the Constitution, by enacting the Promotion of Access to Information Act, 2000 ("**PAIA**");

7.3 It is conceivable that, in certain circumstances, information about the funding of political parties may be obtainable through PAIA and the applicant must thus make do with the extant legislation;

7.4 Parliament has not "*failed*" to enact the lacking legislation but rather has "*decided*" not to proceed towards its enactment.

8. The applicant stands by the submissions in its founding affidavit, and does not intend to repeat them. The present written argument, as directed by the Court, is concerned with whether this Court has exclusive jurisdiction over this application. The Speaker's affidavit is thus not traversed in full, but is addressed only to the extent that it bears relevance to jurisdiction.

PARLIAMENT'S CONSTITUTIONAL OBLIGATION

9. The applicant's founding affidavit sets out the source and substance of the constitutional obligation to enact the lacking legislation. In short, the right of access to information held by political parties, which is required for the effective exercise of the right to vote, cannot be given effect to without the enactment of the lacking legislation. Section 32(2) of the Constitution thus imposes an obligation to enact such legislation.

10. It is appropriate, in view of this Court's directions, to emphasise that this obligation belongs to and binds Parliament, and Parliament alone.

11. Indeed, it has never been doubted, in the seventeen years since the Constitution came into force, that the enactment of the lacking legislation has been the business of Parliament.

12. This is apparent from Parliament's own evidence before this Court. The Speaker acknowledges that the lacking legislation "*has been discussed in Parliament since 1997*",[1] and quotes the following from the report of the Portfolio Committee on Constitutional Affairs considering the Promotion of Multi-Party Democracy Bill ("**the Bill**"):[2]

---

[1] First and second respondents' answering affidavit (by the Speaker, Baleka Mbete) dated 9 October 2014 ("**Parliament's answering affidavit**"), p 18 para 39.

[2] Id, pp 18-19 paras 40-41.

> *[t]he Bill has to be seen as the first stage of the process of addressing the complex matter of the funding of political parties. There are other issues relating to the funding of political parties that will have to be addressed in the near future, the main one being the need for public disclosure of the private funding received by political parties, and the form and scope of such disclosure.* (our emphasis)

13. It is uncontested, therefore, that as early as 1997, Parliament itself was conscious of the "*need*" to enact the lacking legislation "*in the near future*". Indeed, the Portfolio Committee itself inserted a chapter in the Bill to achieve exactly that, but this chapter was removed before the enactment of the Bill, because the issue was "*highly complex and politically charged*".[3]

14. In this case, the Speaker does not dispute that the obligation contended for by the applicant would be binding on Parliament, and on Parliament alone. The Speaker indeed implicitly concedes that the obligation in section 32(2) of the Constitution is directed at Parliament. She contends, however, that Parliament has permanently discharged that obligation, by enacting PAIA. Parliament accepts that it, and it alone, bears the obligation to enact the national legislation envisaged in section 32(2), but simply disputes that it

---

[3] Affidavit of Kgalema Petrus Motlanthe on behalf of the African National Congress, dated 18 February 2004, in **Institute for Democracy in South Africa and Others v African National Congress and Others 2005 (5) SA 39 (C)** ("**IDASA**") (annexed to the founding affidavit as "**FA4**" pp 88-107 ("**Mr Motlanthe's affidavit**"), at para 10.1 (appearing at p 93 of the founding affidavit).

has failed to do so by contending that it has enacted different legislation in fulfilment of its constitutional obligation.

15. It is necessary to note that, in arguing that Parliament definitively discharged its duty by enacting PAIA, the Speaker contradicts herself fatally. In one breath, she contends that PAIA covers the field of access to information and is adequate to enable citizens to access information about private funding of political parties. But in the next breath, she invokes *IDASA* as authority for concluding that citizens are not entitled to access that information, for the very reason that PAIA does not provide such access.

16. What is more, the Speaker extols Parliament's "*discussions*" about the enactment of the lacking legislation in 2010,[4] and yet fails to explain why Parliament bothered to engage in this exercise if it really considered that PAIA adequately covered the field. The Speaker also fails to explain why, among Parliament's many reasons for deciding not to take steps towards the enactment of the lacking legislation, it did not cite the point that PAIA covered the field.

17. The Speaker tries her best to turn **IDASA** on its head. The passages she cites from **IDASA** show that the political parties opposed, and the court rejected, disclosure of private funding information under PAIA. This

---

[4] Parliament's answering affidavit, pp 18-23 paras 39-54.

position was grounded in the apprehension that disclosure under PAIA would necessarily be unregulated, retrospective and piecemeal, whereas private funding information can only meaningfully be disclosed in a carefully regulated, prospective and uniform regime, details of which should be left to Parliament rather than the court. Thus, the parties argued, and the court accepted, that PAIA did not cover the field, that disclosure of private funding of political parties was an exposed part of the field, and that specific legislation was required to cover it.[5]

18. In essence, the Speaker argues that section 32(2) imposed a once-off duty to pass one piece of legislation which henceforth would codify the right of access to information. This argument is misconceived, for several reasons. First, nothing in the text or context of section 32(2) suggests that the obligation lapses or is displaced after the enactment of one piece of legislation. Second, it has never been the position that PAIA covers the full field of access to information, as other primary and subordinate legislation govern specific fields of application. Unlike its contemporary, the Promotion of Administrative Justice Act, 2000 ("**PAJA**"), PAIA does

---

[5] **IDASA**, para 83: "*… the respondents have placed evidence before the court, showing that the question of whether funding of political parties should be publicly made known and, if so, in what manner, to whom and in respect of which donations, is a complex policy issue best dealt with by way of legislation, which properly balances the various interests at stake, rather than through court orders with retrospective effect. As I have indicated above, I share this view.*" And para 86: "*The above-mentioned conclusion does not mean that political parties should not, as a matter of principle, be compelled to disclose details of private donations made to their coffers. It merely means that, on my interpretation of existing legislation, the respondents are not obliged to disclose such records.*"

not proclaim itself or otherwise purport to cover the full extent of the right which it promotes.[6] Third, PAIA by its very nature is confined to a narrow form of access to information, namely the public retrieval of existing records which are not subject to any other disclosure regime.

19. PAIA gives effect only to one aspect of the right of access to information, namely the right to gain access, upon specific request, to specific records held by specific bodies at specific times. It is submitted that the obligation in section 32(2) of the Constitution envisages more than mere promotion of the right of access to information, but enjoins Parliament to give full effect to the right by enacting any and all national legislation needed to replace secrecy with transparency, to the extent that such secrecy cannot be constitutionally justified. Parliament is obliged positively to protect the right of access to information where a lack of legislation results in its violation.

20. This is not to say that PAIA is unconstitutional. On the contrary, PAIA serves a vital purpose in promoting the right of access to information, and

---

[6] I Currie and J de Waal, *The Bill of Rights Handbook* (5 ed), p 686 n 15: "*It is important to note that PAIA is less ambitious than PAJA in at least one significant respect. Unlike PAJA, [PAIA] does not set out to regulate the constitutional right of access to information comprehensively and generally. … PAIA applies instead only to certain 'records'… There is no parallel and comprehensive concept in PAIA to define the scope of the application of the constitutional right of access to information as there is a parallel and comprehensive concept in PAJA to define the scope of s 33. The practical effect is that PAIA leaves room for direct application of s 32 in applications for access to information that is not covered by the Act.*"

in giving effect to a crucial dimension of it. The lacking legislation, however, would be fundamentally different from PAIA in its nature and purpose. It would do something that PAIA does not and cannot do. It would replace a default regime of unregulated secrecy with one of regulated transparency, in a specific field of application.

21. The Speaker's argument is misconceived for another important reason. It is incompatible with the sworn version of the African National Congress, set out at length in the affidavit of Mr Kgalema Motlanthe in **IDASA**. Mr Motlanthe argued forcefully that PAIA could not avail the applicants of the relief they sought, namely general public access to information about the private funding of political parties.[7] He concluded that only a separate, specific Act of Parliament could, should and would achieve this.[8]

22. The Speaker's arguments about PAIA displacing Parliament's duties to pass the lacking legislation are accordingly unavailing – as the applicant will demonstrate in greater detail at any future hearing before this Court. For present purposes the Speaker's position nonetheless helpfully confirms that whether through PAIA (as the Speaker incorrectly claims), or through the lacking legislation (as the applicant claims), there can be no question that Parliament enjoys the exclusive power and bears the exclusive

---

7 Mr Motlanthe's affidavit, paras 8.1.2 and 10.7.4.4 (founding affidavit, pp 92 and 101).

8 Id, paras 8.2, 10.5.1, 10.7.4.4.1, 46.4, 47.3.1, 55.1, 66, 68.2 and 84 (founding affidavit, pp 92, 97 and 101-106).

constitutional duty of enacting the requisite legislation. That much has already been accepted by Mr Motlanthe, who in **IDASA** acknowledged that Parliament, and Parliament alone, bore the binding constitutional obligation to enact the lacking legislation, and promised that it would do so.[9]

23. As the Speaker concedes, Parliament was seized with the "*need*" to enact the lacking legislation as early as 1997. In her "*history of discussions in Parliament*", the Speaker makes a telling jump from 1997 to 2010,[10] whereafter Parliament decided not to take steps towards the enactment of the lacking legislation.[11] She does not tell us what was discussed, if anything, in the intervening thirteen years, and she says no more about the "*need*" to enact the national legislation, but seems to assume that this need no longer exists, without explaining why.

24. What is more, the Speaker fails to address or distinguish the statements of Mr Motlanthe under oath. She offers no reasons for contradicting Mr Motlanthe, who spoke on behalf of the ANC, when he accepted that Parliament alone was assigned the obligation to enact the lacking legislation, and that Parliament alone was in the process of discharging that obligation.

---

9 Id.

10 Parliament's answering affidavit, p 19 paras 43-44.

11 Id, pp22-23 paras 50-53.

PARLIAMENT'S FAILURE TO FULFIL ITS CONSTITUTIONAL OBLIGATION

25. Section 167(4)(e) of the Constitution provides that only the Constitutional Court has jurisdiction to "*decide that Parliament or the President has failed to fulfil a constitutional obligation*".

26. The essential rationale for this Court's exclusive jurisdiction was explained in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)** (at paras 72-73)

> *Where we used to have a supreme Parliament, we now have a supreme Constitution. The Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values. Section 167(4) thus confers exclusive jurisdiction to this Court in a number of* ***crucial political areas*** *which include the power to decide disputes between organs of state in the national and provincial sphere, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution and* ***to decide whether Parliament or the President has failed to fulfil a constitutional obligation****. ...*

It follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of ***issues which would inevitably have important political consequences****.*

27. This was amplified in **Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC)** ("**Doctors for Life**"), where this Court held as follows (at paras 23-24):

The purpose of giving this Court exclusive jurisdiction to decide issues that have important political consequences is "to preserve the comity between the judicial branch of government" and the other branches of government "by ensuring that only the highest court in constitutional matters intrudes into the domain" of the other branches of government. ...

The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more

likely be one for the exclusive jurisdiction of this Court. (emphasis added)

28. The precise nature of the "*constitutional obligation*" described in section 167(4)(e) is, however, elusive. In **Women's Legal Centre Trust v President of the Republic of South Africa and Others 2009 (6) SA 94 (CC)** ("**Women's Legal Centre**"), the Court explained that the bearer of such an obligation must be either Parliament or the President alone (at paras 14-16):

Section 167(4)(e) must be read in the setting of the provision as a whole, which determines the powers of this Court, and of subsection (4) specifically, which allocates it exclusive powers. The unifying theme of the Constitution's allocation of jurisdictional competence is that areas of intense political contention are reserved for the exclusive jurisdiction of this Court.

These exclusive competencies draw on the Court's political legitimacy. They reflect its special status as guardian of the Constitution, with exclusively constitutional functions and a specially-determined composition. Any exercise of the judicial function may cause tension with the other arms of government and trigger political contention. Hence the mere fact that a matter is or may become politically fraught does not of itself mean that only this Court has

jurisdiction to deal with it. More is needed. Dispositive indications may lie in the nature of the obligation, whether its content can be clearly ascertained, whether it is stated unambiguously in the Constitution, how its content is determined, and whether it is capacity-defining or power-conferring.

Section 167(4)(e) itself contains a significant pointer: its agent-specific focus. The provision mentions "Parliament" and "the President", and them alone. This Court has recently observed that the constitutional duties in the provision are "pointedly reserved" for the actors in question. The wording suggests that the exclusive jurisdiction relates to obligations resting on these agents only, in contradistinction to constitutional duties they may bear together with other agents.

29. In both **Doctors for Life** and **Women's Legal Centre**, this Court held that the ambit of its exclusive jurisdiction should be carefully circumscribed, so that it does not obviate the jurisdiction of the Supreme Court of Appeal and the High Court under section 172(2)(a) of the Constitution to "*make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President*", subject to confirmation by this Court. Thus, where the validity of legislation enacted by Parliament is vitiated by its failure to observe some substantive or procedural

requirement of the Constitution, the lower courts are appropriately empowered and enjoined to declare that enactment invalid.

30. Where Parliament has failed, however, to take the necessary steps to enact constitutionally required legislation at all, there is no enactment for the lower courts to test. We submit that this would be an extreme instance where, as articulated by the Supreme Court of Appeal in **King and Others v Attorneys Fidelity Fund Board of Control and Another [2006] 1 All SA 458 (SCA)** (at para 23), "*Parliament has so renounced its constitutional obligations that it ceases to be or to act as the body the Constitution envisages*".

> *And the question whether that extreme has been reached … is not one that this Court [the Supreme Court of Appeal] or the High Courts are able to decide. That it would result in the invalidity of the National Assembly's purported acts is not sufficient in itself to vest this court with jurisdiction under s 172(2) because the invalidity in such a case is predicated upon the anterior question. Given the implications such a decision would entail, that would be pre-eminently a 'crucial political' question, and s 167(4)(e) reserves it for only the Constitutional Court to make.*

31. Accordingly, the determination of Parliament's failure to enact the relevant legislation falls within the exclusive jurisdiction of this Court. This does

not in any way obviate the jurisdiction of the other courts to test "*the constitutional validity of an Act of Parliament*", as there is simply no Act of Parliament to test.

32. Section 32(2) is one of a limited number of provisions in the Constitution which requires that "*national legislation must be enacted*".[12] These are clearly distinguishable from the provisions stating that national legislation "*may*" be enacted,[13] which confer powers rather than duties. Significantly, they are also clearly distinguishable from the provisions which require that "*the state must take reasonable legislative and other measures*" (emphasis added).[14] The latter provisions do envisage national legislation, and do impose a duty to produce it, but they impose that duty explicitly on "*the state*" and do not reserve it for Parliament alone.

33. The present case is thus distinguishable from **Women's Legal Centre** in that the applicant invokes the specific obligation in section 32(2) of the Constitution to "*enact*" "*national legislation*". This unambiguously imposes an obligation on Parliament and clearly encompasses the obligation to enact legislation that is required to give effect to any aspect of

---

[12] See sections 9(4), 32(2) and 33(3) of the Constitution. See also item 21(4) of Schedule 6 to the Constitution read with sections 3(3), 6(5), 155(2) and (3), 172(2)(c), 179(3) and (4), 192, 195(3) and (4), 205(2), 206(6) and (7), 210, 215(2), 216(1), 217(3), 219(1), (2) and (5), and 236 of the Constitution.

[13] See sections 23(5), 58(2), 100(3), 101(4), 117(2), 139(8), 160(5) and (8), 164, 180, 212(2)(b), 218

[14] See sections 6(4), 9(2), 24(b), 25(5), 25(8), 26(2), 27(2), 125(3), 154(1), 165(4), 181(3) and 196(3) of the Constitution.

the right of access to information for which legislation is lacking. It does not only afford Parliament a power, but imposes a specific constitutional duty on Parliament, and Parliament alone.

34. In that regard, it should be emphasised that the applicant does not rely on an obligation imposed on the "*state*" as a whole, but rather an obligation assigned to Parliament exclusively. The applicant does not invoke the broad duty to prepare, enact and implement legislation in fulfilment of the Bill of Rights, which may encompass other state actors in what this Court described as "*[c]onstitutional duties the state and its organs must perform collaboratively or jointly*" (**Women's Legal Centre** at para 20). The obligation in issue in this matter, and upon which the applicant founds its argument, is one that the Constitution reserves specifically for Parliament.

35. The language of section 32(2) of the Constitution is clear. It requires that national legislation "*must be enacted*". Sections 43(a) and 44 of the Constitution vest national legislative authority exclusively in Parliament. The central power of Parliament is "*to pass legislation*".[15] That obligation cannot be fulfilled by organs of state, chapter 9 institutions, the President, or the national executive, even though – as this Court pointed out in **Women's Legal Centre** at para 21 – they each bear a collaborative duty to fulfil the rights in the Bill of Rights through, *inter alia*, legislative

---

[15] Section 44(1)(a)(ii) of the Constitution.

measures. Whatever collaborative duties other state actors may bear under section 7(2) of the Constitution, only Parliament can satisfy the duty assigned to it under section 32(2) to "*enact*" the lacking "*national legislation*".

36. This duty is not contingent or consequent upon the preparation or initiation of draft legislation by the Executive. Parliament is empowered to produce its own legislation without any Executive input or insight. As this Court made clear in **Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly 2012 (6) SA 588 (CC)** (at para 28):

> *The power of the National Assembly to initiate or prepare legislation is set out in section 55(1) in these terms: 'In exercising its legislative power, the National Assembly may - (a) consider, pass, amend or reject any legislation before the Assembly; and (b) initiate or prepare legislation, except money Bills.'*

37. Even when members of the Executive introduce Bills in Parliament, they perform a legislative rather than executive function.

38. In any event, regardless of any prior preparation conducted or not conducted by the Executive, or indeed by any Member or Members of Parliament, the enactment of national legislation is entrusted to and performed by Parliament as a discrete constitutional institution. Just as the

power to enact national legislation is exclusively the power of Parliament, the correlative constitutional duty to enact national legislation is exclusively the duty of Parliament. Section 32(2) imposes such a duty.

39. The determination of whether Parliament has neglected that duty is a weighty exercise. It is rightly entrusted under the Constitution to this Court, which bears the unique constitutional and institutional legitimacy to adjudicate on matters of high political moment, which strain the separation of powers to the full extent permitted by the Constitution.

CONCLUSION

40. It is apparent from all of the above that Parliament exclusively: bears the obligation to enact the required legislation under section 32(2) of the Constitution; is seized with fulfilling that obligation; and has nevertheless failed to fulfil that obligation.

41. It is submitted that the determination of whether the above obligation exists, and whether Parliament has failed to fulfil it, falls squarely within the exclusive jurisdiction of this Court.

David Unterhalter SC

Max du Plessis

Chambers

20 October 2014

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT121/14

In the matter between:

MY VOTE COUNTS NPC	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
AFRICAN NATIONAL CONGRESS	Seventh Respondent
DEMOCRATIC ALLIANCE	Eighth Respondent
ECONOMIC FREEDOM FIGHTERS	Ninth Respondent
INKATHA FREEDOM PARTY	Tenth Respondent
NATIONAL FREEDOM PARTY	Eleventh Respondent
UNITED DEMOCRATIC MOVEMENT	Twelfth Respondent
FREEDOM FRONT PLUS	Thirteenth Respondent

CONGRESS OF THE PEOPLE	Fourteenth Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Fifteenth Respondent
AFRICAN INDEPENDENT CONGRESS	Sixteenth Respondent
AGANG SA	Seventeenth Respondent
PAN AFRICANIST CONGRESS	Eighteenth Respondent
AFRICAN PEOPLE'S CONVENTION	Nineteenth Respondent

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

CONTENTS

THE ISSUES

1. Section 32 of the Constitution reads:

> "*(1) Everyone has the right of access to –*
>
> *(a) any information held by the state; and*
>
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*
>
> *(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."*

2. The applicant claims orders declaring that Parliament has not complied with s 32(2) of the Constitution and compelling Parliament to do so. [1] Its primary contention is that the Promotion of Access to Information Act 2 of 2000 ("PAIA") does not fulfil the requirement of s 32(2) of the Constitution as national legislation which gives effect to the right of access to information in s 32(1) of the Constitution. It bases this contention on the two propositions in prayers 1.1 and 1.2 of its notice of motion:

2.1. The first is that "*information about the private funding of political parties … is reasonably required for the effective exercise of the right to vote … in terms of section 19(3) of the Constitution"*.

2.2. The second is that this information is not accessible to the public in terms of PAIA or any other national legislation.

---

[1] Notice of application, prayer 1 and 2

3. We submit that the application is both wrong and self-defeating. It is wrong because PAIA fulfils the requirements of s 32(2) of the Constitution. It does everything the section requires. The application is in any event self-defeating. The first proposition on which it is based is that information about the private funding of political parties is required for the effective exercise of the right to vote. If this proposition is correct, then the information is already accessible to the public in terms of PAIA and does not require further legislation.

4. The application should however be dismissed without determination of its merits because it is in breach of the subsidiarity principle. PAIA has been enacted to give effect to s 32(2) of the Constitution. It purports to do so. If the applicant contends that it does not do so, then its remedy is to challenge the constitutional validity of PAIA by the conventional route via the High Court.

5. The applicant advances an alternative cause of action in paragraphs 40 to 50 of its founding affidavit to the effect that s 7(2) of the Constitution obliges Parliament to enact legislation for the disclosure of the private funding of political parties. This cause of action however does not support the claims made and relief sought in the notice of motion. The cause of action is in any event unfounded. The Constitution expressly and extensively spells out its requirements of transparency generally and access to information in particular. If the duty, for which the applicant contends, does not arise under those provisions then it cannot be said to be implied by the general obligation s 7(2) imposes on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

6. The applicant thus mischaracterises Parliament's defence when it says the **IDASA** judgment[2] *"forms the foundation of Parliament's entire response to this application"*[3]. Both the answering affidavit and these submissions demonstrate this.

THE SUBSIDIARITY PRINCIPLE

7. This Court has frequently held that,

"*where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."*[4]

[emphasis added]

8. PAIA is the national legislation enacted in terms of s 32(2) of the Constitution to give effect to s 32(1) of the Constitution. This Court said so in **PFE International**:

"*PAIA is the national legislation contemplated in section 32(2) of the Constitution. In accordance with the obligation imposed by this provision, PAIA was enacted to give effect to the right of access to information, regardless of whether that information is in the hands of a public body or a private person. Ordinarily, and according to the*

---

2 Institute for Democracy in South Africa and others v African National Congress and others 2005 (5) SA 39 (C)

3 Applicant's Written Submissions, p 5 para 11

4 Mazibuko and others v City of Johannesburg and others 2010 (4) SA 1 (CC) para 73 and the authorities quoted in footnote 54

principle of constitutional subsidiarity, claims for enforcing the right of access to information must be based on PAIA."[5]

9. The applicant challenges this finding in paragraphs 25 to 28 of its founding affidavit in an attempt to escape the subsidiarity principle.[6] But its challenge is unfounded for the following reasons:

9.1. The question is whether Parliament enacted PAIA to give effect to s 32(1) of the Constitution, that is, whether it purports to be the legislation required by s 32(2) of the Constitution. The question is not whether it in fact gives proper effect to s 32(1). It is precisely when legislation purports to give effect to a right but fails to do so properly, that the subsidiarity principle requires a constitutional challenge in the ordinary way.

9.2. PAIA makes it clear in its preamble that its purpose is to give effect to s 32(1) of the Constitution in accordance with the requirement of s 32(2) of the Constitution.

9.3. Section 9(a) of PAIA says that the first object of PAIA is "*to give effect to the constitutional right of access to –*

(i) any information held by the State; and

(ii) any information that is held by another person and that is required for the exercise or protection of any rights".

---

5 PFE International and others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC) para 4

6 Founding affidavit p 19 paras 25 to 28

9.4. PAIA goes on to do exactly that. Section 11(1) gives effect to the right of access to any information held by the state. Section 50(1) gives effect to the right of access to information held by any other person that is required for the exercise or protection of any right.

9.5. Thus, whether political parties are an extension of the state (as the applicant contends in paras 17 and 29 of its written submissions) or they fall outside the definition of "state" as contemplated in s 32(1)(a) of the Constitution (as the applicant seems to contend in the alternative in para 18 of its written submissions) PAIA is the product of Parliament's purported fulfilment of its constitutional obligation under s 32(2) of the Constitution.

9.6. The applicant's bold contention at paragraph 88 of its written submissions that *"no requester can conceivably meet this threshold"* in s 70 of PAIA is conveniently self-defeatist. In any event, if the applicant is correct in this contention, its relief lies properly in a constitutional challenge of the section in the ordinary way, not in hankering for the enactment of yet another piece of legislation dealing with the very issue for which PAIA was enacted.

10. The applicant argues in paragraph 28 of its founding affidavit that PAIA does not cover the field because this Court held in **PFE International** that PAIA does not apply to information sought for purposes of civil or criminal proceedings after commencement of those proceedings.[7] But this submission is unfounded. Section 7 of PAIA merely

[7] Founding affidavit p 20 para 28 citing PFE International v Industrial Development Corporation of SA 2013 (1) SA 1 (CC) para 7

excludes information sought for civil or criminal proceedings after commencement of those proceedings in recognition of the fact that disclosure for those purposes is already regulated by national legislation, that is, by the Criminal Procedure Act 51 of 1977 and the rules of the High Court, the Magistrate's Court and the various other courts. The point is that PAIA was not enacted in mere partial fulfilment of s 32(2) of the Constitution. It purports to fulfil s 32(2) completely. The applicant contends that it does not do so. The subsidiarity principle prescribes that, in these circumstances, the applicant's remedy is to challenge the constitutional validity of PAIA in the High Court in the ordinary way.

11. The application directly to this Court should thus be dismissed because it contravenes the subsidiarity principle.

THE APPLICATION IS WRONG AND SELF-DEFEATING

12. The applicant says that PAIA merely empowers the public "*with a procedural pin to pierce the seal of secrecy on existing records in specific circumstances"*.[8] It adds that the legislation contemplated by s 32(2) must "*replace a regime of unregulated secrecy with one of regulated transparency"* which requires "*disclosure of funding records … as a matter of continuous course, rather than once-off upon request"*.[9] We submit however that these claims are extravagant. PAIA in fact does precisely what s 32(2) of the Constitution requires.

---

[8] Founding affidavit p 19 para 25

[9] Founding affidavit p 19 para 26

13. Section 32(2) requires national legislation which gives effect to the right of access to information in s 32(1). The right to which it must give effect, is the right of "*access to"* any information held by the state and any information held by any other person required for the exercise or protection of any right. That is precisely what PAIA does. Section 11(1) of PAIA gives effect to the right of access to any information held by the state. Section 50(1) gives effect to the right of access to information held by anybody else if it is required for the exercise or protection of any right.

14. PAIA moreover gives ample effect to the right of access to information in terms of s 32(1) of the Constitution by its generous interpretation of the unqualified right of access to information held by "*the state"*:

    14.1. Section 11(1) recognises an unqualified right of access to information held by any "*public body"*.

    14.2. The definition of a "*public body"* in s 1 is not limited to "*the state"*, that is, to departments of state. Paragraph (b) of the definition extends it to "*any other functionary or institution when –*

        (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

        (ii) exercising a public power or performing a public function in terms of any legislation".

    14.3. Section 8(1) picks up on paragraph (b)(ii) of the definition to make it clear that a body, which might otherwise be a private body, is treated as a public body

for purposes of access to its records if they relate to its exercise of a power or performance of a function as a public body.

15. The applicant assumes that PAIA does not allow public access to information about the private funding of political parties. Its assumption accords with the High Court's judgment in the **IDASA** case.[10] But the High Court's conclusion was dependent on two key findings.

15.1. The first was that, in its fund-raising activities, a political party acts as a "*private body*".[11]

15.2. The second was that the public did not require information about the private funding of political parties for the exercise or protection of the right to vote in terms of s 19 of the Constitution. The High Court put the latter conclusion as follows:

"*To sum up, as far as this aspect is concerned, I have not been persuaded by the applicants, on the facts of this case, that they reasonably require any of the records in question for the exercise or protection of any of the rights claimed by them. Donor secrecy does not impugn any of the rights contained in either ss 19(1) or (2) of the Constitution. Put differently, disclosure of donor funding is not a pre-requisite to free and fair elections --- a proposition borne out by the experience of our first 11 years of democracy, which included no*

[10] Institute for Democracy in South Africa and others v African National Congress and others 2005 (5) SA 39 (C)

[11] IDASA paras 31 and 32

less than three general elections that have universally been accepted as free and fair. In the circumstances, I conclude that the applicants are not entitled to the relief claimed."[12]

16. If the High Court was mistaken in either of these findings, then the dismissal of IDASA's application was wrong. The public would be entitled to the records of the private funding of political parties in terms of PAIA,

16.1. if political parties act as "public bodies" in their fund raising activities;[13] or

16.2. if the public requires the information of the private funding of political parties for the exercise or protection of their right to vote.[14]

17. The applicant seems to argue that the High Court's first finding was wrong because political parties are "public bodies".[15] But if that is so, then the public is entitled to the funding records of political parties in terms of s 11(1) of PAIA.

18. The applicant clearly repudiates the High Court's second finding. Its primary contention, upon which its application is based, is that "*access to accurate information about the private funding of political parties is essential for the effective exercise of the*

---

12 IDASA para 52

13 s 11(1) of PAIA

14 s 50(1) of PAIA

15 Applicant's Written Submissions, p 13 paras 24 to 39 particularly para 29

right to vote and to make political choices".[16] But if this contention is correct, then the **IDASA** judgment was wrong. If "*access to accurate information about the private funding of political parties is essential for the effective exercise of the right to vote and to make political choices"*, then the public has access to that information in terms of s 50(1) of PAIA, even if a political party is a "*private body"*.

19. We accordingly submit that the application is unfounded on two grounds. The first is that PAIA amply fulfils all the requirements of s 32(2) of the Constitution. The second is that the application is in any event self-defeating because it is founded on the applicant's contention that access to information about the private funding of political parties is essential for the effective exercise of the right to vote. If this contention is correct, then PAIA already provides for public access to the information concerned. If the contention is not correct, then the application must fail because it is based on a flawed foundation.

THE STATE'S DUTIES UNDER SECTION 7(2)

20. The applicant advances an alternative cause of action in paragraphs 40 to 50 of its founding affidavit based on s 7(2) of the Constitution.[17] We submit for the following reasons that this cause of action is unfounded and does not avail the applicant.

21. The cause of action does not support the applicant's claims in its notice of motion. It will not be entitled to the relief it seeks even if this cause of action were to be upheld. It accordingly does not avail the applicant.

---

[16] Founding affidavit p 17 para 19.1 read with p 18 paras 22 to 39

[17] Founding affidavit p 25 paras 40 to 50

22. This cause of action is modelled on this Court's majority judgment in **Glenister**.[18] We submit with respect that the ratio of the majority judgment in **Glenister** may be summarised as follows:

22.1. Everyone is entitled to the fundamental rights guaranteed in the Bill of Rights.

22.2. Section 7(2) obliges the state to "*respect, protect, promote and fulfil"* the fundamental rights.[19]

22.3. Corruption undermines the fundamental rights.[20]

22.4. The state is accordingly obliged by s 7(2) to set up an effective mechanism to prevent and root out corruption.[21]

22.5. Section 7(2) implicitly demands that the steps the state takes towards that end be reasonable.[22]

---

18 Glenister v President of the Republic of South Africa and others 2011 (3) SA 347 (CC) paras 175 to 202

19 Glenister para 189

20 Glenister paras 175 and 177

21 Glenister paras 175 and 177

22 Glenister s 194

22.6. International law, through an inter-locking grid of conventions, agreements and protocols, obliges South Africa to establish an anti-corruption unit with the necessary independence.[23]

22.7. To create an anti-corruption unit which is not adequately independent, would not be reasonable and would thus fall short of the requirements of s 7(2).[24]

22.8. The Court therefore concluded "*that to fulfil its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the State must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable"*.[25]

23. **Glenister** however does not avail the applicant because this case is different and not subject to the ratio of **Glenister**.

24. The Constitution does not expressly say that the state must establish an anti-corruption unit and does not expressly describe the features of such a unit. That was why the Court in **Glenister** had to resort to a process of inferential reasoning to determine what the Constitution impliedly said about these matters.

---

[23] Glenister para 192

[24] Glenister para 194

[25] Glenister para 197

25. This case is very different because the Constitution spells out its requirements for transparency generally and access to information in particular. It does so explicitly, clearly and comprehensively:

25.1. Section 1(d) says that one of our founding values is a multi-party system of democratic government to ensure "*accountability, responsiveness and openness"*.

25.2. Section 32(1) recognises a right of access to information which it defines with precision.

25.3. Section 32(2) defines the duty of the state to give effect to the right of access to information. It is a specific duty, focussed on and confined to the right in s 32(1). It thus takes precedence over the general duties s 7(2) imposes on the state to give effect to fundamental rights generally.[26]

25.4. Section 36(1) makes the values of "*an open and democratic society"* the benchmark for the limitation of fundamental rights.

25.5. Section 39(1)(a) makes the values of "*an open and democratic society"* the lode star for the interpretation of the Bill of Rights.

25.6. All spheres of government and all organs of state within each sphere must provide "*transparent"* and "*accountable"* government in terms of s 41(1)(c).

---

[26] Minister of Health and others v Treatment Action Campaign and others (No 2) 2002 (5) SA 721 (CC) paras 29 to 36

25.7. The legislatures in all three spheres of government must conduct their business publicly, openly and transparently in terms of ss 42(3), 42(4), 57(1)(b), 59, 70(1)(b), 72, 116(1)(b), 118, 152(1)(a) and 160(7).

25.8. The executive authorities in all three spheres of government are in turn accountable to the legislatures. That is so for the national executive in terms of ss 55(2)(a), 92(2) and 93(2); a provincial executive in terms of s 133(2); the Chapter 9 institutions in terms of s 181(5); and the Public Service Commission in terms of s 196(5). The executive is thus held accountable by the legislatures which are in turn obliged to do so by their public, open and transparent proceedings.

25.9. Subordinate legislation made by the executive must be accessible to the public in terms of ss 101(3) and 140(3).

25.10. Reports issued by the Public Protector must be open to the public in terms of ss 182(5) and 188(3).

25.11. "*Transparency must be fostered"* throughout the public service in terms of s 195(1)(g).

25.12. Parliamentary committees must have oversight of all security services to give effect to "*the principles of transparency and accountability"* in terms of s 199(8).

25.13. Transparency and accountability in the financial affairs of government at all levels are required by ss 215(1), 216(1) and 217(1).

26. This case is accordingly not like **Glenister** where the Court had to determine by inference what the Constitution impliedly required of the state. Here, the Constitution speaks expressly and with specificity. Section 32(2) in particular prescribes in clear and specific terms precisely what legislation is required of the state to give effect to the right of access to information. It does not leave any room for an inference that s 7(2) impliedly imposes greater duties on the state to legislate for access to information beyond and in addition to the requirements of s 32(2).[27]

27. The same point may also be made as follows:

27.1. **Glenister** did not hold that everyone had a fundamental right to an anti-corruption unit. It held that the state's obligation under s 7(2), to respect, protect, promote and fulfil the rights in the Bill of Rights, obliged it to establish an anti-corruption unit.

27.2. But, in this case, it is not necessary to resort to s 7(2). Section 32(1) directly entitles everyone to access to information and s 32(2) obliges the state to enact legislation to give effect to that right. It is not necessary to go to s 7(2) to find that the state bears such a duty.

---

[27] Minister of Health and others v Treatment Action Campaign and others (No 2) 2002 (5) SA 721 (CC) paras 29 to 36

27.3. The state has discharged its duty in terms of s 32(2) by enacting PAIA. It gives full effect to the right entrenched in s 32(1).

27.4. If the applicant is correct, that information about the private funding of political parties is essential for the effective exercise of the right to vote in terms of s 19, then PAIA in fact makes that information publicly accessible.

27.5. The applicant's resort to s 7(2) is accordingly an unjustified attempt to impose a duty on the state which goes beyond s 32(2) to enact legislation for the creation of a right of access to information wider than s 32(1).

28. It must also be borne in mind that the legislation, for which the applicant contends, will inevitably limit fundamental rights without any constitutional mandate to do so:

28.1. PAIA already provides for unqualified access to all information held by public bodies. The only purpose of the legislation, for which the applicant contends, would be to provide for greater access to the information of political parties insofar as they are private bodies.

28.2. Section 14 of the Constitution protects the privacy of the information of private bodies. Section 32(1)(a) mandates the limitation of that right insofar as the information is required for the exercise or protection of the rights of others. This is the limitation already imposed by PAIA.

28.3. The applicant however contends for legislation which goes further than PAIA in that it allows access to the information of a political party even if it is a

private body and the information is not required for the exercise or protection of any right. That would be a limitation on the privacy of the political party beyond the limitation mandated by s 32(1)(b).

28.4. The applicant does not justify its contention that the Constitution, not only mandates, but indeed requires such further limitation of a fundamental right. One should for obvious reasons not lightly read such an implied term into the Constitution that fundamental rights be limited.

29. We accordingly submit that this application is also unfounded and in any event does not avail the applicant.

30. Lastly, a few observations on some of the applicant's contentions in its written submissions are necessary.

30.1. The applicant charges that the Speaker *"misunderstands"* the test for determining whether information is "required" for the exercise of a right within the contemplation of s 32(1)(b) of the Constitution.[28] It says "required" in this context does not connote "necessity" or "dire necessity"; rather, it means a person would, in exercising his right, derive *"substantial advantage"* from having been apprised of the information in question.[29]

---

[28] Applicant's Written Submissions, p 27 para 53

[29] Applicant's Written Submissions, p 27 paras 53 & 54

30.2. This is a significant departure from the position adopted in the founding affidavit, where the applicant used words like *"essential"*[30], *"vital"*[31] and *"imperative"*[32] to describe the information required for the effective exercise of the right to vote. But this debate would be relevant only if the applicant had sought access to information about the private funding of political parties under s 50 of PAIA.

30.3. Another significant departure from the original position advanced in the founding affidavit relates to the applicant's conception of political parties. In the founding affidavit it conceives of them as *"not organs of state"* but *"a special species of private actors"*.[33] But in its written submissions, a substantial part (11 pages from p 9 para 16 to p 20 para 39) argues that political parties are an extension of the state. Nevertheless, while impermissible, this *volte face* does not assist the applicant because whether political parties are private actors or an extension of the state PAIA is the legislation that Parliament enacted in order to give effect to the right which the applicant claims to invoke – that is, access to the records of political parties' private funding for the effective exercise of the right to vote.

30.4. The applicant's charge that the Speaker is guilty of *"self-destructive logic"* has no factual basis. It is founded on the proposition that the Speaker asserts, on

---

[30] Founding Affidavit, p 17 para 19.1

[31] Founding Affidavit, p 23 para 34

[32] Founding Affidavit, p 25 para 40

[33] Founding Affidavit, p 22 para 33

the one hand, that there is no need for disclosure legislation because PAIA already provides for disclosure of private donations and, on the other, PAIA does not permit disclosure of private donations.[34] Nowhere in the answering affidavit does the Speaker say PAIA does not permit the disclosure of political parties' private donations. What she does say is that s 19 of the Constitution does not confer a right to such disclosure.

30.5. The new argument that PAIA does not apply to unrecorded information is simply a desperate lunge for any straw. [35] This contention is not raised on the papers at all and one accordingly does not know what the facts are. For one thing, the applicant does not say either political parties or their private donors do not keep records of private funding thus placing information of such private funding beyond the reach of PAIA. For another, it cannot possibly prove that no such record is kept since it has not requested it under PAIA.

30.6. The applicant again misconstrues the Speaker's response to its application when it says she mistakes Parliament's constitutional obligation to pass legislation for an "option" to do so.[36] This argument is unfortunate in its intemperance and is wrong. Parliament is not obliged to pass legislation on demand by a lobby group or any person. A constitutional duty brings about that obligation. Parliament's case is that there remains no such constitutional duty since the passing of PAIA.

---

[34] Applicant's Written Submissions, p 36 para 82

[35] Applicant's Written Submissions, p 37 para 84 to p 38 para 87

[36] Applicant's Written Submissions, p 41 para 93 to p 43 para 97

30.7. The suggestion that Parliament has failed to justify its failure to enact the legislation for which the applicant contends is incorrect. Firstly, right at the outset in her answering affidavit the Speaker clearly articulates Parliament's reasons for not enacting the legislation. She refers to ss 11 and 50 of PAIA and says PAIA satisfies the requirement for s 32(2) of the Constitution.[37] She also elaborates on that point under the rubric "PAIA IS ADEQUATE". Secondly, the Speaker gave adequate reasons for the adoption by Parliament of the report of the Committee on Private Members' Legislative Proposals and Special Petitions under the rubric "HISTORY OF DISCUSSIONS IN PARLIAMENT". The fact that the applicant does not like those reasons cannot mean they were never advanced. What it means is that the applicant missed an opportunity to take that decision on review when it could. Now, realising that there has been a considerable delay since the adoption by Parliament of that report in 2011, it seeks to obtain the same result by raising a non-existent constitutional obligation.

PRAYER AND COSTS

31. The first and second respondents ask that the applicant's claims be dismissed with costs including the costs of two counsel.

32. Invoking the principle in **Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC)**, the applicant claims payment of its costs including costs consequent upon the employment of two counsel if it should succeed, but asks

[37] Answering Affidavit, paras 7-9

that it not be burdened with Parliament's costs if it should fail. For that to happen, the applicant must show at the very least

32.1. that Parliament has failed to fulfil its constitutional obligation thus compelling the applicant to approach this Court directly; and

32.2. that Parliament advances unsustainable technical and procedural objections to the applicant's case.

33. Neither factor is present in this case. Parliament's constitutional obligation to enact legislation that gives effect to s 32(1) of the Constitution was fulfilled with the enactment of PAIA some 14 years ago. Parliament's objection to the applicant's case is substantive. It is, in summary, that

33.1. if the applicant is correct that political parties are public bodies or *"are part of the state for the purposes of section 32(1)(a)"*, then s 11(1) of PAIA confers unqualified right of access to their funding records and there is no need for new legislation;

33.2. if it is wrong, and political parties are not public bodies, but correct in its contention that access to political parties' funding records is "essential"[38] or "vital"[39] or "imperative"[40] for the effective exercise of the right to vote and to

---

[38] Applicant's Written Submissions, p 17 para 19.1

[39] Applicant's Written Submissions, p 23 para 34

[40] Applicant's Written Submissions, p 25 para 40

make political choices, then s 50(1)(a) of PAIA confers the right of access to those funding records provided such access is in the public interest.

34. By contrast, we submit that Parliament is entitled to its costs, including the costs consequent upon the employment of two counsel, because

34.1. since the applicant asserts that PAIA is for its purposes inadequate, it should have complied with the subsidiarity principle, which is trite, in challenging PAIA in the High Court;

34.2. the applicant has unreasonably resisted Parliament's suggestion in its answering affidavit that its remedy lies properly in PAIA, citing perceived difficulty in meeting the threshold in s 70 of PAIA;

34.3. on its own argument (if correct) the applicant's remedy of access to political parties' private funders records lies fully and properly in PAIA, whether political parties are public or private bodies;

34.4. the applicant's motivation for this application seems rooted in a desire to fight corruption, a scourge for which numerous pieces of legislation have already been enacted and to which the applicant's attention has been drawn in the answering affidavit but it says nothing in its written submissions to gainsay the point; and

34.5. the applicant generally invokes unsustainable contentions, including among others the contention that s 8(2) of the Constitution imposes a duty on political

parties to advance the political rights of the voting public and not only the interests of members, whereas that provision simply says a provision in the bill of rights chapter binds a natural or a juristic person *"if, and to the extent that, it is applicable, taking into account the nature of right and the nature of the duty imposed by the right"*, thus begging the very question posed to the applicant to identify a provision in the Constitution that imposes a duty on political parties to advance the political rights of the voting public in general.

35. For these reasons, we submit that Parliament is entitled to its costs if it succeeds in resisting this application.

Wim Trengove SC

Vuyani Ngalwana SC

Farzanah Karachi

Chambers
Sandton
13 January 2015

AUTHORITIES

Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC)

Glenister v President of the Republic of South Africa and others 2011 (3) SA 347 (CC)

Institute for Democracy in South Africa and others v African National Congress and others 2005 (5) SA 39 (C)

Mazibuko and others v City of Johannesburg and others 2010 (4) SA 1 (CC)

Minister of Health and others v Treatment Action Campaign and others (No 2) 2002 (5) SA 721 (CC)

PFE International and others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC)

THE CONSTITUTIONAL COURT

Case 121/14

In the matter between:

MY VOTE COUNTS NPC	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
AFRICAN NATIONAL CONGRESS	Seventh Respondent
DEMOCRATIC ALLIANCE	Eighth Respondent
ECONOMIC FREEDOM FIGHTERS	Ninth Respondent
INKATHA FREEDOM PARTY	Tenth Respondent
NATIONAL FREEDOM PARTY	Eleventh Respondent
UNITED DEMOCRATIC MOVEMENT	Twelfth Respondent
FREEDOM FRONT PLUS	Thirteenth Respondent
CONGRESS OF THE PEOPLE	Fourteenth Respondent

AFRICAN CHRISTIAN DEMOCRATIC PARTY	Fifteen Respondent
AFRICAN INDEPENDENT CONGRESS	Sixteenth Respondent
AGANG SA	Seventeenth Respondent
PAN AFRICANIST CONGRESS	Eighteenth Respondent
AFRICAN PEOPLE'S CONVENTION	Nineteenth Respondent

_____

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

ON EXCLUSIVE JURISDICTION

INTRODUCTION

1. On 30 September 2014, the parties were directed to address the question **"*whether the application falls within the exclusive jurisdiction of this Court"***.

2. The applicant was given until Friday, 17 October 2014 and the respondents until Friday, 24 October 2014 to file respective written arguments.

3. On Monday, 20 October 2014 the applicant filed its written argument together with an application for condonation for the late filing thereof.

4. The first and second respondents do not oppose the application for condonation.

EXCLUSIVE JURISDICTION

5. A court's jurisdiction to determine a claim depends on the nature of the claim made on the claimant's pleadings.

6. In *Chirwa v Transnet 2008 (4) SA 367 (CC)* Langa CJ said that:

> ***"[169] …a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable."***

7. This court confirmed in *Gcaba v Minister for Safety and Security 2010 (1) SA 238 (CC)* that jurisdiction is determined on the pleadings:

> ***"[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being***

> ***challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court."***

8. It is thus "*axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it"*.[1] The applicant's submissions on the merits of its claim in paragraphs 14 to 24 and 32 to 39 of its heads of argument are accordingly misguided.

9. The nature of the applicant's claim is apparent from its notice of motion. It claims that Parliament has failed to fulfil an obligation imposed on it by s 32(2) of the Constitution to enact national legislation to give effect to the right of access to

---

[1] *Chirwa* at para 155; *Gcaba* at para 75

information.[2] The applicant seeks a declaratory order to this effect and an order directing Parliament to enact the legislation concerned.[3]

10. The applicant's claim is thus unambiguously and only based on an allegation that Parliament has failed to fulfil a constitutional obligation.

11. Section 167(4)(e) of the Constitution says that only the Constitutional Court may decide such a claim.

12. For these reasons, we accept that the application falls within the exclusive jurisdiction of the Constitutional Court.

WIM TRENGOVE SC

V NGALWANA SC

F KARACHI

Counsel for the 1st and 2nd respondents
Chambers, Sandton
24 October 2014

---

2 NoM, prayer 1

3 NoM, prayers 1 and 2