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

Case No.: **13372/2016**

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
THE SOUTH AFRICAN HUMAN RIGHTS 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
AGANG SA	Fifteenth Respondent
PAN AFRICAN CONGRESS	Sixteenth Respondent
AFRICAN PEOPLE'S CONVENTION	Seventeenth Respondent

JUDGMENT: 27 SEPTEMBER 2017

MEER J.

Introduction

[1] This application is brought in terms of Section 172(2) of the Constitution of the Republic of South Africa, Act No 108 of 1996 ("the Constitution"). The Applicant seeks a declaration that information about the private funding of political parties is reasonably required for the effective exercise of the right to vote in Section 19(3)(a) of the Bill of Rights. Furthermore it seeks a declaration that the Promotion of Access to Information Act, 2 of 2000 ("PAIA") is inconsistent with the Constitution and invalid, insofar as it does not allow for the continuous and systematic recordal and disclosure of private funding information of political parties.

[2] In its notice of motion the Applicant frames the order it seeks in the following terms:

"1. declaring that information about the private funding of political parties and independent ward candidates (the latter concept as contemplated in section 16 of the Local Government Municipal Electoral Act 2000) ("independent candidates") registered for elections for any legislative body established under the Constitution ("private funding information") is reasonably required for the effective exercise of the right to vote in such elections and to make political choices, in terms of sections 19(1), 19(3), 32 and 7(2) of the Constitution; and

2. declaring that the Promotion of Access to Information Act 2000 **("PAIA")** is inconsistent with the Constitution and invalid insofar as it does not allow for the continuous and systematic recordal and disclosure of private funding information;

3. directing that the declaration of invalidity in 2 above be suspended for 18 months in order to allow Parliament to remedy the defects in PAIA and to achieve the following outcomes:

3.1 the affirmation of the duty of political parties to disclose private funding information;

3.2 the automatic and regular disclosure of private funding information by political parties;

3.3 access to all private funding information, whatever forms the funding or the information may take;

3.4 the obligatory creation by political parties of records of private funding information in order to facilitate disclosure and access;

3.5 the obligatory maintenance of records of private funding information by political parties for at least five years after their creation;

3.6 the disclosure contemplated in 3.3.1 to 3.3.5 above will be mandatory and no persons will be permitted to raise any basis for not disclosing the relevant information;

4. *alternatively* to 3.3 above, granting such other just and equitable relief as this Honourable Court deems fit;

5. directing that the costs of this application, including the costs of two counsel, be borne jointly and severally by any respondents who oppose it; and

6. granting the applicant further and/or alternative relief."

[3] The Applicant is a non-profit voluntary association whose purpose is to improve the accountability, transparency and inclusiveness of elections and politics in South Africa. The Applicant's basic premise in this application is that the right of access to information in Section 32(1) of the Constitution entitles citizens to have access to the private funding information of political parties ("private funding information"). Such information, according to the Applicant, is reasonably required for the effective exercise of the right to vote in elections and to make political choices, which are rights enshrined in Sections 19(1) and (3) of the Constitution, respectively. The constitutional imperative for providing access to such information is further re-inforced by Section 7(2) and Section 1(d) of the Constitution, as transparency in the funding of political parties is required for the effective prevention and detection of corruption. It is also strengthened by a number of international agreements which have been ratified by South Africa. The Applicant challenges the constitutionality of PAIA against this premise.

[4] In early 2015 the Applicant launched an application to the Constitutional Court in terms of Section 167 of the Constitution, seeking an order to compel Parliament to enact legislation (in terms of the constitutional obligation to give

effect to the right of access to information), to regulate the disclosure of private funding information. This legislation, the Applicant argued, was required in addition to PAIA.

[5] The majority of the Constitutional Court in the resultant judgment of *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) ("My Vote Counts"), held that PAIA is the legislation envisaged in terms of Section 32(2) of the Constitution that was intended fully to give effect to the right of access to information. Accordingly, it was held that the principle of subsidiarity required that the Applicant's argument should have taken the form of a "frontal challenge" to the constitutional validity of PAIA in an application before the High Court of South Africa, under Section 172(1) of the Constitution. The merits of the Applicant's argument were not considered by the majority of the Constitutional Court. The minority judgment in My Vote Counts dealt with the merits of the case. Its findings support the Applicant's contentions in this application.

[6] This application is thus the sequel to My Vote Counts. It is the "frontal challenge" to the constitutional validity of PAIA.

[7] The application is opposed by two Respondents only, namely the Second Respondent, the Minister of Justice and Correctional Services, ("the Minister"), and the Sixth Respondent, the Democratic Alliance, ("the DA").

Joinder

[8] The DA argues that the application is defective as the Applicant has failed to join the Independent Electoral Commission ("IEC"), whose core responsibilities, the DA submits, include overseeing political parties, promoting

research into electoral matters, reviewing electoral legislation and promoting voter education.

[9] The core responsibility of the IEC, as appears from the preamble to the Electoral Commission Act 51 of 1996 ("Electoral Act"), is to manage elections. The object of the IEC is to strengthen constitutional democracy and promote democratic electoral process, as appears in Section 4 of the Electoral Act. The primary functions of the IEC, as provided for in Section 5 of the Electoral Act, are *inter alia* to manage elections, ensure elections are free and fair, compile a register of parties and promote voter education. The IEC has very little, if anything, to do with access to information concerning the private funding of political parties, the focus of this application. The focus of the IEC is elections and how they are run, and not access to information under Section 32 of the Constitution and the failings of PAIA. The fact that this application addresses the subject in relation to the Section 19 political rights does not detract from this.

[10] This being so, I am inclined to agree with the Applicant that the IEC does not have a direct and substantial interest in the relief sought by the Applicant, directed as it is against the unconstitutionality of PAIA in addressing the Section 32 right of access to information, read with sections 19, 7(2) and 1(d) of the Constitution. Were this case within the purview of the statutory mandate of the IEC, the situation might have been different. The Applicant notes moreover that pursuant to the Rule 16 A Notice, the IEC could have sought to be joined, which it has not done. In any event, contends the Applicant, if this application is successful, all interested individuals will have an opportunity to make submissions to Parliament, including the IEC.

[11] The question of the joinder of some 540 political parties, not represented in Parliament, who the DA contends were registered with the IEC for the 2016 local government elections, was also raised. In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* [2016] 1 All SA 520 (WCC), at paragraphs 47 and 48, Binns-Ward J stated as follows:

> "[47] .....where the interests of a very large, and effectively indeterminable, number of persons might be affected by the order sought, it would be impracticable to require that they should all be joined. A pragmatic approach has to be adopted in such cases in identifying who needs to be joined as a necessary party. A material consideration is that the constitutional invalidity of legislation – certainly laws of general application - falls to be determined objectively, and not with reference to its subjective effect on particular individuals. (Footnote omitted)
>
> [48] It seems to me that Rule 16 A of the Uniform Rules was introduced recognising that in matters where the constitutional validity of legislation is impugned it will often be impractical for an applicant to join everyone whose interests might be affected. Rule 16A serves in effect to provide for a surrogate joinder by means of a legislatively ordained form of judicial notice of proceedings to affected parties. It gives them notice of the opportunity to ask for a hearing...".

It seems to me that this reasoning would apply equally to the political parties registered with the IEC who have not been joined in this application, whatever their number.

Issue 1: Does the Constitution require the disclosure of private funding

[12] I consider this first issue in three sections. The first of these analyses the right to information in Section 32 (1), read with the right to vote in Section 19 of the Constitution. The second, considers whether private funding information is required for the exercise of the latter right, having regard to the unique nature of political parties in our constitutional democracy. The third, considers Sections 7(2) and 1(d) of the Constitution and a number of international

agreements in the context of the state's duty to prevent corruption, and their impact on private funding disclosure.

Section 32(1) read with Section 19 of the Constitution.

[13] The Applicant submits that the continuous and systematic recordal and disclosure of information about parties' private sources of funding is required in terms of Sections 32(1) and (2) of the Constitution, for the effective exercise of the right to vote and make political choices enshrined in Sections 19(1) and (3) of the Constitution. This approach, contends the Applicant, flows from a plain reading of Section 32 which must be read together with Section 19 in order to determine what the Constitution requires.

These sections state as follows:

> "**32. Access to information.** – (1) Everyone has the right of access to-
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> (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."

> "**19. Political rights.** – (1) Every citizen is free to make political choices, which includes the right-
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> (a) to form a political party;
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> (b) to participate in the activities of, or recruit members for, a political party; and
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> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right-
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[14] A plain reading of Section 32 makes clear that it is **everyone** who has the right of access to **any information.** There is no restriction on either who can access information or the type of information that can be accessed. Information is not, for example, restricted to documentary or recorded information. The concept of information that is "held" is suggestive of information that is known, or current.

[15] Section 32 envisages two holders of information. Under Section 32(1)(a) there is an unqualified right of access to information held by the state, whilst under Section 32(1)(b) there is a qualified right of access to information held by another person, in the sense that such information must be required for the exercise or protection of "any rights". The subsection is thus inter-dependent, as it is related to the exercise or protection of other rights.

[16] It was common cause that political parties fall within the category of "another person" in Section 32(1)(b) of the Constitution. Mr Unterhalter, for the Applicant, argued that political parties could also fall under the category of the state, as contemplated in Section 32(1)(a). He asserted that they were in fact more closely connected to the state, as they discharged public functions and were extensions of the state for the discharge of those functions.

[17] Neither PAIA nor the Constitution defines the state. The Constitution defines organ of state, in Section 239, as:

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
>
> (b) any other functionary or institution-
>
> (i) exercising a power or performing a function 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, but does not include a court or a judicial officer; ..."

[18] A party is defined in the Electoral Act in Section 1:

"... any organisation or movement of a political nature which publicly supports or opposes the policy, candidates or cause of any registered party, or which propagates non-participation in any election; ..."

In *Ingonyama Trust v Ethekwini Municipality* 2013 (1) SA 564 SCA, the definition of state was considered at paragraph 6, where Ponnan JA stated as follows:

"[6] In *Holeni v Land and Agricultural Development Bank of South Africa* 2009 (4) SA 437 (SCA) ([2009] 3 All SA 22) at para 11, Navsa JA put it thus:

'The State as a concept does not have a universal meaning. Its precise meaning always depends on the context within which it is used. Courts have consistently refused to accord it any inherent characteristics and have relied, in any particular case, on practical considerations to determine its scope. In a plethora of legislation, no consistency in meaning has been maintained.'

And in *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 (SCA) paras 14 and 15 Melunsky AJA had this to say:

'I turn to consider what is meant by the expression "the State". In "'The State' and other Basic Terms in Public Law" (1982) 99 SALJ 212 at 225-6 LG Baxter suggests that, as a rough description, "the State" appears to be used as a collective noun for:

"(a) the collective wealth ('estate') and liabilities of the sovereign territory known as the 'Republic of South Africa' which are not owned or owed by private individuals or corporations; and

(b) the conglomeration of organs, instruments and institutions which have as their common purpose the 'management' of the public affairs, in the public interest, of the residents of the Republic of South Africa as well as those of her citizens abroad in their relations with the South African 'Government'."

The Concise Oxford English Dictionary, Tenth Ed, 2002, defines the state as: "a nation or territory considered as an organised political community under one government" and also as "civil government of a country."

[19] Juxtaposing the various definitions of "the state" against that of a "party" it would require something of a quantum leap and a strained interpretation of both "the state" and a "party" to locate the latter within the definition of the former, and I decline the invitation to do so. I note also that the Applicant's stance that political parties are part of the state, is not apparent from its pleadings and for this reason too, the Applicant's reliance on Section 32(1)(a) should be disallowed.

[20] This is happily an issue that need not detain me any further, as much of the debate before me focused on access to information about political parties in the context of information required from "another person" under Section 32(1)(b) for the exercise of the right to vote in Section 19 of the Constitution, the Applicant arguing that the two sections must be read together to determine what the Constitution requires. The issue, put simply, is whether the relevant information is required for the exercise of the right to vote.

[21] The Minister disagrees that Sections 32 and 19 are required to be read together. He contends that the rights in Section 19 are self-standing and should not be read with Section 32 for the following reasons: the rights in Section 19(3) are rights guaranteed only to citizens and the exercise of those rights does not depend on access to information; in contrast the right to information under Section 32 is held by everyone; Section 19 does not require legislation to give effect to the right to vote while Section 32 is clearly subject to national legislation; the right to vote is enshrined in Section 19 which is designed to give effect to this right, while Section 32 is clearly inter-dependent and related to the exercise or protection of any rights.

[22] The Minister's arguments cannot be sustained, precisely because of the inter - dependency of Section 32(1)(b) on other rights. Whilst Sections 19 and

32 obviously do not overlap in every respect, it is clear from the wording of Section 32(1)(b) that the relevant information must be accessed for the purpose of exercising any rights, including those contained in Section 19 to give effect to other rights in the Bill of Rights. Section 32(1)(b) specifically refers to information that is required for the exercise or protection of any rights. The Minister's contentions, as is observed by the Applicant, are also contrary to the purposive, contextual and holistic consideration of the Bill of Rights by our Courts when interpreting and giving effect to those rights. As is, in my view, correctly stated in the minority judgment in *My Vote Counts* ("The Minority Judgment") at paragraph 31:

> "The 19(3) right to vote is among the rights contemplated by 32(1)(b)".

Sections 32 and 19 must therefore be read together in order to determine what the Constitution requires.

Is information about the private funding of political parties required for the exercise of the right to vote?

[23] In keeping with a long line of judgments it is well established that 'required' in the context of Section 32(1)(b) of the Constitution, means "reasonably required". See *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 13; *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) para 30; *Company Secretary of Arcelor Mittal South Africa and Another v Vaal Environmental Justice Alliance (69/2014)* [2014] ZASCA 184; 2015 (1) SA 515 (SCA); [2015] 1 ALL SA 261 (SCA) (26 November 2014). The Minority Judgment, referencing *Clutchco* and *Unitas supra* points out at paragraph 31:

> "'Required' in the context of s 32(1)(b) does not denote absolute necessity. It means 'reasonably required'. The person seeking access to the information must establish a substantial advantage or element of need. The standard is accommodating, flexible and in its application fact bound."

[24] Having established that the right in Section 19(3) is among the rights contemplated in Section 32(1)(b) and that the term "required" in Section 32(1)(b) denotes reasonably required, I turn to consider whether private funding information is reasonably required for citizens to be able to effectively exercise their Section 19(3) right to vote.

[25] The Applicant argues that this enquiry must take into account the fact that political parties occupy a unique and critical role in our constitutional democracy. The entire electoral system, it says, is dependent upon political parties contesting elections, and therefore determining which persons will become members of the legislature and executive. It is members of political parties who determine the laws of the country and shape policy, they point out. In terms of sections 236, 57(2) (c) and 116(2) (c), the Constitution envisages the provision of public funding to political parties. Although political parties are not organs of state, says the Applicant, they are a special species of private actors, rightly bearing constitutional responsibilities towards the voting public.

[26] This unique role of political parties is acknowledged in the Minority Judgment, at paragraphs 32 to 37, some of which is quoted below:

> "[32] The founding premise of the applicant's argument is the unique role of political parties in our constitutional democracy. This is difficult to dispute. The electoral system the Constitution creates pivots on political parties and whom they admit as members. In the *First Certification* judgment this court noted that, '(u)nder a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate'.
>
> [33] Our constitutional order places the key to elective office and executive power in the hands of political parties. Members of the National Assembly and provincial legislatures are not directly elected. Nor is the President or the Deputy President. The same applies to provincial and national executives. Under the current electoral system it is political parties, and parties alone, that determine which persons are

allocated to legislative bodies and to the executive. If you cease to be a member of the party that nominated you, you lose your membership of that legislature. The President is in turn elected from amongst the members of the National Assembly and the President appoints the Deputy President and the members of the Cabinet, bar a maximum of two, from among the members of the legislature." (Footnotes omitted.)

[27] At paragraph 34 the Minority Judgment refers to *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC), which highlighted the centrality of political parties, finding them to be 'the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy.' At paragraphs 36 and 37 the minority judgment makes the following observations about the role of political parties and their funding:

"[36] Crucially, *Ramakatsa's* reasoning elucidates the link between the democratic role of political parties and their funding. Participation in parties' activities, the judgment explains, is critical to social progress, through the policies they adopt and put forward to address problems facing communities. And it is to enhance multi-party democracy that the Constitution enjoins Parliament to enact national legislation providing for funding of political parties represented in national and provincial legislatures:

'Public resources are directed at political parties for the very reason that they are the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy.'

[37] *Ramakatsa's* reasoning on the public funding of political parties applies pointedly to the question whether information about parties' private funding is required for the right to vote. Political parties receive public resources because they are the vehicles for facilitating and entrenching democracy. This entails a corollary: that the private funds they receive necessarily also have a distinctly public purpose, the enhancement and entrenchment of democracy, as well as a public effect on whether democracy is indeed enhanced and entrenched. The flow of funds to political parties, public or private, is inextricably tied to their pivotal role in our country's democratic functioning." (Footnotes omitted)

[28] I respectfully agree with these views expressed in the Minority Judgment. The unique nature of political parties and their influential role has a significant bearing on whence and from whom their funds derive. The Minority Judgment goes on to find at paragraph 38 and following, that the right to vote is a right to cast an informed vote:

> "[38] The applicant submitted that the right to vote is a right to cast an informed vote. This must be correct. The reason was stated by Ngcobo CJ, on behalf of a unanimous court, in *M & G Media Ltd*:
>
> > 'In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.'
>
> [39] Section 19(1) of the Constitution envisages that every citizen is 'free to make political choices'. This includes forming a political party, participating in a political party's activities, and campaigning for a political party or cause. It also includes, of course, the freedom to choose one's leaders. But that choice, like all others, is valuable only if one knows what one is choosing. It loses its value if it is based on insufficient information or misinformation. This the Constitution recognises by insisting that government is not only democratic but openly accessible. That is why its preamble speaks of a 'democratic and open' society; why its fundamental rights are to be interpreted to promote the values underlying an 'open and democratic' society, and limited only on that same basis; and why the founding values of universal suffrage and democratic elections are tied to 'openness' of government." (Footnotes omitted)

[29] In concluding that information about political parties' private funding is required for the exercise of an informed right to vote, The Minority Judgment states:

> "[41] So the right to vote does not exist in a vacuum. Nor does it consist merely of the entitlement to make a cross upon a ballot paper. It is neither meagre nor formalistic. It is a rich right – one to vote knowingly for a party and its principles and

programmes. It is a right to vote for a political party, knowing how it will contribute to our constitutional democracy and the attainment of our constitutional goals.

[42] Does this include knowing the private sources of political parties' funding? It surely does. Private contributions to a political party are not made thoughtlessly, or without motive. They are made in the anticipation that the party will advance a particular social interest, policy or viewpoint. And political parties, in turn, depend on contributors for the very resources that allow them to conduct their democratic activities. Those resources keep flowing to the extent that they meet their contributors' and funders' expectations. There can be little doubt, then, that the identity of those contributors, and what they contribute, provides important information about the parties' likely behaviour. As the United States Supreme Court explained in *Buckley v Valeo*, disclosure of political funding –

> 'provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows the voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favours that may be given in return.'

[43] For the reasons *Ramakatsa* sets out, the first two considerations noted in *Buckley v Valeo* have particular edge in our democracy. This is because political parties hold the key to elective and executive office. They are the indispensable conduits through which the Constitution's vision of our democratic functioning is to be attained. It follows that information about political parties' private funding is required for the exercise of the right to vote." (Footnotes omitted)

[30] The conclusions in the Minority Judgment are, in my respectful view, correct and accord with a weight of jurisprudence regarding the right of access to information and the right to vote. See *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) *supra* at paragraph

38. See also *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) at paragraph 64, where the Constitutional Court referred to the imperative to create an "active, informed and engaged citizenry" since "the public can only properly hold their elected representatives accountable if they are sufficiently informed of the relative merits of issues... . "

[31] The importance and effective exercise of the right to vote was further endorsed in *August and Another v Electoral Commission and Others* 1999 (3) SA 1 CC para 17, *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 CC para 11, and in *Richter v Minister of Home Affairs and Others* 2009 (3) SA 615 CC, para 54, where it was held that:

> "...the right to vote imposes an obligation upon the State not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised."

[32] Both the DA and the Minister submitted that an endorsement of the Minority Judgment would discount the validity of elections to date, which were conducted without disclosure of private funding information. This does not logically follow from the content of the Minority Judgment, which neither indicts past elections, nor discounts their validity. It would take a lot more than the endorsement of a minority judgment, whose concern was not past elections, to discount the validity of the past few democratic elections since the advent of democracy in South Africa. As contended by the Applicant, the judgment is a prospective acknowledgment that Parliament must legislate in a way that gives effect to its constitutional obligation in respect of access to information.

[33] I now turn to deal with some of the other arguments raised by the DA and the Minister in opposing disclosure as a constitutional requirement.

33.1 Both the Minister and the DA submitted that the judgment in *Institute for Democracy in South Africa and Others v African National Congress and Others* ("Idasa") 2005 (5) SA 39 (C) was a bar to the Applicant succeeding in this application. In Idasa, unlike in the case before me, the Applicant sought access to private funding records of political parties under PAIA, seeking a declaration that PAIA and Section 32(1) of the Constitution obliged political parties to disclose the records it requested. The Applicant did not challenge the validity of PAIA like in the instant case. The Applicant in Idasa was unsuccessful. Griesel J found that political parties were private bodies, under PAIA, for fundraising purposes. The Applicant therefore had to link the donation records it sought to the exercise and protection of rights under Section 19(1) and (2) of the Constitution and it had not adequately explained how the records it sought would assist them in exercising these rights. The DA submitted that, as I was bound by Idasa, it being a judgment of this Division, the application before me could not succeed.

33.1.1 Idasa did not find against private funding disclosure of political parties as a matter of principle, and certainly not in the context of a challenge to the constitutionality of PAIA. Although Griesel J was not persuaded, on the facts in Idasa, that the records requested were reasonably required for the exercise or protection of any of the rights claimed, he specifically went on to state at paragraphs 57 – 58 as follows:

> "The abovementioned 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.

> "This said, the applicants have nevertheless made out a compelling case – with reference both to principle and to comparative law – that private donations to political parties ought to be regulated by way of specific legislation in the interest of greater openness and transparency".

Idasa is thus not at odds with the Applicant's stance and does not present a bar to the relief it seeks in this application.

33.2 The Minister argued that if access to private funding information was part of the right to vote, access to this information would have been granted in terms of the legislative framework regulating the exercise of this right, namely the Electoral Act 73 of 1998 and/or the Electoral Commission Act 51 of 1996 and/or the Local Government: Municipal Electoral Act 27 of 2000. In my view it does not follow from the fact that no legislation has been enacted to give effect to the disclosure of private funding information, that such disclosure is not required by the Bill of Rights.

33.3 The DA argues that the Applicant has failed to provide sufficient evidence demonstrating "how the right to vote is impoverished by the absence of a disclosure regime in respect of private funding information." I note that it is by now a well-established principle that constitutional invalidity is not proven by subjective evidence, but by objectively examining legislation as against the Constitution and arriving at a conclusion about invalidity. This principle was set out in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984(CC), at paragraphs 26 to 28, where the court held that the invalidity of a law was determined by an "objective" enquiry and that a statute was "of no force and effect to the extent of the inconsistency" as provided for in section 4(1) of the Interim Constitution Act 200 of 1993.

As stated by the Court, "[t]he subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack."

33.3.1 In accordance with this principle, referred to as the doctrine of objective constitutional invalidity by Mr Unterhalter, the Applicant has objectively explained why private disclosure information is required for the exercise of the right to vote. It has done so by comparing legislation as against the Constitution and by relying on compelling case law.

Sections 7(2) and 1(d) of the Constitution: International Agreements and Corruption

[34] The Applicant argues that the constitutional requirement for disclosure of private funding information is re-inforced by Sections 7(2) and 1(d) of the Constitution, as well as a number of international agreements which have been ratified by South Africa. In this context the Applicant develops an argument around the state's duty to prevent corruption. The applicant points out that Section 7(2) requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This injunction is fortified in Sections 195, 215 and 217 of the Constitution, which require that all spheres of Government maintain high ethical standards, provide impartial services, and that they are responsive, accountable and transparent. In this regard, Section 1(d) states as follows:

"**1. Republic of South Africa.** – The Republic of South Africa is one, sovereign, democratic state founded on the following values.:

...

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[35] The Applicant contends that the ability of the state to discharge its duties under these sections is corroded by the insidious effects of corruption. The Constitution, it contends, requires that effective preventative measures be put in place to safeguard against corruption. As much was acknowledged by the Constitutional Court in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), at paragraph 177, where the Court stated:

> "It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy... The State's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms."

In *Helen Suzman Foundation v President of the Republic of South Africa and Others; In Re: Glenister v President of the Republic of South Africa and Others* 2014 (4) BCLR 481 (WCC) at paragraph 21 page 568, the Court said:

> "It is a closed chapter that corruption is rife in South Africa".

[36] The Applicant points also to three international agreements ratified by Parliament, which directly address corruption. These are the Southern African Development Community Protocol against Corruption, adopted in May 2003, the United Nations Convention against Corruption, adopted in November 2004, (which obliges member countries to enhance transparency in the funding of candidates for elected public office and, where applicable, the funding of political parties), and the African Union Convention on Preventing and Combatting Corruption, adopted in November 2005. Article 10(b) thereof instructs each state party to incorporate the principle of transparency into the funding of political parties.

[37] Thus the nexus between corruption and political donations has already been accepted by Parliament by its ratification of these conventions and South Africa has an obligation to honour them.

[38] The prospect of political parties being beholden to donors, especially substantial donors, creates considerable scope for corruption, submits the Applicant. Secret funding creates the risk that public officials may extend undue and undetected favouritism towards those that funded their political progress. In this way, it is argued, secret funding of political parties threatens to encourage or at least conceal corruption and thus to retard the realisation of the pivotal command in Section 7(2) of the Constitution.

[39] In contrast, both the Minister and the DA argue that the detection of corruption is a matter which can be left to the criminal justice authorities and law enforcement agencies. Mr Jamie, for the DA, compiled and handed in a list of statutes aimed at addressing corruption. Mr Masuku, for the Minister, submitted that it was unclear how Sections 32 and 19 should be read together with Section 7(2) to require the disclosure of private funding information in order to curb corruption. These arguments cannot be sustained, especially in light of the acknowledgment of the state's duty to prevent corruption under Section 7(2) in *Glenister (supra)*. This is a duty not wholly discharged by criminal justice authorities and law enforcement agencies tasked with tackling corruption.

[40] The DA denies that the secret nature of donations promotes corruption for, *inter alia*, the following reasons:

40.1 Almost all donations are unconditional and, when donations are conditional, the conditions are anodyne;

40.2 Private funding does not affect party behaviour and the disclosure regime contended for by the Applicant invades the rights of donors;

40.3 Unscrupulous individuals would not be thwarted by mandatory disclosure of private funding;

40.4 The fact that donations are made to parties and seldom to individuals in South Africa, lowers the risks identified in *Buckley v Valeo*.

[41] Much of this is gainsaid by the DA's acknowledgment that certain donations are conditional, albeit, "anodyne". The Applicant points out that the DA has accused the African National Congress of using political favour by rewarding funding with lucrative contract awards. It is widely reported, says the Applicant, that a company that was granted almost R2 billion in tenders from Eskom had paid R1,7 million in donation to the governing party. This too negates the DA's reasoning above. It is further belied by the Minister's statement in his answering affidavit that the notion that financial backers may corrupt a political system, is correct.

[42] In view of all of the above I accept that Section 32(1) read with Section 19 of the Constitution, and also Sections 7(2) and 1(d) thereof, require disclosure of information on political parties' private funding for the exercise and protection of the right to vote.

Issue 2: Does PAIA allow for the disclosure of private funding of political parties, as is required under Section 32(1) of the Constitution, for the effective exercise of the right to vote and make political choices, enshrined in Sections 19(1) and (3) of the Constitution?

[43] In considering this issue, I firstly assess the Minister's submission that PAIA is not the statute whose constitutionality should be challenged in this application. Thereafter I examine, with reference to relevant sections of PAIA, whether PAIA affords a right of access to information about the private funding of political parties. This section then concludes with an illustration of the

Applicant's attempts to obtain private funding information using the mechanisms available under PAIA.

The Minister's Contention that PAIA is the wrong target in this application

[44] The Applicant contends, as aforementioned, that insofar as Section 32(1) read with Section 19(3) of the Constitution requires the systematic and continuous recordal and disclosure of private funding information, PAIA must accordingly provide for this. It does not, and is therefore unconstitutional. This application, as aforementioned, it thus terms as the "frontal challenge" to PAIA which was required by the majority of the Constitutional Court in *My Vote Counts*. The Minister disagrees that PAIA is the statute whose constitutionality should be challenged in this application. PAIA, he contends, is not the legislation at the heart of the Applicant's submissions, because the Applicant is, in fact, concerned with the content of Section 19 and the right to vote. The Applicant should have directed its constitutional challenge to the Electoral Act, 25 of 1998 ("Electoral Act 1998") and or the Electoral Act.

[45] The Minister's argument cannot be sustained in the light of the following statement by the majority in *My Vote Counts,* at paragraph 193:

> "Although the application falls under this court's exclusive jurisdiction, PAIA is the legislation envisaged in 32(2) of the Constitution. The applicant has not challenged it frontally for being constitutionally invalid. In accordance with the principle of subsidiarity, it ought to have done so, as that principle is applicable to this application."

[46] The majority judgement moreover, at paragraph 149, dismissed the Applicant's contention that other pieces of legislation gave effect to section 32, and that PAIA was not the legislation implicated by the Applicant's submissions:

> "However, even though those pieces of legislation do make this provision, they are distinguishable from PAIA. The main focus of each is some other subject; not access to information in terms of s 32(1) of the Constitution. That this is so is reinforced by the sparse manner in which the content of each touches on the right of access to information. In each, provision for the right is merely incidental to the legislation's main focus. On the contrary, PAIA'S focus is one subject: the provision of information in terms of s 32(1) of the Constitution." (Footnotes omitted)

So too, the sparse manner in which the Electoral Act 1998 and Electoral Act touch on the right of access to information, such right being merely incidental to their main focus which is elsewhere. I do not agree with the Minister that this statement was made by the majority in the context of it being a *fait accompli* in the application before the Constitutional Court, that PAIA was the applicable legislation. The issue before the Constitutional Court was not a challenge to PAIA, but that Parliament had failed to fulfil its constitutional obligation to enact legislation giving access to private funding information, and it was in that context that the Court identified PAIA as the legislation to be challenged.

Does PAIA afford a right of access to information about the private funding of political parties?

[47] I embark below upon an analysis of PAIA, in relevant part, to consider whether it affords a right of access to information about the private funding of political parties.

Whose information does PAIA give access to? Does this include political parties?

[48] PAIA gives access to records that are held by two entities, namely public bodies and private bodies as defined in Section 1 of PAIA. A "public body" is defined as:

"(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

b) 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;..."

A "private body" is defined as:

"(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;

(b) a partnership which carries or has carried on any trade, business or profession; or

(c) any former or existing juristic person,

but excludes a public body."

[49] The first observation to be made, is that whilst the definition of "public body" might mirror the definition of "organ of state" in Section 239 of the Constitution, the definition of "private body" is much narrower than "any person" under Section 32 of the Constitution. The second observation is that if an entity does not fall under the definition of a public or private body, its records are clearly not available for disclosure at all and PAIA will not apply to it.

[50] There is a debate as to whether political parties fit comfortably, or at all, under the definition of a "public body" or "private body" under PAIA. The same would apply to independent candidates.

[51] The Minority Judgment states at paragraph 113:

"Political parties do not sit comfortably within the Constitution's definition of 'organ of state' or PAIA's definition of 'public body'. The reason is that, while in certain of

> their functions they may perform statutory duties (such as when they constitute national and provincial bodies that elect the members of executive government), it is simply constitutionally inappropriate to call them "organs of state".

[52] Political parties are also, in terms of the unanimous conclusion of the Constitutional Court in *Ramakatsa*, *supra,* not comfortably termed "private entities". It is, in my view, somewhat problematic to attempt to fit political parties under PAIA's definition of "private bodies". On a direct interpretation of this definition, political parties are clearly not natural persons or partnerships and, accordingly, would need to qualify as "juristic persons". The difficulty however is that political parties are not always incorporated as juristic persons, nor are they legally required so to be. A "party" in terms of the Electoral Act, can be simply an organisation or movement, and not a juristic person. PAIA therefore imposes no obligation on political parties that are not juristic persons.

[53] As the Minority Judgment states at paragraph 114:

> "...political parties are quite plainly not private bodies, and, as already shown, if not juristic persons, they are not covered by PAIA at all. Even where a political party is a juristic person, and thus falls inside PAIA, the term 'private' ill befits it. The reason lies in the nature of political parties, and the critical importance of their functioning to the success of the country's constitutional project".

The judgment goes on to state at paragraph 116, correctly in my view:

> "In short, the public/private disjunct in PAIA appears to have been created without having political parties in mind at all. They are a category of 'persons', outside the state, for whom PAIA has failed to make express or any provision. Where political parties should be, there is a gaping hole." (Footnotes omitted)

[54] The DA's submission that all of the Respondents in this application are constituted as juristic persons and that Section 8 of PAIA caters for bodies

which straddle the public private divide, does not detract from the legitimate concerns highlighted above.

The requirement that information must be requested under PAIA

[55] Under PAIA information is available only upon request and in respect of a specific entity. In terms of sections 18 and 53 of PAIA, which pertain respectively to requests to public and private bodies, requests must be made in the prescribed forms, be relatively detailed and contain "sufficient particulars" to enable identification of a specific record. Once a request is received, the obligation to disclose comes into being, but exists only in respect of the requestor and only in respect of the specific request which has been made. As Applicant aptly contends, the disclosure under PAIA is thus not a continuous process affording citizens equal access to information. Thus access is only to specific existing records that are known to the requestor and a separate request has to be lodged each time a record is sought. This regime clearly does not cater for the continuous disclosure of private funding information flowing from the rights in Section 32(1) read with those in Section 19 (1). Citizens cannot be expected to incur the expense and effort of compiling detailed requests, which may not be met. As the Applicant states, this would impose an onerous and unwarranted burden on citizens who would be expected to pay the standard fee charged for administering these requests.

[56] At paragraph 96 the Minority Judgment, commenting on the right to information on request under PAIA, in my respectful view correctly states:

> "That right of access to information is important. But it is not capable of affording the electoral citizenry the information to which they are entitled about the way political parties vying for their votes are funded. That is a context with unique demands, to which PAIA does not address itself... The right of individuals to apply to receive individual records, furnished on request, could never keep the electorate as a whole meaningfully informed. For that to be achieved, records must be made

publicly available to all. And this would have to be done systematically and regularly, not only upon application. It is not possible for each voter to apply to each political party at each election to obtain the specified records he or she seeks. The difficulty reveals the disjunct between the purpose PAIA is designed to serve and the purpose of the legislation the applicant seeks to have enacted."

Information under PAIA is restricted to records

[57] PAIA only allows requestors access to "records". A record is defined as follows in Section 1of PAIA:

> "'**record**' of, or in relation to, a public or private body, means any recorded information-
>
> (a) regardless of form or medium;
>
> (b) in the possession or under the control of that public or private body, respectively; and
>
> (c) whether or not it was created by that public or private body, respectively;...".

[58] Thus although Section 32(1) of the Constitution explicitly gives access to any information, the right to information under PAIA is restricted to recorded information. Access to unrecorded information about funding is inaccessible. Under this regime, information concerning foreign and other substantial donors, unless properly recorded and disclosed, may never come to light. The receipt of such funding and the identity of the donors would arguably have a significant bearing on a party's foreign and domestic policy, as is contended by the Applicant.

[59] Furthermore, as the Applicant aptly contends, a record can be deleted or destroyed before an application is made for its disclosure, without falling foul of PAIA. The recordal of sensitive information could also be avoided.

Grounds upon which access to information can be refused under Chapter 4 of PAIA

[60] PAIA provides for a range of instances where access to information can, and in some cases must, be refused. These are as follows:

60.1: Section 36 of PAIA provides for the mandatory protection of, inter alia, commercial information of a third party by a public body;

Section 64 contains the same provision in respect of private bodies, directing the refusal of a request where a record contains:

> "(a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or
>
> (c) information supplied in confidence by a third party, the disclosure of which could reasonably be expected-
>
> (i) to put that third party at a disadvantage in contractual or other negotiations; or
>
> (ii) to prejudice that third party in commercial competition."

60.2: In terms of section 68 a private body may refuse a request for access to a record of the body if the record contains, inter alia, financial, commercial or technical information, the disclosure of which would be likely to cause harm to the commercial or financial interests of the body, or contains information, the disclosure of which could reasonably be expected to put the private body at a disadvantage in contractual or other negotiations. Section 42(3) similarly permits a public body to refuse access to a record for these reasons.

60.3: Section 37(1)(a) of PAIA requires the mandatory refusal by a public body if disclosure of a record "would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement".

Under Section 37(1)(b) there is the discretionary refusal where information was supplied in confidence by a third party and disclosure "could reasonably be expected to prejudice the future supply of similar information, or information from the same source" and it is in the public interest that this flow of information should be preserved. Likewise, under Section 65 of PAIA "[t]he head of a private body must refuse a request for access to a record of the body if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement". Under this Section a political party could merely avoid disclosure of private funding if the terms of an agreement with a donor provided for this.

59.4: Sections 34 and 63 of PAIA provide for the mandatory protection of the privacy of a third person who is a natural person, in respect of public bodies and private bodies respectively.

[61] Political parties may well be able to effectively rely on the protection from disclosure afforded by the aforementioned sections of PAIA.

The public interest over-ride: Section 70 of PAIA

[62] Section 70 of PAIA provides for mandatory disclosure in the public interest in certain circumstances. The Section states:

> **"Mandatory Disclosure in public interest.** - Despite any other provision of this Chapter, the head of a private body must grant a request for access to a record of the body contemplated in section 63(1), 64(1), 65, 66 (a) or (b), 67, 68(1) or 69(1) or (2) if-
>
> (a) the disclosure of the record would reveal evidence of-
>
> (i) a substantial contravention of, or failure to comply with, the law; or
>
> (ii) imminent and serious public safety or environmental risk; and

> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

The bodies contemplated in the sections referred to in Section 70 are private bodies and the sections cited pertain to the mandatory protection of their information in various instances. A voter relying on Section 70, would have the arduous task of showing that the information sought was required under Section 70(a) and (b). I do not agree with the DA that the balance required by PAIA is completed and complemented by the public interest over-ride in Section 70, given the arduous threshold requirements imposed by the section.

Applicant's attempts to obtain funding information under PAIA

[63] The Applicant points out that on 31 May and 1 June 2016, in terms of Section 53(1) of PAIA, it submitted various requests for information to the political parties currently represented in Parliament. These either elicited no response or were denied. The inadequacies of PAIA are, I agree, amply demonstrated by this state of affairs.

[64] From the above I conclude that PAIA as a whole does not provide for the disclosure of private funding information of political parties. As was aptly stated in the Minority Judgment, PAIA's mechanisms and processes are inherently limited. PAIA is not in sync with Section 32 of the Constitution and limits that Section and concomitantly the right to vote and make political choices in Sections 19 (1) and (3). Whether this circumstance renders PAIA unconstitutional, depends on whether the limitation is reasonable and justifiable in an open and democratic society, taking into account all relevant factors, under Section 36 of the Constitution. I embark on this enquiry below.

Issue 3: Is PAIA Unconstitutional?

Is PAIA'S limitation of Sections 32 and 19 of the Constitution justified under the limitations clause in Section 36 of the Constitution?

[65] The DA argues that even if PAIA limits Sections 32 and 19 of the Constitution, such limitation is justified by the general limitations clause in Section 36 of the Constitution for, *inter alia,* the following reasons:

> 65.1 The limitation protects the rights of donors to privacy and to express their political support in secret. It likewise protects the right to privacy of political parties;
>
> 65.2 It protects the ability of smaller parties to secure private funding anonymously in order to ensure a level electoral playing field with the ruling party;
>
> 65.3 Political parties are spared the unduly onerous task of compiling and preserving records;
>
> 65.4 Disclosure of private funding would have the severe effect of funders withdrawing donations to opposition parties for fear of reprisals from the ruling party. This impacts on their right to freedom of association.

Of the above concerns the right to privacy was paramount, and I shall begin by addressing this aspect.

[66] In *Mistry v Interim Medical and Dental Counsel of South Africa and Others* 1998 (4) SA 1127 CC, in paragraph 27, the Constitutional Court affirmed that the right to privacy exists on a continuum. The more public the undertaking, the more attenuated the right to privacy would be and the less intense any possible invasion. Similarly, in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 CC, at paragraph 67, it was acknowledged that privacy operates in the truly personal realm, "but as a person moves into

communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly".

[67] Flowing from this, given the public nature of political parties and the fact that the private funds they receive have a distinctly public purpose, their rights to privacy can, in my view, justifiably be attenuated. The same principles must, as a necessary corollary, apply to their donors. Thus, the right to privacy cannot avail the DA.

[68] The possibility of a ruling party taking action to punish donors for supporting opposition parties is not, in my view the type of reasonable and justifiable limitation contemplated in Section 36 of the Constitution for the limitation of the right of access to information and the right to vote. Such a limitation would certainly not pass muster taking into account the factors to be considered under Section 36, *inter alia* the importance of the limitation and the nature of the rights sought to be limited. I note in this regard that it does not follow that private funding disclosure would deprive donors of the choice as to which parties to associate with, as alluded to by the DA.

[69] Under Section 36 of the constitution, PAIA's limitation of Sections 32 and 19 of the Constitution are thus neither reasonable nor justifiable in an open and democratic society, taking into account all relevant factors, in particular the nature of the rights and the nature and extent of the limitation. This accordingly renders PAIA unconstitutional and invalid insofar as it does not allow for the disclosure of private funding of political parties as is required under Section 32 (1) of the Constitution for the effective exercise of the right to vote and make political choices enshrined in Sections 19 (1) and (3) of the Constitution.

The appropriate remedy

[70] The relief that the Applicant seeks is that PAIA must be remedied so as to allow for the continuous and systematic recordal and disclosure of private funding information, by all political parties to all citizens. Whilst I am able to order disclosure, I am of the view that I am prevented, by the pronouncements at paragraphs 122, read with paragraphs 155 and 156 of the majority *My Vote Counts* judgment, from ordering the preferred manner of disclosure, namely "continuous and systematic", that the Applicant seeks. I explain this with reference to the sections

At para 122 the Court said:

> "Summarising it, our difficulty with the minority judgment is twofold. First, insofar as it seeks to have Parliament legislate in a manner preferred by the applicant, the minority judgment violates the doctrine of separation of powers. We elaborate on this below."

The judgment elaborates on this statement made in paragraph 122, at paragraphs 155 and 156, where it states as follows:

> "[155] The applicant wants information on the private funding of political parties to be made available in a manner preferred by it. It prefers that the legislation should require the disclosure of the information as a matter of 'continuous course, rather that once-off upon request'. According to the minority judgment, what South Africa must have is systematic disclosure. It may well be that this is ideal; who knows? But that is not the issue. It is for Parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant. Crucially, lack of rationality is not an issue in these proceedings.
>
> [156] Despite its protestation to the contrary, what the applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner. By what dint of right can the applicant do so? None, in the present circumstances. That

attempt impermissibly trenches on Parliament's terrain; and that is proscribed by the doctrine of separation of powers." (Footnotes omitted)

[71] Regarding paragraphs 155 and 156 of the Majority Judgment, Mr Unterhalter submitted that the Court was simply illustrating the fact that once Parliament has passed legislation, absent a rationality attack, the Applicant's preferences are irrelevant. The criticism of the Minority Judgment was due to the fact that it was willing to consider the substantive issues, he suggested. These observations, he concluded, must be seen in the light of the Court's finding, at paragraph 124, that its approach makes it unnecessary to pronounce on whether information on the private funding of political parties is required for the exercise of the right to vote. This latter finding, he submitted, exempts me from being bound by the statements at paragraph 122, read with paragraphs 155 and 156.

[72] Mr Unterhalter's submissions do not, however, account for the statement at paragraph 122, which, read together with paragraphs 155 and 156, does not in my view, entitle me to make a finding that disclosure should be continuous and systematic, the Applicant's preferred choice, the majority judgment having found such to be proscribed by the doctrine of separation of powers.

[73] In the circumstances the relief sought by the Applicant in paragraph 2 of the Notice of Motion, to the extent that it calls for "continuous" and "systematic" recordal and disclosure, cannot be granted. Mere disclosure can be granted at paragraph 2. The outcomes at paragraphs 3.1 to 3.6 of the Notice of Motion would, in the words of the Majority Judgment, be an "attempt at prescribing to Parliament to legislate in a particular manner" and would be similarly proscribed by the doctrine of separation of powers, as stated in the Majority Judgment, and must be excluded.

[74] The Applicant seeks that the declaration of invalidity of PAIA be suspended for 18 months in order to allow Parliament to remedy the defects in PAIA and to allow for the recordal and disclosure of private funding of political parties. This is an appropriate time frame.

[75] I accordingly order as follows:

1. It is declared that information about the private funding of political parties and independent ward candidates (the latter concept as contemplated in section 16 of the Local Government: Municipal Electoral Act, 27 of 2000) **("independent candidates")** registered for elections for any legislative body established under the Constitution **("private funding information")** is reasonably required for the effective exercise of the right to vote in such elections and to make political choices, in terms of sections 19(1), 19(3), 32 and 7(2) of the Constitution of the Republic of South Africa, Act No 108 of 1996 ("the Constitution");

2. It is declared that the Promotion of Access to Information Act, 2 of 2000 **("PAIA")** is inconsistent with the Constitution and invalid insofar as it does not allow for the recordal and disclosure of private funding information;

3. The declaration of invalidity in paragraph 2 above is suspended for 18 months in order to allow Parliament to remedy the defects in PAIA and to allow for the recordal and disclosure of private funding of political parties and independent candidates;

4. The costs of this application, including the costs of two counsel, shall be borne jointly and severally by the Second and Sixth Respondents.

5. The Registrar of this Court is directed in terms of Section 172(2) of the Constitution, read with Section 15(1)(a) of the Superior Courts Act 10 of 2013 to refer this order within 15 days to the Constitutional Court for confirmation.

Y S MEER

Judge of the High Court

REPORTABLE

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

Case No.: **13372/2016**

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
THE SOUTH AFRICAN HUMAN RIGHTS 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
AGANG SA	Fifteenth Respondent
PAN AFRICAN CONGRESS	Sixteenth Respondent
AFRICAN PEOPLE'S CONVENTION	Seventeenth Respondent

PRESIDING JUDGE	:	**YASMIN SHEHNAZ MEER**
Counsel for Applicant	:	**Adv D Unterhalter (SC)** **Adv M Du Plessis**
Instructed by	:	***Webber Wentzel*** ***Ref.: V Movshovich***
Counsel for Second Respondent	:	**Adv Thabani Masuku** **Adv Liziwe Dzai**
Instructed by	:	***The State Attorney*** ***Ref.: M Sisilana***
Counsel for Sixth Respondent	:	**Adv Ismail Jamie (SC)** **Adv David Borgström**
Instructed by	:	***Minde Schapiro & Smith Inc*** ***Ref.: Elzanne Jonker***
Date of Hearing	:	**15, 16 and 17 August 2017**
Date of Judgment	:	**27 September 2017**