CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 249/17

In the matter between:

MY VOTE COUNTS NPC Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES First Respondent

DEMOCRATIC ALLIANCE Second Respondent

Neutral citation: *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17

Coram: Mogoeng CJ, Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J.

Judgments: Mogoeng CJ majority: [1] to [91]
Froneman J concurring: [92] to [97]

Heard on: 13 March 2018

Decided on: 21 June 2018

Summary: Constitutionality of Promotion of Access to Information Act 2 of 2000 — Act constitutionally deficient for failure to provide for recordal, preservation and disclosure of information on private funding of political parties and independent candidates

Sections 32, 7(2), 19 of the Constitution — State's duty to enable or facilitate exercise of right to an informed vote — transparency, accountability, openness

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ORDER

On an application for confirmation of the order of the High Court of South Africa, Western Cape Division, Cape Town (Meer J):

1. The order of constitutional invalidity made by the Western Cape Division of the High Court, Cape Town is confirmed, in these terms:

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

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

    1.3 It is also declared that the Promotion of Access to Information Act 2 of 2000 (PAIA) is invalid to the extent of its inconsistency with the Constitution by failing to provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates.

    1.4 Parliament must amend PAIA and take any other measure it deems appropriate to provide for the recordal, preservation and facilitation of reasonable access to information on the private funding of political parties and independent candidates within a period of 18 months.

2. Leave to appeal against the exclusion of the words "continuous and systematic" from the High Court order is granted but the appeal is dismissed.

3. The Minister of Justice and Correctional Services must pay costs to My Vote Counts NPC, including the costs of two counsel.

JUDGMENT

MOGOENG CJ (Zondo DCJ, Dlodlo AJ, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J concurring):

Introduction

[1] A true and vibrant constitutional democracy owes its essence to the existence of three functionally independent arms of the State – the Executive, Parliament and the Judiciary. That in turn assumes adherence to high ethical standards and unwavering commitment to the affirmation or oath of office by a critical mass of constitutional office-bearers.

[2] Two of these arms are political in character or orientation. Consistent with this reality, the architectural design of our constitutional democracy requires that leaders in these arms first be elected by the populace[1] before any of them, including the Head of State, may be elected by fellow members in the different legislative bodies to become a leading constitutional office-bearer.[2] Here, the constitutionally-prescribed instrumentalities for rising to public office are political parties and independent

[1] This is done in terms of section 19 of the Constitution.

[2] The President, Speaker and Deputy Speaker of the National Assembly, Chairperson and Deputy Chairpersons of the National Council of Provinces, Speaker and Deputy Speaker of the Provincial Legislature and the Premier are elected in terms of sections 86, 52, 64, 111 and 128 of the Constitution respectively read with Schedule 3 to the Constitution. The Deputy President and Ministers must, in terms of section 91(3) of the Constitution ordinarily be Members of the National Assembly and section 93 of the Constitution requires the same in relation to Deputy Ministers.

candidates. But it does seem to require a lot of money to run a successful campaign for public office.

[3] That said, not all public office-seekers are adequately-resourced to mount a meaningful campaign for office without external funding. Although the State does provide some financial assistance to political parties for their activities which include campaigns,[3] it appears to be a far cry from what is in fact needed to meet the demands of running a proper political machinery or electoral campaign. That inadequacy underscores the need for substantial monetary aid from the private sector or individuals. And that need seems to have birthed another need – the facilitation of the electorate's access to information on private funding. For, that access—

> "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 [public] 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."[4]

[3] See section 236 of the Constitution which reads as follows:

> "To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis."

The Public Funding of Represented Political Parties Act 103 of 1997 is the legislation that was passed to provide for the funding of political parties envisaged in section 236.

[4] *Buckley v Valeo* 424 US 1 (1976) (*Buckley*) at paras 66-7, which is also quoted in the minority judgment of *My Vote Counts v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts* judgment) at para 42. I inserted the word "public" in brackets to give the quotation a correct South African context. The original word is "federal".

[4] Public and private sector corruption is a matter of grave concern around the world. And it appears that the political landscape and by extension governance has not been left untouched. The need for efficiency and effectiveness in the prevention, containment and elimination of corruption linked to the private funding of political parties and independent candidates seems to cry out for urgent intervention. For, corruption that flows from secret private funding could otherwise stealthily creep into our political and governance space, toxify it and fossilise itself to our detriment, if it has not already done so.

[5] Several issues thus arise for determination here: (i) the need to minimise the risk of voters putting into office or even electing into government a political party or independent candidate who is corrupt or somehow compromised; (ii) whether a citizen's constitutional right to vote necessarily entails the right to cast an informed vote; (iii) if so, whether that informed vote includes the obligatory recordal, preservation and simplified yet effective access to information on the private funding of political parties and independent candidates; and (iv) whether the existing regulatory framework for the exercise of the right of access to information enables a voter to enjoy real access to that critical information.

Background

[6] My Vote Counts NPC brought an application in the Western Cape Division of the High Court, Cape Town.[5] It essentially challenged the constitutional validity of the Promotion to Access to Information Act[6] (PAIA) on several grounds.

[7] One of them was that, although PAIA is indeed the national legislation envisaged by section 32 of the Constitution to give effect to a citizen's right of access to information, it has failed to do so. This deficiency is however confined to access to information on the private funding of political parties and independent candidates.

[5] *My Vote Counts NPC v President of the Republic of South Africa* 2017 (6) SA 501 (WCC) (High Court judgment).

[6] 2 of 2000.

And it flows from, among other things, the definition of a juristic person or public body[7] and a private body[8] as well as the onerous requirements for access to information, in general and in particular on private funding which include the payment of a fee.[9]

[8] To buttress the need for access to information on private funding, My Vote Counts also relies on both sections 7(2) and 19 of the Constitution.[10] In this regard, it broadly contends that the State is under an obligation to respect, protect, fulfil and promote the right to vote by ensuring that it is exercised meaningfully or with understanding. And when it is known who is funded by whom, the likelihood or reality of political players being inappropriately influenced by those who fund them, at times to the detriment of the nation, could be detected, exposed, minimised or prevented.

[9] The High Court concluded that PAIA neither applies to political parties nor to independent candidates nor to all records on private funding.[11] It in effect held that PAIA's failure to provide for access to information on private funding is a deficiency that renders PAIA inconsistent with the provisions of sections 32, 7(2) and 19 of the

[7] Section 1 of PAIA.

[8] Id.

[9] Section 54 of PAIA.

[10] Section 7(2) of Constitution states: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights".

Section 19 of the Constitution states:

> "(1) Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (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."

[11] High Court judgment above n 5 at paras 52-9.

Constitution,[12] read together. The Court however, dismissed the contention that the order has to provide for a "continuous and systematic" recordal and disclosure of information on private funding on the ground that to do so would amount to prescribing to Parliament how to execute its constitutional mandate, thus encroaching on its exclusive domain impermissibly.[13]

[10] Because that order of constitutional invalidity is required to be confirmed by this Court before it can have any force, this Court is seized with the matter.[14] But, My Vote Counts has also sought leave to appeal against the High Court's refusal to include the words "continuous and systematic" in the order.

[11] None of the political parties opposes the confirmatory proceedings or the application for leave to appeal. Although the Democratic Alliance is cited as the second respondent, it too did not participate in these proceedings.

[12] The Minister of Justice and Correctional Services, however, opposes the confirmation of the order and the application for leave to appeal. He does so on the grounds that PAIA makes adequate provision for the recordal and disclosure of information on the private funding of political parties and independent candidates. He also argues that the provision that deals with the funding of political parties is not section 32 read with sections 7(2) and 19, but section 236 of the Constitution.

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[12] Id at para 75.

[13] Id at paras 70-3.

[14] Section 167(5) of the Constitution reads as follows:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

See also section 172(2)(a) of the Constitution which states:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

Does this judgment undermine the Bill?

[13] We have become aware that Parliament has already embarked on the process of passing legislation in terms of which the recordal and disclosure of information on the private funding of political parties would be regulated.[15] And a question has arisen whether the legislative process should perhaps be left to run its full course before this judgment could be produced and delivered. The potential problem being anticipated is, in other words, whether this judgment could interfere in some way with the ongoing parliamentary process and cause confusion that we should seek to avoid.

[14] After proper reflection, the production and delivery of this judgment seems to be appropriate and inevitable. The High Court has made an order that PAIA is constitutionally invalid to the extent of its failure to provide for the recordal and disclosure of information on the private funding of political parties and independent candidates. That "order has no force unless it is confirmed by the Constitutional Court".[16] For this reason, the High Court order cannot be left hanging. Its merits were debated in this Court so that we may do what the Constitution requires of us to do – confirm or set aside the order.

[15] In any event, the content of the Bill and its possible impact on the issues before us was not part of the case that culminated in the High Court order. The case that was presented to the High Court, that we are grappling with in these confirmatory proceedings, has to do with a frontal attack that was launched on the constitutional validity of PAIA. That is so because, in a previous case, this Court correctly ruled that PAIA is the legislation envisaged by section 32(2) of the Constitution to regulate access to information.[17] And the long title of PAIA makes this abundantly clear. It refers to the right of access to information and that PAIA is the national legislation

[15] Political Party Funding Bill (as introduced in the National Assembly (section 75); prior notice of its introduction published in Government Gazette No. 41125 on 19 September 2017).

[16] Section 172(2)(a) of the Constitution above n 14.

[17] *My Vote Counts* judgment above n 4 at paras 147-8.

"enacted to give effect to this right".[18] It was for that reason, that this Court held that PAIA's constitutional validity had to be attacked frontally.[19] And this is what My Vote Counts did successfully in the High Court. The case was about the need to regulate the recordal and disclosure of information on the private funding of political parties and independent candidates and was specifically grounded on section 32 read with sections 7(2) and 19 of the Constitution as well as PAIA.

[16] The ongoing law-making process may comfortably run parallel to this judgment without the one being undermined by the other in any way. This is so because the Bill is intended to provide exclusively and uniquely for the recordal and disclosure of information on the private funding of political parties – not to give effect to the High Court order sought to be confirmed here.

[17] Parliament enjoys functional independence in the discharge of its law-making obligations even in relation to the regulation of private funding. Whether it does so through one, two or more pieces of legislation falls squarely within its discretionary powers. It may for example meet that obligation through an appropriately recalibrated PAIA alone, PAIA and another legislation or a different mechanism altogether.

The right of access to information

[18] My Vote Counts sought information relating to private funding from some political parties. It did so in terms of section 32 of the Constitution read with the relevant provisions of PAIA.[20] Some of them successfully took cover under the provisions of PAIA[21] to avoid disclosing that information. This then triggered the

[18] The long title of PAIA reads as follows:

> "To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith."

[19] *My Vote Counts* judgment above n 4 at paras 122 and 155.

[20] See section 53(1) of PAIA. See also High Court judgment above n 5 at para 63.

[21] Sections 50(1) and 63-5 of PAIA.

need to challenge the constitutional validity of aspects of PAIA in the public interest[22] based on, among others, section 32 of the Constitution.

[19] Section 32 provides:

> "(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."

[20] The word "everyone" is wide enough to accommodate both a juristic and a natural person. Similarly, "another person" in this context suggests a person other than the State and is on the face of it wide enough to apply to a natural and juristic person, including a political party or an independent candidate.

[21] The word "held" is broad. It connotes control over information captured or "held" in written form, in human memory, in some electronic or audio-visual contraption or any other form capable of holding information. The noun "record" in PAIA is thus meant to connote nothing more than a mechanism or consequence or product of capturing or keeping whatever information might be needed or required.[23] This meaning is wide enough to apply to "held" in any portion of section 32.

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[22] Section 38 of the Constitution states:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> …
>
> (d) anyone acting in the public interest".

[23] No wonder section 1 of PAIA says—

> "'record' of or in relation to, a public or private body, means any recorded information—
>
> (a) regardless of form or medium;

[22] "Any information" includes information about the private funding of political parties or independent candidates.

[23] And when access is sought to information in the possession of the State, then it must be readily availed. A challenge is, generally speaking, likely to arise when information is "held by another person". There, information is accessible only when "required". And "required" implies the need to demonstrate that there is a legitimate reason to grant access to that information. That ostensibly serves the purpose of ruling out unnecessary or spurious requests. For, some information might indeed be such as to render it necessary for a requester to explain why it is really said to be required. That is an internal qualifier. Information would thus be accessible only if the requester is able to demonstrate that it is reasonably needed or required "for the exercise or protection of any rights". To meet this requirement, it would be necessary to disclose the right(s) that the requester seeks to exercise or protect. Only when so satisfied would the custodian of that information have to give it to the requester.

[24] What then is the reasonable or best form in which certain information must be held? Should it be discretionary or obligatory that all or some information be held? How best should information be "held" to facilitate disclosure when required? For example, funding is generally given to a political party for the benefit of the collective membership not an individual. Such information must be held or recorded. Similarly, the use of funding for independent candidates would ordinarily have to be accounted for. To do so requires record-keeping and the preservation of that record. But that still begs the question which Parliament might wish to reflect on. And that is a possible need for a rights-sensitive approach to holding and disclosing information. Who should hold and disclose which information? Must it necessarily or ideally be held by the one who first received it and about whom enlightenment might be

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(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."

required? Is the State best placed to hold certain information to facilitate reasonable access to it by all who need it for the exercise and protection of certain fundamental rights as a way of honouring its section 7(2) constitutional obligations, as is the case with Judges, Parliamentarians and Members of the Executive?

[25] Broadly speaking, the nature, importance and purpose of certain constitutional rights or information that relates to them, could necessitate that information be kept and recorded for the sake of, among other things, transparency and accountability. It is conceivable that Parliament might be more permissive in this connection. It might for example identify rights in relation to which information ought to be readily or reasonably accessible. The Constitution might, in relation to certain provisions, like the right to vote, have to be read as requiring of all persons to record or hold and preserve information in a way that would render it capable of being reasonably accessible or disclosable.

The right to vote

[26] The citizens' right to express their "will",[24] on which government is based, is provided for in section 19 of the Constitution in these terms:

> "(1) Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (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."

[24] The Preamble to the Constitution says in relevant part that the supreme law of the Republic is to lay the foundations "for a democratic and open society in which **government is based on the will of the people**".

[27] The section highlights the right every citizen has to "make political choices". Choice is of its own a loaded concept. And much more is required of a choice-maker if the choice to be made is political in character and affects important national interests. The gravity of the choice is more pronounced in relation to the right of an adult citizen to participate or vote in the elections for "any legislative body". This is because of the centrality of elections in the functioning, preservation and effectiveness of our constitutional democracy.

[28] To recruit members or supporters and campaign for a political party or a political cause, information would be needed. To be able to distinguish one's party or cause from others would likewise require access to information about them. One also needs to know more about one's competitors to be able to appreciate their strengths, expose their weaknesses or wrongdoing and magnify one's strengths and make an informed comparison between her presumably more progressive policies and objectives and theirs.

[29] Finally, the section addresses the fundamental right every adult citizen has "to stand for public office and, if elected, to hold office". Our Constitution does not itself limit the enjoyment of this right to local government elections. The right to stand for public office is tied up to the right to "vote in elections for any legislative body" that is constitutionally established. Meaning, every adult citizen may in terms of the Constitution stand as an independent candidate to be elected to municipalities, Provincial Legislatures or the National Assembly. The enjoyment of this right is not and has not been proscribed by the Constitution. It is just not facilitated by legislation. But that does not mean that the right is not available to be enjoyed by whoever might have lost confidence in political parties. It does, in my view, remain open to be exercised whenever so desired, regardless of whatever logistical constraints might exist.

[30] The issues before us must thus be addressed as they ought to apply to political parties and independent candidates for any constitutionally-recognised legislative

body. After all, the need for the recordal and disclosure of information ought to be fundamentally the same for all political parties and independent candidates regardless of whether or not they are registered or seek to hold public office at a local, provincial or national level. And the parties in this matter have all grounded their contentions on the Constitution. It is to those constitutional provisions that we must address ourselves.

[31] Some of the values on which our democratic State is founded are: "[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".[25] Citizens thus exercise their right to vote in terms of the Constitution. They presumably want to vote into public office people with the character, credentials and qualities necessary to build a future that every responsible and patriotic citizen yearns for. And that is a future that would redound to the good of all citizens.[26] Regular elections, accountability, responsiveness, openness and public office-bearers who are committed to the core values and principles for good governance laid down in section 195 of the Constitution are what would facilitate the attainment of the South Africa we all deserve.[27]

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[25] Section 1(d) of the Constitution.

[26] We all make that undertaking in the Preamble to the Constitution in these terms:

> "We, the people of South Africa, . . . through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to— . . . [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [i]mprove the quality of life of all citizens and free the potential of each person; and [b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

[27] Section 195(1)(a)-(g) of the Constitution provides:

> (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-oriented.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
>
> (f) Public administration must be accountable.

[32] The right to vote derives its fundamentality from the central role voting plays in the establishment, functionality and vibrancy of a constitutional democracy. It is a pre-requisite for the very existence of the Legislature and the Executive at all levels of the State. And the proper exercise of that right is so critical to the coming into being of our political arms of the State and the effective and efficient functioning of the entire State machinery that the need for transparency and accountability from those seeking public office is self-evidently more pronounced. The future of the nation largely stands or falls on how elections are conducted, who gets elected into public office, how and why they get voted in. Only when transparency and accountability occupy centre stage before, during and after the elections may hope for a better tomorrow be realistically entertained.

[33] This case is after all about establishing a principle-based system that will objectively facilitate the meaningful exercise of the right to vote, regard being had to its veritable significance. The system's inbuilt capacity to sift the corrupt from the ethically upright is an indispensable requirement. For this reason, any information that completes the picture of a political party or an independent candidate in relation to who they really are or could be influenced by, in what way and to what extent, is essential for the proper exercise of the voter's "will" on which our government is constitutionally required to be based.[28] An environment must thus be created for the public to know more than what is said in manifestos or during campaign trails. As will become apparent below, what is implicitly envisioned by section 19 is an informed exercise of the right to vote.

[34] For every citizen to be truly free to make a political choice, including which party to join and which not to vote for or which political cause to campaign for or support, access to relevant or empowering information must be facilitated. Not only

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(g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

[28] Preamble to the Constitution above n 26.

must the information be "held" in one form or another, it must also be reasonably accessible to potential voters. They need it to be able to make a quality decision to vote for a particular political party or independent candidate.

[35] For, there is a vital connection between a proper exercise of the right to vote and the right of access to information. The former is not to be exercised blindly or without proper reflection. In this regard, Ngcobo CJ made the following observations:

> "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."[29]

[36] Public office is so important that it is only to be ascended to by those who have been properly examined and found worthy to represent the electorate. And that may only be so with the benefit of information. Without it, "the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined".

[37] By its very nature, the proper exercise of the right to vote is largely dependent on information. No wonder it takes months, at times even a year or more, for political parties and independent candidates to wage a campaign for public office. This entails imparting whatever information they consider necessary for the electorate to know more about them. That information-sharing process takes the form of many house-to-house visits, town-hall and stadia meetings, radio and television interviews and newspaper articles. Billboards and advertisements are routinely used for the same purpose. There is wide coverage of electoral campaigns on all media platforms and they are fundamentally about sharing information so that the electorate know more about those public office-seekers.

[29] *President of the Republic of South Africa v M & G Media Limited* [2011] ZACC 32; 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC) at para 10.

[38] That information is generally calculated to have voters believe that the candidate it relates to can be trusted and deserves their support because she is best-placed to serve citizens in the public office being campaigned for. It seeks to demonstrate their abhorrence of corruption and all facets of unethical conduct. It is also meant to assure the public of their commitment to our constitutional values[30] and good governance. The centrality of information to this process cannot be over-emphasised.

[39] This then means that political parties and independent candidates should not be left to pick and choose what information would be "held", preserved and disclosed to those who depend on information to determine to whom to entrust their future, that of the nation and posterity. All information necessary to enlighten the electorate about the capabilities and dependability or otherwise of those seeking public office must not only be compulsorily captured and preserved but also made reasonably accessible.

[40] The reality is that private funders do not just thoughtlessly throw their resources around. They do so for a reason and quite strategically. Some pour in their resources because the policies of a particular party or independent candidate resonate with their world-outlook or ideology. Others do so hoping to influence the policy-direction of those they support to advance personal or sectional interests. Money is the tool they use to secure special favours or selfishly manipulate those who are required to serve and treat all citizens equally.

[41] Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation's strategic objectives, sovereignty and ability to secure a "rightful place"[31] in the family of nations. Our freely elected representatives must thus be so free that they would be able to focus and

[30] See section 1 of the Constitution.

[31] Preamble to the Constitution above n 26.

deliver on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivation.

[42] The commitment to build "a united and democratic South Africa" and to "improve the quality of life of all citizens"[32] can only be honoured by public office-bearers whose character or will-power is unencumbered. Only when there is a risk of being exposed for receiving funding from dubious characters or entities that could influence them negatively, for the advancement of personal or sectoral interests, would all political parties and independent candidates be constrained to steer clear of such funders and be free to honour their declared priorities and constitutional obligations. And that risk would be enabled by a regime that compels a disclosure of information on the private funding of political players.

[43] That said, it is probably correct that not every voting citizen would necessarily seek information about the private funding of political parties and independent candidates. Blind loyalty, ready access to information by reason of proximity to public office-seekers, illiteracy or other factors could probably explain why. But that is not the point. The State is under an obligation to do everything reasonably possible to give practical and meaningful expression to the right of access to information and the right to vote. These two are human rights and freedoms. And one of the foundational values of our State is "the advancement of human rights and freedoms."[33]

[44] The cumulative effect of these responsibilities yields an outcome that requires of the State[34] to pass legislation that provides for the recordal, preservation and reasonable accessibility of information on private funding. If these principles were not infused into our constitutional jurisprudence, it would be very difficult to give real meaning to the right of access to information within the context of the right to vote.

[32] Id.

[33] Section 1(a) of the Constitution.

[34] See section 7(2) of the Constitution above n 10.

The role of transparency and accountability, that are essential for rooting out the corruption that could be enabled by undisclosed private funding, reinforces the need to record, preserve and disclose. A reasonably accessible or disclosable record in this connection thus needs to be kept and not destroyed at the discretion of the holder.

Transparency, accountability and corruption

[45] Secrecy enables corruption and conduces more to a disposition by politicians that is favourable towards those who funded them privately once elected into public office. This is likely to flourish even where information on private funding is "held" at the discretion of the funded and unlikely to be exposed to "the light of publicity".[35] For this reason, information on private funding must be compulsorily "held". PAIA captures "record" in sufficiently broad terms to ensure that as much information as possible in the envisaged categories is "held".[36]

[46] Because the right of access to information cannot be exercised in a vacuum, section 32(1)(b) alludes to the need to explain that the purpose for seeking information "held" by another person is for the exercise or protection of any rights. If it were not an implicit constitutional requirement for information relating to the proper exercise of certain constitutional rights to be "recorded" and "held", it is conceivable that "another person" could easily cave in to the temptation not to hold some sensitive and potentially revealing information, or having "held" it to destroy it, so that there would be nothing available to disclose. But, even apart from disclosure being an aid that could discourage corruption, information does help one to know more about an entity or person.

[47] The loophole or leeway "not to hold" or not to preserve information and the consequential non-disclosure of information relating to private funding or quantifiable support in kind, constitutes fertile ground for undermining or even subverting the real

[35] See *Buckley* above n 4 at para 67.

[36] Section 1 of PAIA above n 23.

"will of the people" that is expressible through voting. If the door is left open to potentially or actually compromised political parties or independent candidates to be voted into and hold public office, then the government birthed by such flawed political players could hardly be described as truly based on the "will" of the people. That government or legislative body would not find it easy to implement the good governance and efficiency-enhancing practices prescribed by section 195 of the Constitution.

[48] The foundational values of our constitutional democracy like openness, responsiveness, accountability and the realisation of the constitutional vision of building a united nation and improving the quality of life of all, could thus be at the mercy of unknown and even unscrupulous funders. For, there is indeed no free lunch. This is not to say that all funders are, without more, intent on furthering selfish or sectional interests at the expense of national interests. But some big political campaign funders even in old democracies have been exposed as being inclined[37] "to use money for improper purposes".[38] They reportedly tend to determine or influence in a meaningful way, the policy-direction to be pursued by those in whose political life or fortunes they "invested" their resources.[39] And when elected public office-bearers are illegitimately dictated to, that is likely to poison the broader political landscape and governance, thus weakening or throttling our shared values and constitutional vision. Lack of transparency on private funding provides fertile and well-watered ground for corruption or the deception of voters.

[49] Unsurprisingly, the United Nations Convention Against Corruption, which our Parliament has duly ratified, enjoins State Parties to:

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[37] See Wilcox "Transparency and Disclosure in Political Finance: Lessons from the United States" (conference paper presented at the Democracy Forum for East Asia Conference on Political Finance, Sejong Institute, Seoul, 2001). See also Benton "Rethinking Political Party Contribution Limits: A Roadmap to Reform" (2017) 63 *Loyola Law Review* 257.

[38] *Buckley* above n 4 at para 67.

[39] Id. See also Falguera (ed) et al *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (International Institute for Democracy and Electoral Assistance, 2014), available at https://www.idea.int/publications/catalogue/funding-political-parties-and-election-campaigns-handbook-political-finance?lang=en.

> "consider taking appropriate legislative and administrative measures consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties."[40]

[50] In the same vein, the African Union Convention on Preventing and Combating Corruption, which we have also ratified, says:

> "Each State Party shall adopt legislative and other measures to:
>
> (a) Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
>
> (b) Incorporate the principle of transparency into funding of political parties."[41]

[51] Transparency in the area of the private funding of political parties and independent candidates helps in the detection or discouragement of improper influence and the fight against corruption.[42] Both the African Union and the United Nations have come to this realisation and have taken appropriate steps to help inject transparency and root out corruption in relation to private funding. Politicians who use public office in the furtherance of the agendas of benefactors, at the expense of the best interests of all, are very likely to be found out where there is transparency. The recordal, preservation and disclosure of information on the private funding of political players will thus keep voters better-equipped to make out the real interests these politicians are likely to serve.

[52] Access to this information helps voters and contestants to speak against and expose the corrupt "pay-back-time" political practices. The known possibility of voters and political rivals being able to make the necessary connection between

[40] Article 7(3) of the United Nations Convention against Corruption, 11 October 2004.

[41] Article 10 of the African Union Convention on Preventing and Combating Corruption, 11 July 2003.

[42] OECD *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture* (OECD Publishing, Paris 2016), available at http://transparenz-ja.ch/wp-content/uploads/sites/65/2016/04/Financing-Democracy-OECD.pdf.

private funding and the likely or actual stance of political parties and independent candidates on policy matters of importance, does have the predictable effect of discouraging the pursuit of corrupt or selfish sectarian agendas. And, it also frees our public representatives to do what they promise and are obliged to do, unencumbered by potentially corrupt deals that could be enabled by undisclosable private funding. If secrecy thrives, then our constitutional project would be at risk of being betrayed or shipwrecked.

The need for access by all key players

[53] It is now settled that information on private funding is vital for the proper exercise of the right to vote. But, not all voters appreciate the need to inform themselves and make an informed political choice. Predictable hurdles to the free flow of information on private funding to the broader public, through as many platforms as possible, must thus be removed. Failure to ease access to information for all those who could source and impart that information to the broader public would reduce this judgment to nothing more than a pyrrhic victory for voters. To give substance to access to this information, clarity is required as to just how reasonably accessible it is, even to those who do not need it for voting, but for the education of the voting public.

[54] Access to public office is a highly contested terrain. Contestants ought therefore to have virtually unrestrained access to information on the private funding of one another. This way they would be able to use it to expose and eliminate corruption or the appearance of corruption tied up to funding. Similarly, the extensive reliance on the media by those seeking public office and the voting public, demands that information on private funding also be availed not only to political players but also to the media. And not to be left out is the academia. For, the latter are a resource widely used to either provide political advice or critical political analysis on all forms of media platforms. To do that, they too need reasonable access to information on the funding of political players.

[55] But, a proper basis must be laid for that information to be made just as accessible to them. It must thus be demonstrated at the level of principle that they too require that information "for the exercise or protection of any rights". It would be disingenuous of a political party, a media outlet or an academic to rely on section 19 when in fact the information is required for the exercise or protection of another right or other rights. Integrity is key and must be facilitated here. And section 16(1) of the Constitution lays a solid basis for political players, non-governmental entities, the academia and the media to have reasonable access to it. It provides:

> "Everyone has the right to freedom of expression, which includes—
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research."

[56] The right to freedom of expression is available for the enjoyment of "everyone". "Everyone" here is as all-encompassing as "everyone" in section 32 (1) of the Constitution. Non-profit organisations like My Vote Counts, political parties, independent candidates, the media, the academia and indeed "everyone" ought to be able to effectively exercise or protect all facets of the right to freedom of expression. We all therefore enjoy the right to freedom of expression in relation to information on private funding that is essential for meaningful participation in the electoral process.

[57] The media and the press are doubly covered by section 16(1)(a) of the Constitution in their entitlement to information that could help them exercise or protect "any rights".[43] The academia is similarly-situated by reason of section 16(1)(d). As for political parties, independent candidates or the likes of My Vote Counts, who do not necessarily need information for the purpose of exercising or protecting their right "to vote in elections for any legislative body

[43] Section 32(1)(b) of the Constitution.

established in terms of the Constitution", this section provides the basis for their access to information on private funding.

[58] Section 16(1)(b) guarantees "everyone" the right to "freedom to receive or impart information or ideas". This is an omnibus provision so wide that it appears incapable of leaving any willing passenger behind. In a political environment like elections, information on funding is needed by party members or supporters of a political cause to recruit, campaign and generally impart information or ideas. All of them including NGOs, the media and academia need to "receive" information relevant to voting to in turn be able to "impart" and cause others to "receive" processed information from them. These are rights open to them to exercise or protect. The State's constitutional obligation to ensure that this information is not deceptively or selectively recorded, is preserved and reasonably accessible to voters, also extends to all, especially information-disseminating and public interest-advancing establishments.

Is PAIA deficient?

[59] My Vote Counts launched a frontal challenge to the constitutional validity of PAIA. It contends that, properly understood, section 32 read with sections 19 and 7(2) of the Constitution requires Parliament to pass legislation that provides for the recordal and disclosure of information on the private funding of political parties and independent candidates. Also, that PAIA being the legislation passed in an attempt to fulfil this obligation has failed to do so.

[60] The High Court made the following order:

> "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, 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 para 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."[44]

To confirm this order, we must first be satisfied that it was correctly granted.

[61] Section 32 contemplates two holders of potentially disclosable information – the State and "another person". Although "another person" is not defined by the Constitution, it is the only category capable of accommodating political parties and independent candidates which obviously do not fall under the category of "the State". And the definition section of PAIA says "person means a natural person or juristic person".[45] We thus have to determine first, not only whether the definitional section of PAIA includes political parties and independent candidates, but also whether "recorded" and disclosable information includes that which is "held" by them.

[62] PAIA sets out circumstances under which a requester would be entitled to information, which at times include the payment of a fee.[46] And that is information held by what PAIA, among others, refers to as a "private body". For the purpose of

[44] High Court judgment above n 5 at para 75.

[45] Section 1 of PAIA.

[46] See sections 50-70 of PAIA.

this case, it is necessary to understand what a private body is. Section 1 of PAIA defines a private body 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."

[63] It follows from this definition that, although an independent candidate is indeed a natural person, he or she is one who is excluded from the meaning of a private body and the application of PAIA. Only "a natural person who carries or has carried on any trade, business or profession but only in such a capacity" could be requested to disclose information or a "record" that relates to that activity. Even if an independent candidate is a professional, trader or business person she would still be excluded. Since the information required from her would not be about what she did or does in her capacity as a professional or trader or business person, but about the private funding of her political activities, then access cannot be granted. An independent candidate for public office is therefore doubly excluded. To the extent that PAIA excludes the disclosure of information on the private funding of independent candidates that is required for the exercise or protection of the right to vote or impart information or ideas, it is constitutionally defective.[47]

[64] The meaning of "private body" extends to "any former or existing juristic person". A juristic person is by the way an entity or association that possesses attributes such as perpetual succession, the capacity to acquire certain rights apart from its members and to sue or be sued in its name or through its institutional head. This legal personality status is conferrable either by legislation or the common law. Legislation that creates an entity like a university or state-owned enterprise ordinarily bestows legal personality upon that entity. And it is a statutory precondition for the

[47] The category of a "partnership" clearly does not apply to an independent candidate.

incorporation or registration of some entities that they be juristic persons with the legal capacity to sue or be sued. Other entities could derive their legal personality from their constitutions.

[65] Political parties are neither created by legislation nor required by any legislation to be juristic persons. But, they can in terms of their constitutions clothe themselves with juristic personality, including the capacity to sue or be sued. In all probability, most political parties are juristic persons. PAIA therefore applies to them. However, since there is no law that requires political parties to be juristic persons, a real possibility does exist that some have deliberately or inadvertently not provided for their legal personality in their constitutions. That this probably applies to a small number is neither here nor there. It is an absolute necessity that all, not some, political parties be required to record, preserve and disclose information on their private funding. After all, any of them has the possibility to be elected into power aided by private funders. For this reason, to the extent that PAIA does not cover those political parties that are not juristic persons, it is constitutionally deficient.

[66] The real question is whether PAIA provides for the recordal, preservation and disclosure of information on the private funding of political parties and independent candidates. Sections 18 and 53 of PAIA do not pass muster. They prescribe a form to be completed with laborious particularity. And information on private funding would have to be requested from a particular political party for a specific purpose or as and when it is needed. To have it, a fee must be paid and the record asked for must obviously be in existence. It is a cumbersome process that many would not be able to follow. PAIA does not impose any obligation to record information on the private funding of political parties and independent candidates, but even if it did, provision was not made for reasonable access.

[67] Information might be withheld on the basis that it is likely to harm the commercial or financial interests of say the private or public body or would amount to

a breach of a duty of confidence owed to a "funder" in terms of an agreement.[48] Possible legal action for breach of a duty of confidence owed to a third party in terms of an agreement could justify denial of access to information.[49] In some respects, PAIA offers mandatory protection of the privacy of third parties.[50]

[68] All of the above highlight PAIA's inconsistency with the constitutional obligation to avail information on private funding to all who need it in a reasonable manner. In sum, PAIA is deficient because it does not provide that: (i) information on the private funding of political parties and independent candidates be recorded and preserved; (ii) it be made reasonably accessible to the public; and (iii) independent candidates and all political parties are subject to its provisions. Additionally, it suffices to say that no compelling reasons exist to justify these limitations.

What is to be done?

[69] The right of access to information read with the entitlement to exercise or protect the informed right to vote, and the State's section 7(2) obligation to respect, promote and fulfil the rights in the Bill of Rights, implicitly demands that information on the private funding of political parties and independent candidates be recorded, preserved and made reasonably accessible to the public.

[70] Part of what stands in the way of making information reasonably accessible to voters in terms of PAIA is the laborious procedure to be followed[51] and the fees actually or potentially payable by the requester of the information.[52] It does not help much that this crucial information could only be freely accessible at the discretion of the Minister.[53] Reasonable access should be institutionalised. It is not to be subject to

[48] See sections 37(1)(a)-(b) and 68 of PAIA.

[49] See section 65 of PAIA.

[50] See sections 34 and 63 of PAIA.

[51] See section 53 of PAIA.

[52] Section 54 of PAIA.

[53] See sections 51(4) and 54(8) of PAIA.

the benevolent exercise of a ministerial discretion. This is so because it ultimately helps to determine whether those elected will handle the bread and butter issues of the people well. It must, so to speak, be free-flowing.

[71] There are some good and strong pointers in PAIA itself to what could possibly be done to properly record and make information on the private funding of political parties or independent candidates easily or reasonably accessible.[54] It cannot be emphasised enough that it would be erroneous to construe section 32 as conferring an absolute or blanket entitlement to seekers of any information required from whomsoever for the exercise or protection of all rights. The ease with which it is made accessible ought to depend on the nature of the right whose exercise or protection is sought to be facilitated. If that right self-evidently requires particular information to be properly exercisable, then a person or entity in need of it does not always have to explain the need. The right to vote is one such example. It is intrinsic to its proper enjoyment and its essentiality that all information, that could reveal the potential disadvantage that private funding could bring about, be recorded and easily or reasonably accessible.

[72] It is enough to lay down a principle that requires the State to ensure that the information be recorded, preserved and disclosable in a reasonably accessible manner and that it is not to be paid for. Millions of voting South Africans are unemployed. And even those who are employed need every Rand they earn to meet their basic necessities. Those who stand to benefit from these people's vote or participation in the elections ought to be agreeable to a regulatory framework that facilitates the recordal, preservation and reasonable access to information that could shed more light on who they really are and whose favours they might have to return. That information is indeed essential for voting and imparting information.

[54] See sections 52 and 70 of PAIA.

[73] More importantly, it remains the primary duty of the State[55] to ensure that it facilitates access to information that would enhance the enjoyment of fundamental rights. For this reason, the nature of the information on private funding is such that Parliament might, if so advised, impose on the State or any of its organs the duty to hold, preserve and disclose that information, so that voters may have ready or reasonable access, as envisaged by section 32(1)(a) of the Constitution. Be that as it may, whatever Parliament might decide to do, the State is obligated by a proper reading of section 32 with sections 19 and 7(2) to make this information reasonably accessible to the public.

[74] The consequence of all this is that political parties and independent candidates are constitutionally obliged to record, preserve and disclose information on private funding. But, because section 7(2) imposes the obligation on the State to facilitate the enjoyment of rights in the Bill of Rights, and section 32(2) requires the enactment of national legislation to essentially provide for the recordal or "holding" and disclosure of required or needed information, it thus falls on the shoulders of the State to honour its section 7(2) obligations.

[75] How best to fulfil that obligation should be left to Parliament which bears the legislative authority of the Republic. No information on the private funding of political parties or independent candidates may be "unheld" or "unrecorded" or destroyed at the discretion of the holder and therefore undisclosable. This must however not be understood to be a definitive pronouncement on whether it would be justifiable for Parliament to include or exclude the recordal and disclosure of some information on say R10 contributions or the cleaning of offices or premises for free by one or more people. It is arguably an incredibly tedious exercise to have to record and disclose every quantifiable assistance or support given to a political party or independent candidate, however negligible. Jurisprudence in one of the older democracies singles out for special attention "large contributions and expenditures"

[55] See section 7(2) of the Constitution above n 10.

and "most generous supporters".[56] That said, whether they should be required to record and disclose any and every help, is a matter best left to Parliament to reflect and decide on.

[76] It does not fall within the remit of this Court to prescribe to Parliament whether the recordal, preservation and disclosure of all information relating to private funding should be regulated in terms of PAIA, or PAIA and another legislation or PAIA and other measures. Again, that is a decision to be taken by Parliament itself. Our duty is to articulate the unfulfilled obligation in broad terms, but with sufficient clarity to give Parliament a fair sense of what is required of it. We are required to provide broad guidelines on what could be considered by Parliamentarians in developing a fitting regulatory framework in this connection. The fundamental principle that must be underscored here is that information on the private funding of political parties and independent candidates must be "held" or "recorded", preserved and be reasonably accessible.

Leave to appeal

[77] For the above reasons, the application for leave to appeal against the High Court's exclusion of the words "continuous and systematic" recordal and disclosure in the order is granted. This is done because there are indeed reasonable prospects of success and it is in the interests of justice to do so. But, the appeal must itself be dismissed. Voters will get all they need based on the appropriately modified order granted by the High Court guided by the reasoning in this judgment. The words sought to be added are not only prescriptive but superfluous.

[78] The contention that the order must stipulate that the recordal and disclosure of information must be "continuous and systematic" was addressed by the majority in this Court in the *My Vote Counts* judgment as follows:

[56] See *Buckley* above n 4 para 67.

> "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."[57]

[79] The majority went on to say:

> "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 than 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.
>
> 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."[58]

[80] It is not for this Court to insist on Parliament having to provide for a "continuous and systematic" recordal and disclosure of information on private funding. It suffices to require of Parliament to provide for the holding, preservation and reasonable disclosure of information on private funding.

Suspension of the declaration of invalidity

[81] The High Court suspended the declaration of invalidity "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".[59] It is

[57] *My Vote Counts* judgment above n 4 at para 122.

[58] Id at paras 155-6.

[59] High Court judgment above n 5 at para 75.

necessary to reflect more on the rationale for the suspension of a declaration of invalidity and its legal implications.

[82] The suspension of the declaration of invalidity draws its force from the Constitution and has a purpose to serve. Section 172 provides for it in these terms:

> "(1) When deciding a constitutional matter within its power, a court—
>
> . . .
>
> (b) may make an order that is just and equitable, including—
>
> . . .
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[83] The suspension of the declaration of invalidity is meant "to allow the competent authority to correct the defect". But, it is not merely about allowing for the correction of the defect. There is a vital connection between the nature of the defect that lies at the heart of the declaration of invalidity and the need to suspend the order of invalidity. The particular nature of the defect is critical to the decision to suspend. The overriding consideration should always be whether the nature of the defect is such that the enjoyment of benefits provided for by the invalidated provision would cease to flow if the order of invalidity is not suspended. It would therefore be necessary to suspend an order of invalidity in circumstances where its continued operation would otherwise have a detrimental effect on the rights or interests whose enjoyment was facilitated by the invalidated provision.

[84] Meaning, absent harm or prejudice to the public or any interests no suspension would be necessary. This is so because logically a suspension is triggered by negative or undesirable consequences that would otherwise flow from a failure to suspend. For example, when provisions that regulate certain processes that benefit the public like firearm or business licensing are declared constitutionally invalid but licensing must go on, then the order of invalidity must be suspended because failure to do so would

mean that the mechanism for regulating licensing would immediately cease to exist to the prejudice of the public.[60] And one of the conditions often attached to the suspension is a period within which the defect must be corrected by the competent authority. In appropriate circumstances, the operation of the provision would, pending curative action, be subject to words severed from or read into that provision. The order of suspension is not without purpose nor is it an automatic consequence of a declaration of invalidity.

[85] In this case, no consequence would flow from a failure to suspend the declaration of invalidity. No provision of PAIA was declared invalid in the sense that it would, barring the suspension, ordinarily be required not to apply to the extent of its inconsistency with the Constitution. Virtually all provisions of PAIA stand as if nothing has happened. It is the omission to provide for the recordal and disclosure of private funding that is inconsistent with the Constitution and invalid. This is so because the Constitution, properly construed, requires that this should have been done. The bite of the declaration of invalidity thus falls on PAIA's failure or omission. Meaning that none of the consequential provisions of PAIA is itself nullified by the order or inconsistent with the Constitution. It is the incidence of what is not there that is. The extent of the inconsistency is nothing but a lamentation of the lacunae in PAIA.

[86] It bears emphasis that there is no section of PAIA whose application is tangibly or actually affected by the declaration of invalidity. The purpose of the declaration of invalidity is to alert Parliament to its inadvertent dereliction of a constitutional duty. It must amend PAIA and, if so advised, pass another legislation that would remedy the deficiency now detected and brought to its attention. There is thus no purpose that would be served by suspending the declaration of invalidity.

[60] *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries* [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) at para 41.

[87] What needs to be done, though, is to ensure that Parliament does not take inordinately long to cure the exposed defect. But that does not require a suspension. It requires an order that directs Parliament to cure the deficiency within whatever period we deem appropriate.

[88] A concern might well arise that the failure to suspend would leave access to information unregulated by PAIA, thus leaving it to be exercisable only in terms of the Constitution. Well, PAIA does not regulate or regulate appropriately, access to information on the private funding of political parties and independent candidates, which this case is about. There is thus no difference in effect between the position before and after the declaration of invalidity. In the interim, it is open to those seeking access to information on private funding to do so in terms of section 32(1)(b) of the Constitution or the relevant provisions of PAIA as understood within the context of this judgment. All they would have to do is state that they require information for the exercise or protection of the right to vote. For the correct position is indeed that those who require information for the exercise or protection of the right to vote, reasonable access would no doubt have to be facilitated by this judgment. The only challenge might be that it had never before been known to be obligatory to record and preserve it. As a result, some of it might not have been recorded or might have been destroyed and could therefore be "unheld" and unavailable.

[89] In conclusion, declarations of constitutional invalidity are often accompanied by a suspension. But the underlying reason is that a failure to do so would otherwise yield consequences adverse to the rights or interests hitherto enjoyed or advanced. It should never be done without a purpose. If that were ever done by this Court before, it would have been an oversight we dare not shy away from correcting. We are not to follow our judgments or aspects of them even when they are demonstrably incorrect. It should be right to acknowledge and correct our errors. Remedies given by our courts must after all be effective.[61]

[61] See *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851(CC) at para 69.

[90] An order directing Parliament to address the deficiencies of PAIA within a specified period would thus be made. The order of the High Court will be confirmed in the terms set out below and costs will follow the result.

Order

[91] In the result, the following order is made:

1. The order of constitutional invalidity made by the Western Cape Division of the High Court, Cape Town is confirmed, in these terms:
    1.1 It is declared that information on the private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in the elections.
    1.2 It is declared that information on private funding of political parties and independent candidates must be recorded, preserved and made reasonably accessible.
    1.3 It is also declared that the Promotion of Access to Information Act 2 of 2000 (PAIA) is invalid to the extent of its inconsistency with the Constitution by failing to provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates.
    1.4 Parliament must amend PAIA and take any other measure it deems appropriate to provide for the recordal, preservation and facilitation of reasonable access to information on the private funding of political parties and independent candidates within a period of 18 months.
2. Leave to appeal against the exclusion of the words "continuous and systematic" from the High Court order is granted but the appeal is dismissed.
3. The Minister of Justice and Correctional Services must pay costs to My Vote Counts NPC, including the costs of two counsel.

FRONEMAN J (Cachalia AJ concurring):

[92] In his characteristically vibrant manner the Chief Justice concludes in the main judgment that information on the private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in elections and that information on this private funding must be recorded, preserved and made reasonably accessible. I agree with this and the order made to give effect to this legal holding. Why a separate concurrence? Only because on certain aspects I arrive at that conclusion from a somewhat different perspective

[93] The first aspect relates to the new legislation in terms of which the recordal and disclosure of information on the private funding of political parties would be regulated. PAIA acts only as a mechanism for gaining access to recorded information. The only issue before us is whether the record-creation and record-keeping duties required by the Constitution can be accessed under PAIA. If there are any implications for the new legislation flowing from the Court's judgment they will have to be dealt with in future.

[94] The holding in the main judgment that information on the private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in elections and that information on this private funding must be recorded, preserved and made reasonably accessible gives judicial content to the fundamental political rights of every citizen.[62] It does not intrude on the separation of powers in any way. It is difficult to conceive that the constitutional obligation to record, preserve and make information on private political funding reasonably accessible can ever be an unsystematic, sporadic, one-off, or intermittent obligation, as opposed to a systematic and continuous one. So, whilst I agree that there is no necessity for the order to explicitly record the constitutional obligation as being systematic and continuous, I am not compelled to do so by

[62] Section 19 of the Constitution above n 10.

separation of powers concerns.[63] It would simply be irrational not to do it systematically and on a continuous basis.

[95] The main judgment links the citizen's right to vote to the right to freedom of expression and academic freedom directly to the right of access to information. The judgment refers to the necessity of involving all key players in the democratic process.[64] Another way of strengthening this conclusion is to recognise that the right to vote is that of every adult citizen.[65] In a sense it is the whole citizenry's right, and to view it only as an atomised individual right diminishes our concept of participatory democracy.[66] Every citizen also has the right to free and fair elections.[67] There can be no fair and free elections if the press or other institutions of our civil society are prevented from access to information about private political funding. When they seek that access they can also justify it on the ground that they are acting in the public interest on behalf of the country's citizenry.

[96] Finally, I am satisfied with the conclusion that PAIA is also deficient for failing to provide clarity whether political parties that are not natural or legal persons are subject to its provisions.[68]

[97] For these further reasons I concur in the main judgment.

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[63] See [77] to [80].

[64] See [53] to [58].

[65] *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 17.

[66] *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at para 26; *Matatiele Municipality v President of the RSA (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at paras 57-60; *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 115.

[67] Section 19(2) above n 10.

[68] See *My Vote Counts* judgment above n 4 at paras 102-116.

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