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

Case No: 10607/24

In the matter between

MY VOTE COUNT NPC APPLICANT

AND

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1st RESPONDENT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 2nd RESPONDENT

MINISTER OF HOME AFFAIRS 3rd RESPONDENT

ACTING SPEAKER OF THE NATIONAL ASSEMBLY 4th RESPONDENT

And

In the application for intervention of

THE DEMOCRATIC ALLIANCE **INTERVENING APPLICANT**

In re the matter between

MY VOTE COUNTS NPC APPLICANT

AND

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1st RESPONDENT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 2nd RESPONDENT

MINISTER OF HOME AFFAIRS 3rd RESPONDENT

ACTING SPEAKER OF THE NATIONAL ASSEMBLY 4th RESPONDENT

Date of Hearing: 12 August 2024
Date of Judgment: 16 August 2024 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is judgment on the return date of a *rule nisi*. The Democratic Alliance (the DA) considered itself an 'interested person' called upon to show cause why an order in the terms prayed for by the applicant (MVC) should not be made final on the return date, and filed papers to oppose the application. The applicant (MVC) disputed that the DA was an 'interested person'. The President, the Minister of Justice and Correctional Services, the Minister of Home Affairs and the Acting Speaker of the National Assembly, all abided the decision of the court on the return date. The Speaker filed an explanatory affidavit which explained the measures that the National Assembly (NA) took and intended taking in relation to a resolution for the President's consideration which will include upper limit and disclosure thresholds.

[2] The issues were whether the DA was an interested person, and whether the *rule nisi* stood to be confirmed.

THE DA'S INTEREST

[3] The DA's case on its interest is in substance couched in the following terms at para 15 of its founding affidavit:

> "The DA plainly has a direct and substantial interest in the main application. As a registered political party, it is required to comply with the donation limit in section 8(2) of the Funding Act ("the donation limit") and the disclosure threshold in section 9(1)(a) thereof ("the disclosure threshold"). The relief sought in the main application relates to the donation limit and disclosure threshold."

MVC's position was that the mere fact that a person or entity was required to comply with legislation did not automatically confer upon them a direct and substantial interest in litigation concerning the validity of that legislation. It was contended that compliance with a statutory provision did not inherently grant an interest in legal proceedings challenging that law's validity. It was also contended that the relief that the applicant sought was what applied as a matter of statute. MVC contended furthermore, that even in circumstances where the relief sought aimed to temporarily address a gap in legislation, it did not grant the DA a direct and substantial interest, as such relief did not affect any of its legal rights. In particular, the DA could not claim any prejudice to its rights, to the extent that it had any, because, by its own interpretation, it accepted that it was subject to the financial thresholds. If the relief was granted, the DA would continue to act in accordance with the financial thresholds. MVC's case was that the DA did not meet the higher threshold that was required of a party to establish any interest in a matter where the validity of the law was in issue.

[4] MVC's view was that even if it was shown that the DA had a direct and substantial interest in this matter, it would not be in the interests of justice to allow their intervention. MVC provides five reasons for this view. First, the DA's case was based on the incorrect reading of section 11 of the Interpretation Act, a submission which was already made by

the third respondent in the urgent application. MVC's view was that the interpretation was manifestly wrong, misleading and an unhelpful submission to the court. Second, the DA belatedly sought to intervene. Third, the intervention application essentially sought to introduce a counter-application at a late stage in the proceedings, and this would delay the hearing. Fourth, the DA would not suffer any prejudice if the relief was granted as the DA believed it was currently as a matter of law already subject to the threshold limits and caps, which the applicant sought by way of interim relief in these proceedings. Fifthly, the intervention application was not *bona fide,* and was a misguided attempt to safeguard its interests in the 2023 application which dealt with a different subject and was yet to be heard. The *non-bona fides* of the DA was clear when regard was had to the fact that the DA's member of Parliament and its Shadow Minister of Home Affairs then Mr Adriaan Roos argued, during a Portfolio Committee on Home Affairs deliberations on the law under consideration, that with the removal of the R15 million limit, political parties could receive unlimited donations with no regulatory oversight. The DA was on record in the National Assembly stating that there was a lacuna in the law and that it was a major problem that should avoided. It was inexplicable that the DA now tried to depart from its previous position, in this litigation.

[5] The DA was well within its rights, if it believed that it was an interested person as envisaged in the *rule nisi,* to answer to the call on the return date. The delay occasioned by such answer is a necessary consequence of the applicant's approach to court, the right to be heard and to fully prepare for litigation and the interests of justice. Moreover, such delay did not occasion in this matter. This disposes of the second and third ground upon which MVC relied on why it was not in the interests of justice to allow the DA's intervention. There is a vast difference between a political argument and a legal argument. Politicians, including in the National Assembly, do and say things which if they had legal advice, would not have done or said. Courts should be too slow to hold politicians and political parties to their word in political debates, as this may have the tendency to stifle democratic debate. It is courts that should assist that there is no judicialisation of politics. The Speaker's explanatory note drives the point home. It is once the judgment in the *rule nisi* was delivered, in the midst of uncertainty and political

debates, that the NA through its lawyers read and considered the judgment, advised of its correctness and agreed with it, that the view was that any resolution proposed by the NA in terms of section 24 of the Act must set amounts on the upper limit and disclosure thresholds in order to enable the President to apply his mind to the figures and numbers resolved. In my view, it is proper to reject the invitation to go into political debates in the Committees of the NA, which may or may not have been informed by prior legal advice, and use it against the DA. In legal matters, it is not unheard of that one may get conflicting legal advice one after the other on the same matter. I am not persuaded by the fifth ground, in that a change of front on a matter was necessarily a demonstration of the DA not being *bona fide*. I am not persuaded that a political party, without more, owes a court an explanation when its political rhetoric outside the courtroom differs from its legal argument in litigation. Such duty may be owed to its members, supporters, voters and others interested in consistency in its conversations. It is the first and fourth grounds that require some closer scrutiny. I will deal with the first last as it is the same ground that the third respondent argued in the *rule nisi.*

[6] In *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) at para 12 and 13 it was said:

> "[12] As was pointed out on behalf of Mr Bell, the considerations applicable to Uniform Rule 12 are not necessarily wholly appropriate to a case involving an order of constitutional invalidity of a statute in terms of s 172 of the Constitution. The common-law principles relating to intervention of parties applied by the courts in respect of Uniform Rule 12 deal primarily with disputes *in personam*, whereas an order under s 172 is an order *in rem*. In disputes concerning the constitutional validity of a statute, it would - so it was submitted - be impractical if 'the test of a direct and substantial interest in the subject-matter of the action is again regarded as being the decisive criterion' (emphasis added). This Court would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity.

[13] This submission is a convincing one. In every case this Court must ultimately decide whether or not to allow intervention by considering whether it is in the interests of justice to grant leave to intervene. Thus, in cases involving the constitutionality of a statute, while a direct and substantial interest in the validity or invalidity of the statute in question will ordinarily be a necessary requirement to be met by an applicant for intervention, it will not always be sufficient for the granting of leave to intervene. Even if the applicant is able to show a direct and substantial interest, the Court has an overriding power to grant or to refuse intervention in the interests of justice. Other considerations that could weigh with the Court in this regard include the stage of the proceedings at which the application for leave to intervene is brought, the attitude to such application of the parties to the main proceedings, and the question whether the submissions which the applicant for intervention seeks to advance raise substantially new contentions that may assist the Court."

An indirect interest in the litigation is not sufficient. The person must have a direct and substantial interest in the results of the decision [*Standard Bank v Swartland Municipality* 2011 (5) SA 257 at para 9; *Collin v Toffie* 1944 AD 456 at 464]. In *SA Riding for the Disabled Association v Regional Land Clamis Commissioner and Others* 2017 (5) SA 1 (CC) this was expressed in the following terms in para 9 and 10:

> "Intervention
>
> [9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not

have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation."

The DA may have shown that it has an interest in that it was required to comply with the donation limit in section 8(2) of the Funding Act ("the donation limit") and the disclosure threshold in section 9(1)(a) thereof ("the disclosure threshold") and that the relief sought in the main application related to the donation limit and disclosure threshold. The DA failed to address, and thereby failed to show that this one interest it relied on, would be adversely affected by the order sought. The DA accepted that it was subject to the donation limits and disclosure thresholds as a matter of law, which the applicant sought through an interim relief in this matter to ensure continued transparency by ensuring compliance with existing transparency requirements. The absence of any prejudice of the order sought, is fortified by the DA itself in what it sought as an alternative to its prayer for dismissal of MVC's application. The DA sought the retention of the donation limit and the disclosure threshold retrospective to the date the amendments came into operation.

[7] I am not persuaded by the DA's case for intervention. Following *Gory's* factors included to be considered, I have already dealt with the stage of the proceedings at which the application for leave to intervene was brought, and on the return date as regards the stage, it favours the DA. The President, the two Ministers in Cabinet and the Speaker of the National Assembly abide the decision of the court. MVC is opposed to the intervention. The DA's submissions sought to be advanced do not raise substantially

new contentions that may assist the court. They are the same contentions raised by the Minister of Home Affairs, the third respondent, in the *rule nisi,* which for all intents and purposes have been abandoned, if regard is had to the Minister's decision to abide on the return date. It is reliance on section 11 of the Interpretation Act, 1957 (Act No. 33 of 1957) (the IA). My analysis of section 11 appears in paragraphs 7 to 13 of my judgment on the *rule nisi.* It is sufficient to refer thereto. The DA brought no new contentions that may assist the court. Its proposition that they were the first to file papers raising section 11 of the IA, and therefore must be afforded an opportunity to be heard on it, is simply flimsy and insubstantial. The DA's answer to the call upon all interested parties to show cause on the return date why the order sought by MVC should not be final stood to be dismissed. The DA is a party with an interest. The DA has however failed to show that it had a right adversely affected or likely to be affected by the order sought. The DA also failed to show that the submissions it sought to advance raised substantially new contentions that may assist the court.

THE MERITS

[8] Absent the DA, all the other respondents elected to abide the decision of the court. The matter stands unopposed. Upon the Electoral Matters Amendment Act, 2024 (Act No. 14 of 2024) (the EMAA) taking effect on 8 May 2024 there was no upper limit to donations in Regulation 7(1), and there was no disclosure threshold for donations in Regulation 9. The old regulations were repealed and had been substituted by the new regulations. The President required a resolution of the NA to determine the new upper limits and the disclosure thresholds. There was no resolution of the NA that authorized the President to determine the upper limit and the disclosure threshold. When the EMAA took effect on 8 May 2024, it created an unfilled space, or a gap, or lacuna in the law as regards the amounts in the upper limit and disclosure threshold for donations. Section 11 of the IA, upon which the Minister of Home Affairs relied in the *rule nisi,* is applicable to old law which was repealed, in circumstances where the intended new law has not yet come into operation. It is a transitional mechanism to ensure that between the date of repeal of the old law and the date of effect of the new law, there was legal

certainty. I remain unpersuaded that *S v Koopman* 1991 (1) SA 474 (NC) was authority for section 11 of the IA to cover mistakes like the present, made by the NA, Cabinet and the President. *Koopman* would save the day for the NA, Cabinet and the President, if the NA had debated and resolved figures and numbers in relation to the upper limit and disclosure threshold and passed resolutions thereon, and the President had made a determination, but the mistake related to that part of the law not being put into effect on 8 May 2024. The mistake where such new law does not exist at all, and is obviously pending, is simply beyond the reach of *Koopman* or section 11 of the IA. *Koopman* is no authority for the courts to usurp the function of Parliament and the Executive through some fictitious reasoning and create non-existing laws. Where the courts identify a mistake, our democratic structure is that the courts should so pronounce, and allow the legislature and the Executive an opportunity to attend to such identified mistake. It is Parliament's responsibility to resolve the upper limits and disclosure thresholds, and the President's responsibility to make the determination. This court can only go as far as making an order that is just and equitable to provide temporary relief. The Speaker is thanked for her explanatory affidavit, and this court is satisfied that Parliament would attend to the matter, on behalf of the people of the Republic, in the robust and urgent manner such a matter deserves.

ORDER

For these reasons I make the following order:

(a) The application to intervene, by the Democratic Alliance, is dismissed with costs on the basis of scale B.

(b) The *rule nisi* is confirmed, subject to the corrections in (c) hereunder.

(c) The words "per annum" in paragraphs 1.1.1 and 1.1.2 of the *rule nisi* are substituted with the words "per financial year".

(d) The first and third respondent are to pay the costs jointly and severally, the one to pay the other to be absolved, on the basis of scale B.

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DM THULARE

JUDGE OF THE HIGH COURT