

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case No 9828/03

In the matter between:

**THE INSTITUTE FOR DEMOCRACY
IN SOUTH AFRICA**

First Applicant

JUDITH FEBRUARY

Second Applicant

BRETT DAVIDSON

Third Applicant

and

THE AFRICAN NATIONAL CONGRESS

First Respondent

THE DEMOCRATIC ALLIANCE

Second Respondent

THE INKATHA FREEDOM PARTY

Third Respondent

THE NEW NATIONAL PARTY

Fourth Respondent

JUDGMENT: DELIVERED 20 APRIL 2005

GRIESEL J:

Introduction

[1] The professed aim of this application, as articulated by the applicants in their founding affidavit, is ‘to establish the principle that political parties, or at least those who hold seats in the national, provincial and local government legislatures, are obliged in terms of s 32(1) of the Constitution and s 11 or s 50 of the Promotion of Access to Information Act 2 of 2000 (*PAIA*), to disclose particulars of all the substantial donations they receive, on due and proper request for those particulars made by any adult South African citizen’.¹

[2] In an uncharacteristic display of solidarity across party-political divisions, all four respondents – which were the four largest political parties represented in Parliament prior to the last election – vigorously opposed the relief claimed by the applicants.

[3] The first applicant is the Institute for Democracy in South Africa (*Idasa*), an association not for gain, incorporated in terms of s 21 of the Companies Act 61 of 1973. The second and third applicants are private individuals, both South African citizens and both employed by the first applicant. The three applicants bring the present proceedings in terms of s 38 of the Constitution on their own behalf; in the interests of all South African citizens; and in the public interest.

¹ Record p 9 para 12.

[4] The respondents are the African National Congress (ANC), the Democratic Alliance (DA), the Inkatha Freedom Party (IFP) and the New National Party (NNP), all political parties registered in terms of s 15 of the Electoral Commission Act 51 of 1996. I shall refer to them individually by their respective acronyms and collectively as ‘the respondents’.

Relief Claimed

[5] In their notice of motion as amended, the applicants claim an order in the following terms:

2. 2.1 *It is declared that the respondents are obliged in terms of s 32(1) of the Constitution and s 11 and s 50 of the Promotion of Access to Information Act, to give access to any adult South African citizen on due and proper request, to their donations records relating to all the donations they received during the period 1 January 2003 to 1 May 2004.*

2.2 *The obligation in prayer 2.1 is subject to the applicability of the provisions of Chapter 4 (parts 2 and 3) of the Promotion of Access to Information Act in respect of any specific record.*

3. *The respondents are ordered to give the applicants access to their donations records relating to all the donations they received from 1 January 2003 until 1 May 2004.*²

For purposes of the application, the applicants define ‘donations records’ to mean the respondents’ ‘records’ as defined in s 1 of PAIA that reflect the following information about every donation they received in cash or in kind of more than R50 000 in value:

- the date of the donation;
- the name of the donor;
- the amount or value of the donation; and
- the conditions on which the donation was made and received, if any.

[6] The present application is a sequel to requests addressed to each of the respondents during August 2003 in terms of the provisions of PAIA for details of their private donations. Those requests were refused by all the respondents, thus giving rise to the present litigation. According to the applicants, the relief claimed herein is limited so as to compel disclosure only in respect of dona-

² The mandatory relief claimed in prayer 3 was subsequently abandoned and replaced with the following in terms of a proposed draft order handed in during the course of argument:

4. *The respondents are directed, within 21 days of the grant of this order, to:*
- 4.1. *take all reasonable steps to inform all donors whose interests may be affected by the order sought by the applicants in terms of prayer 3 of the notice of motion of these proceedings and this order;*
 - 4.2. *inform the relevant third parties of the facts contemplated in section 47(3) of the Promotion of Access to Information Act, 2 of 2000.*

tions that are ‘sufficiently substantial to influence a political party, its office bearers and its members’ and it is further limited to those donations that are ‘sufficiently current still to have an effect on political parties, their office bearers and their members’. The applicants claim that the principle they seek to establish is of the ‘utmost importance’ to a range of constitutional values, of which the most important is the due and proper functioning of the democratic state envisaged in s 1(d) of the Constitution, based *inter alia* on ‘regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness’. According to the applicants, it is important to all adult citizens with a right to vote in terms of s 19(3)(a) of the Constitution and is, indeed, in the broader public interest of society at large.

[7] Answering affidavits were filed on behalf of all four of the respondents, although the IFP, shortly before the hearing, filed a notice indicating that it abided by the court’s decision; hence it did not address written or oral argument to this court. In their answering papers and during argument before me, the respondents professed support for most, if not all, of the principles and values advocated by the applicants, such as the need for transparency, openness, accountability and the combating of corruption in public life. The respondents furthermore support the idea of public debate on the question of private funding of political parties. They differ from the applicants, however, in taking the attitude that any regulation of private

funding of political parties would best be achieved through legislation after thorough public investigation and debate, rather than through *ad hoc* litigation in the courts. They are vehemently opposed to retrospective and unregulated disclosure of private donations to political parties, which would be the result if the relief being sought by the applicants herein were to be granted. The respondents accordingly seek dismissal of the application; alternatively (in the case of the ANC), a stay of these proceedings ‘so as to allow the political and legislative process to follow the proper course necessary for the adoption of a national policy through legislation regulating the funding of political parties with the Republic of South Africa’.³

Issues

[8] Having regard to the relief claimed in the amended notice of motion, it appears to me that the central issue, as formulated by the applicants and quoted in the opening paragraph above, has been stated too widely. To my mind, the issue is *not* whether all South African citizens are in principle entitled to particulars of all substantial donations received by political parties represented in the legislature. The true issues, as defined by the pleadings, are rather whether or not the present applicants are entitled, in terms of the statutory provisions relied on (*viz* s 32 of the Constitution and ss 11 or 50 of PAIA), to the specific records claimed from the present respondents in respect

³ Record p 390 para 8.2.

of the specified period. Thus, even if the relief claimed in para 2 of the notice of motion were to be granted in its entirety, that would not entitle the applicants (or anyone else) to access to any records falling outside this narrow ambit, eg to the donations records of other political parties or those relating to donations received during any other period.

[9] Before considering these issues in more detail, it is necessary to refer briefly to the relevant legislative background.

Section 32 of the Constitution

[10] The logical starting point is s 32 of the Constitution,⁴ the question being whether the applicants are entitled to invoke its provisions directly in support of the relief that they seek or whether their remedy is confined to the provisions of PAIA.

[11] In terms of item 23 of Schedule 6 of the Constitution, Parliament was enjoined to enact national legislation envisaged, *inter alia* in s 32(2) of the new Constitution, within three years of the date on which the new Constitution

⁴ Section 32 provides as follows:

- (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.*

took effect. During the period of three years, a transitional provision (substantially similar to s 23 of the interim Constitution) would apply. Item 23(3) of Schedule 6 provided further that s 32(2) of the final Constitution would lapse if the legislation envisaged in that section was not enacted within three years of the date the new Constitution took effect.

[12] These provisions received the attention of the Constitutional Court in the *First Certification* judgment,⁵ where the court held as follows:

[83] The transitional measure is obviously a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.

...

[86] ...If the legislation is not passed timeously the general but undefined right as formulated in NT [= New Text] 32(1) will come into operation. That is reasonable. The Legislature is far better placed than the Courts to lay down the practical requirements for the enforcement of the right and the definition of its limits. Although NT 32(1) is capable of being enforced by a court – and, if the necessary legislation is not put in place within

⁵ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC).

the prescribed time it will have to be – legislative regulation is obviously preferable.

[13] The national legislation envisaged in ss 32(2) was duly enacted with the promulgation on 2 February 2000 of PAIA, which came into effect on 9 March 2001.

[14] It is against this background that the applicants argued that a litigant can still rely directly on s 32(1) as an independent cause of action, in addition to any rights and remedies created by PAIA. The respondents, on the other hand, argued that PAIA now provides the exclusive statutory regime governing the exercise of the fundamental right created by s 32(1) of the Constitution – in other words, a litigant is not entitled to invoke s 32 directly as a basis for relief.

[15] The point now under discussion was pertinently raised but left open by the Constitutional Court in *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe and Another*.⁶ One of the questions raised in that case was whether the applicant had a right to information based on s 32 of the Constitution, which could be invoked by him at his option, in addition to his right to discovery in terms of the Rules of Court. The

⁶ 2003 (4) SA 584 (CC) para 29.

court, however, found it unnecessary to decide this point, refusing the application for other reasons.

[16] Currie & Klaaren⁷ express preference for the view that s 32 remains, after the commencement of PAIA, as ‘a free-standing constitutional right of access to information’. As to *when* such constitutional right of access to information can be directly invoked, however, the learned authors are more guarded:

When can the constitutional right of access to information be directly relied on? The answer is only in the exceptional case where a provision of the AIA, other legislation or conduct beyond the reach of the AIA is challenged as an infringement of s 32. This answer is in accordance with the principle of avoidance which dictates that remedies should be found in common law or legislation (interpreted or developed, as far as possible, so as to comply with the Constitution) before resorting to direct constitutional remedies. It is related to the principle that norms of greater specificity should be relied on before resorting to norms of greater abstraction. Most compellingly, however, deference must be given to the constitutional authority that s 32(2) accords to Parliament to give effect to the constitutional right of access to information. This means that the Act must be treated as the principal legal instrument defining and

⁷ Iain Currie & Jonathan Klaaren *The Promotion of Access to Information Act Commentary* (2002) §2.12 at 25–26.

*delineating the scope and content of the right of access to information, establishing the mechanisms and procedures for its enforcement and limiting the right where necessary. The Constitutional right therefore recedes to the background, indirectly informing the interpretation of the Act but rarely directly applicable.*⁸

[17] It appears, therefore, that the learned authors envisage a two-fold role for s 32: the one is to ‘inform’ the interpretation of PAIA; the other is to serve as a basis for a possible challenge to the constitutionality of PAIA for being either under-inclusive or over-restrictive.⁹ I agree with this more guarded approach suggested by the learned authors. In my view it is clear, both from the provisions of PAIA and from the Constitutional Court’s *First Certification* judgment, that PAIA was enacted so as to provide ‘the practical requirements for the enforcement of the right and the definition of its limits’.¹⁰ The long title of PAIA states unequivocally that it is enacted ‘to give effect to the constitutional right of access to 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’. The same intention appears from the Preamble, as well as s 9 of

⁸ Id §2.13 at 26. In *The Promotion of Administrative Justice Act Benchbook* (2001) the same authors express similar views with reference to the administrative justice provisions of s 33 of the Constitution (para 1.28 at 27–8). See also Jonathan Klaaren & Glenn Penfold in Chapter 62 of Matthew Chaskalson *et al Constitutional Law of South Africa* (1999 with loose-leaf updates, Service 2002) at 62-4 to 62-7.

⁹ Id §2.15. See also, to the same effect, G E Devenish *The South African Constitution* (2005) para 145 at 160.

¹⁰ Footnote 5 above.

PAIA, which deals with the ‘Objects of the Act’. In these circumstances, it is clear to my mind that s 32 of the Constitution provides the underlying basis for and informs the rights contained in PAIA, but that the section itself is subsumed by PAIA, which now regulates the right of access to information. As Hoexter¹¹ succinctly puts it, PAIA ‘does not *replace* the constitutional right; but because it purports to “give effect to” it, parties must assert the right *via* the Act’. In my view, therefore, s 32 is not capable of serving as an independent legal basis or cause of action for enforcement of rights of access to information in circumstances such as the present where no challenge is directed at the validity or constitutionality of any of the provisions of PAIA.

[18] I am fortified in this conclusion by the judgment of Conradie J in *Naptosa and Others v Minister of Education, Western Cape and Others*.¹² In that case, the court was concerned with the appropriateness or otherwise of granting relief arising from an alleged unfair labour practice directly under s 23(1) of the Constitution.¹³ The applicants in that case did not complain that the Labour Relations Act 66 of 1995 (LRA) was constitutionally deficient in the remedies it provides. The court held that it could not ‘conceive that it is permissible for an applicant, save by attacking the constitutionality of the

¹¹ Cora Hoexter *The New Constitutional and Administrative Law* Vol 2 at 57.

¹² 2001 (2) SA 112 (C) at 122C–123J. See also *Van Zyl v New National Party and Others* [2003] 3 All SA 737 (C) para 64.

¹³ 23(1) *Everyone has the right to fair labour practices.* (Cf also ss23(5) and (6).)

LRA, to go beyond the regulatory framework which it establishes'.¹⁴ In the course of his judgment, Conradie J said *inter alia* the following:

*To grant relief which would encourage the development of two parallel systems would in my view be singularly inappropriate. Taking into account the right to fair labour practices and the duties imposed thereby on employers and employees alike, it is not a right which can, without an intervening regulatory framework, be applied directly in the work place. The social and policy issues are too complex for that.*¹⁵

[19] The same reasoning applies to the provisions of PAIA, juxtaposed with those of s 32(1) of the Constitution. Clearly, the Constitutional Assembly recognised that 'an intervening regulatory framework' would be required to give effect to the right of access to information and that Parliament was the most appropriate institution to establish such framework. This has now been done, with the result that, in my view, the applicants must seek their remedy within the four corners of that statute unless, of course, the constitutionality of the statute itself is in issue. To hold otherwise would indeed encourage the

¹⁴ At 123I–J.

¹⁵ At 123A–C. This decision was followed by a full bench in *Ampofo and Others v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province and Another* 2002 (2) SA 215 (T) paras 48–51. It was distinguished and the correctness or otherwise thereof was left open by the Constitutional Court in *NEHAWU v UCT & Others* 2003 (3) SA 1 (CC) para 17. Cf also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 22 and 25, for a discussion of the analogous interrelationship between s 33 of the Constitution, which guarantees the right to fair administrative action, and the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

development of ‘two parallel systems’, which would be ‘singularly inappropriate’.

Public or Private Bodies

[20] The foregoing conclusion renders it unnecessary to analyse the multi-layered concept ‘the state’ in s 32(1)(a), as extended by s 239, of the Constitution.¹⁶ Instead, the focus must fall on the cardinal distinction in PAIA between ‘public bodies’ and ‘private bodies’. Both concepts are defined in s 1. Depending on whether a body is public or private, the requirements for access to records differ: public bodies are regulated by s 11, whereas private bodies are regulated by s 50(1). The practical significance of the distinction is that, if the respondents are found to be private bodies, the applicants must overcome the additional hurdle of establishing that the donation records are ‘required for the exercise or protection of any rights’.¹⁷

[21] ‘Public body’ is defined as –

¹⁶ Cf in this regard *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others* 2000 (3) SA 119 (C) at 130J–131D.

¹⁷ Section 50(1)(a).

- (a) *any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or*
- (b) *any other functionary or institution when –*
 - (i) *exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or*
 - (ii) *exercising a public power or performing a public function in terms of any legislation.*¹⁸

[22] The definition thus envisages two types of ‘public bodies’, namely ‘*type (a)*’ public bodies, which are part of the State *per se*, and ‘*type (b)*’ public bodies, which comprise other functionaries or institutions that are not part of the State, but which may, in undertaking certain activities, be subject to the same strictures and controls as would ordinarily apply to the State. It has rightly not been contended in this instance that the respondents resort under type (a) of the definition. The only question is therefore whether or not they resort under type (b).

[23] Klaaren & Penfold¹⁹ give the following instructive examples of the various categories of public bodies envisaged by the definition:

¹⁸ Section 1.

¹⁹ *Op cit* 62-12 (footnotes omitted).

Paragraph (a) of the definition would include, for example, the Department of Agriculture and a local municipality. Paragraph (b)(i) would include the Judicial Service Commission and the Auditor-General. Paragraph (b)(ii) expands the scope of public bodies much wider and would cover entities such as the Financial Services Board, the Independent Communications Authority of South Africa and other entities exercising public power or performing public functions in terms of legislation. This could include, for example, financial exchanges, universities and parastatals such as Eskom, Telkom and Transnet.

[24] The arguments addressed to me on this aspect ranged far and wide. Thus, it was pointed out on behalf of the applicants that in terms of the Constitution, political parties are institutionalised within the legal system of the State. They submitted that this central role of political parties in the process of governance is prescribed and determined by the Constitution, both expressly and implicitly. Multi-party democracy is fundamental to the South African democratic state as contemplated by s 1 of the Constitution, which sets out the foundational values. It is the Constitution which requires that a system of governance based on a system of proportional representation be followed at national, provincial and local government level. It is also the Constitution which requires political parties to nominate and provide the membership of all three spheres of government, national, provincial and local, and which permits political parties, in the main, to control the membership of

legislatures. Political parties are the main constitutive element of the democratic process, the legislature and consequently the executive. Everything that political parties do is aimed at achieving democracy, as prescribed by the Constitution, so the argument went.²⁰

[25] The respondents, on the other hand, emphasised the private nature of political parties as voluntary associations. They pointed out that, although political parties – both here and in other democracies – have very high public profiles and play very prominent public roles, they are voluntary associations, which are created and regulated by their own constitutions and not by legislation. The fact that a political party's actions may on occasion attract widespread public interest does not make its functions 'public' in the legal sense. Reference was made in this context, *inter alia*, to *Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others*²¹ and *Marais v Democratic Alliance*.²²

[26] It is not possible to give any precise meaning to the concepts 'public power' and 'public function'. However, some guidance as to their meaning may be found, I suggest, in the judgment of the Constitutional Court in

²⁰ See also Devenish *op cit* para 100 at 114.

²¹ 1999 (2) BCLR 193 (T) at 199H–200B.

²² [2002] 2 All SA 424 (C) paras 51 and 58.

President of the Republic of South Africa and Others v SARFU and Others,²³ where the court dealt with the enquiry as to the meaning of ‘administrative action’ in s 33 of the Constitution. In para 143 of the judgment, the court said the following:

*A series of considerations may be relevant to deciding on which side of the line a particular action falls. The **source** of the power, though not necessarily decisive, is a relevant factor. So, too, is the **nature** of the power, **its subject-matter**, whether it involves the exercise of a **public duty** and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. [emphasis added]*

[27] A further essential characteristic of a public power or function is that of a service or activity which is required to be undertaken by an appointed statutory functionary or other institution *in the public interest*.²⁴ Where such a function is performed by a private body, it will be regarded *pro hac vice* as a public body. An example that springs to mind in this context is that of a

²³ 2000 (1) SA 1 (CC) para 143 (footnotes omitted).

²⁴ See Klaaren & Penfold *op cit* 62-13 and authorities referred to therein.

private company performing the function of distributing and paying social pensions on behalf of a department of State pursuant to a government tender.

[28] To my mind, the answer to the present enquiry is to be found in the use of the word ‘when’ in para (b) of the above-quoted definition of ‘public body’, read with s 8(1) of PAIA, which provides as follows:

(1) For the purposes of this Act, a public body referred to in paragraph (b)(ii) of the definition of ‘public body’ in section 1, or a private body –

(a) may be either a public body or a private body in relation to a record of that body; and

(b) may in one instance be a public body and in another instance be a private body, depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body.

[29] It is apparent from these provisions that the definition of ‘public body’ is a fluid one and that the division between the categories of public and private bodies is by no means impermeable. The Act recognises the principle that entities may perform both private and public functions at various times and that they may hold records relating to both aspects of their existence.²⁵ The

²⁵ See Currie & Klaaren *op cit* §4.13 at 50.

records being sought can thus relate to a power exercised or a function performed as a *public* body, in which event Part 2 of PAIA is applicable, or they can relate to a power exercised or a function performed as a *private* body, in which event Part 3 of PAIA is applicable.²⁶ The language of s 8(1) makes it clear that, in respect of any particular record, a body must be either a ‘public body’ or a ‘private body’; it cannot be both. Whether it is one or the other thus depends on whether the record ‘relates to’ the exercise of a power or performance of a function by that body ‘as a public body’ or ‘as a private body’.

[30] Returning to the facts of the present case, the records being sought from the respondents relate exclusively to their fundraising activities. Such activities, insofar as they relate to the *private* funding of political parties, are not regulated by legislation.²⁷ The respondents are accordingly entirely at liberty to generate an income from any lawful means, including donations, soliciting contributions from members, the sale of merchandise, the realization of investments, and the like.

²⁶ Section 8(3) and (4).

²⁷ The position is different, of course, with regard to *public* funding. See the Public Funding of Represented Parties Act 103 of 1997, promulgated pursuant to the provisions of s 236 of the Constitution.

[31] Having regard to the guidelines set out above, it cannot be said, in my view, that in receiving private donations, the respondents are (a) exercising any powers or performing any functions in terms of the Constitution; (b) exercising a public power or performing a public function in terms of or any legislation; or (c) exercising any power or performing any function as a *public* body. They simply exercise common law powers which, subject to the relevant fundraising legislation, are open to any person in South Africa.

[32] In the result, I am of the opinion that the matter must be approached on the basis that, for purposes of their donations records, the respondents are *not* ‘public bodies’, as defined by PAIA, but that they are indeed ‘private bodies’.

Exercise or Protection of Any Rights

[33] The next stage of the enquiry is to consider whether the applicants have shown that the respondents’ records relating to private fund-raising are ‘required for the exercise or protection of any rights’.²⁸ In approaching this question, I bear in mind what Comrie AJA said in the recent judgment in *Clutchco (Pty) Limited v Davis*:²⁹

²⁸ Section 50(1)(a).

²⁹ SCA Case No 35/04, 24 March 2005 (not yet reported), para 10.

In extending the fundamental right of access to information to records held by private bodies, the Constitution and the statute have taken a step unmatched in human rights jurisprudence.

[34] The phrase ‘required for the exercise or protection of any rights’ has been considered by our courts on a number of occasions, both in the context of the interim and the final Constitution. Thus, it has been held that the word ‘required’ in this context must be understood to mean ‘reasonably required’.³⁰ In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*,³¹ Streicher JA summed up the position as follows:

Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.

³⁰ *Nortje and Another v Attorney-General, Cape, and Another* 1995 (2) SA 460 (C) at 474G. See also *Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (C) at 299D–J; *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others* 2000 (3) SA 119 (C) at 137H–I; *Davis v Clutchco (Pty) Ltd* 2004 (1) SA 75 (C) at 83G–84E.

³¹ 2001 (3) SA 1013 (SCA) para 28 at 1026F–G.

[35] In the *Clutchco* case,³² Comrie AJA, writing for a unanimous court, again reviewed the relevant case law and, after quoting the above extract from the *Cape Metropolitan Council* case, concluded:

It seems to me that Streicher JA's choice of the words 'assistance' and 'assist' in the above passage indicates that 'required' does not mean necessity, let alone dire necessity. I think that reasonably required in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. It appears to me, with respect, that this interpretation correctly reflects the intention of the legislature in s 50(1)(a).

[36] The applicants initially identified the following sections of the Constitution as the basis for the rights they are seeking to exercise or protect with the aid of the respondents' donations records:

- s 1(d) which, according to the applicants, confers upon them the right to a 'democratic state', founded *inter alia* on 'regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness';
- the right to freedom of expression (s 16);

³² *Supra* para 13.

- the right to freedom of association (s 18);
- the right ‘to make political choices’ (s 19(1));
- the right to ‘fair and regular elections’ (s 19(2));
- the right to ‘effective, transparent, accountable...government’ (s 41(1)(c));
- the right to ‘democratic and accountable government for local communities’ (s 152(1)(a));
- the right to a ‘public administration ...governed by the democratic values and principles enshrined in the Constitution’ (s 195(1)), including the following principles:

(a) A high standard of professional ethics must be promoted and maintained;

...

(f) Public administration must be accountable;

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

[37] The respondents argued, on the other hand, that the provisions of ss 1(d), 41(1)(c), 152(1)(a) and 195(1) reflect values or principles to which the State must adhere; they do not confer upon the applicants any justiciable ‘rights’ for purposes of s 50(1)(a) of PAIA.

[38] In reply, the applicants – without formally abandoning their earlier argument – submitted that there is no need for them to rely independently on the sections in question as the basis for the rights they seek to exercise or protect, but that those sections are highly relevant to the interpretation of sections 16, 18 and 19 of the Constitution in that they inform and give substance to all the provisions of the Constitution.

[39] Support for the respondents’ argument – as well as the applicants’ modified stance in reply – is to be found in the recent judgment of the Constitutional Court in the *NICRO* case,³³ where Chaskalson CJ said the following with reference to s 1 of the Constitution:

The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from

³³ *Minister of Home Affairs v National Institute for Crime Prevention (NICRO) and others* 2004 (5) BCLR 445 (CC) para 21.

the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.

[40] In my view, the same considerations apply to the other sections of the Constitution on which the applicants originally relied, viz ss 41(1)(c), 152(1)(a) and 195(1). These sections all have reference to government and the duties of government, *inter alia* to be accountable and transparent. The duties created by the sections in question are imposed on the government and public service, not on private bodies, including political parties as such. In any event, these sections do not confer upon the applicants any justiciable rights that they can exercise or protect by means of access to the respondents' donations records. The language and syntax of these provisions are not couched in the form of rights, especially when compared with the clear provisions of Chapter 2. Reliance upon the sections in question for purposes of demonstrating a right is therefore inapposite.

[41] As far as ss 16 and 18 of the Constitution are concerned, the applicants placed little reliance on these provisions, either in their founding affidavits or during argument. They also failed to explain how access to the donation records in question would assist them in the exercise or protection of their rights to freedom of expression or freedom of association. I am accordingly of the view that there is no rational connection between the respondents' donations records and the rights derived from ss 16 and 18.

[42] As far as ss 19(1) and (2) of the Constitution are concerned, the question is whether the applicants reasonably require the respondents' donation records for the period in question in order to exercise or protect their right to 'make political choices' or their right to 'free, fair and regular elections'. The applicants motivated their request in this regard by arguing that citizens have the right 'to make political choices', which the applicants interpret as being 'the right, in the first place, to choose between political parties'.³⁴ They submitted further that in exercising his or her choice, an individual is entitled to have to hand relevant information about a party, its policies and finances. As it was summarised by the applicants in their founding affidavit: 'An election is only "fair" ...if the electorate can make informed choices.'³⁵

[43] In support of their argument, the applicants relied *inter alia* on the evidence of certain experts in the field of political science, who expressed the view that disclosure of details relating to political donations is in principle desirable in any democracy. The experts, in turn, motivated their views by referring to the position in various other democratic countries, pointing out that in leading democracies around the world it is now common practice to require political parties to disclose particulars of certain donations, including

³⁴ Founding Affidavit pp 30–31 para 67.

³⁵ Record p 31 para 68.

the identities of large donors. I was urged, in interpreting the relevant legislation, to have regard to foreign law, as enjoined by s 39(1)(c) of the Constitution.

[44] I have carefully considered these submissions. In the final analysis, however, the question whether the respondents are obliged to make disclosure of their donations records must be decided on an interpretation of our own legislation and the application of that legislation to the facts of the matter under consideration. The variable legal regimes prevailing in other countries cannot be used to create a right of access to information if such right is not reasonably to be found in the terms of PAIA. Comparative law is only useful or relevant insofar as it has a bearing on or can assist in arriving at a proper interpretation of our own specific legislation governing the situation in question.

[45] Having said that, and without going into detail in this regard, three features of importance emerge from a comparison of the position in other jurisdictions:

- (a) On the undisputed evidence, it appears that many democratic countries around the globe regulate private donations to political parties.

- (b) They do so by means of distinct and dedicated legislation dealing specifically with the subject of political donations. As appears from Idasa's own position paper,³⁶ different countries regulate the issue in many different ways.

- (c) I have not been referred to a single instance where any of those countries has granted access to information regarding political donations, either under the auspices of general access to information legislation, similar to PAIA, or by means of Constitutional litigation.

[46] Moreover, the opinions of the experts do not assist the applicants in their pursuit of the respondents' donations records in this matter. It appears from the case law that the right to access to information is not a right that exists in the abstract;³⁷ on the contrary, the inquiry is a factual one and the person seeking the information must make out a case therefor on the papers.³⁸ As was said in the *Cape Metropolitan Council case supra*,³⁹ the applicants must not only show what the rights for which they contend are that and what

³⁶ Record pp 458–507.

³⁷ *Truth and Reconciliation Commission v Du Preez and Another* 1996 (3) SA 997 (C) at 1008F; *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (3) SA 119 (C) at 137E-I.

³⁸ *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 225D–E; *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (3) SA 119 (C) at 134A–B and 135B.

³⁹ Para [34] above.

the information is, but they must also demonstrate how that information will assist them in exercising or protecting those rights.

[47] The difficulty that the applicants face in this regard is that – save for reliance upon the general opinions of the experts – they do not explain how the respondents’ donation records would assist them in exercising or protecting any of the rights on which they rely or why, in the absence of those donation records, they are unable to exercise those rights. On the face of it, s 19(1) prevents any restrictions being imposed on a citizen’s right of making political choices, such as forming a political party, participating in the activities of and recruiting members for a party, and campaigning for a political cause. Similarly, the right to ‘free, fair and regular elections’ enshrined in s 19(2), does not impose a duty on political parties to disclose funding sources, nor does it afford citizens a right to gain access to such records. The emphasis in s 19(2) lies upon the elections and the nature of the electoral process and not so much upon the persons or parties participating in those elections.

[48] The applicants are therefore contending for a general principle or abstract right to disclosure, pointing out, *in general*, that this is desirable in any democracy and that it will be beneficial to openness, transparency and accountability. This brings me back to the point made earlier, namely that the issue as formulated by the applicants is stated too widely. As pointed out

above,⁴⁰ the true inquiry is much narrower, viz how will disclosure of the respondents' fund-raising records for the period January 2003 to May 2004 assist the applicants in exercising or protecting their rights in terms of s 19 of the Constitution? Even if it could conceivably be contended that one or more of the applicants might have required the information requested for the purpose of making political decisions or fostering transparency in relation to the 2004 national and provincial elections, they have not explained why they require such information *now*.

[49] Conclusive proof that the present application is about a general principle and *not* about the exercise or protection of the applicants' constitutional rights is found in Idasa's own position paper, entitled 'Regulation of Private Funding to Political Parties' (October 2003), where they explain their motives with regard to the present litigation as follows:

Idasa has embarked on litigation in terms of [PAIA] to compel political parties to provide [Idasa] with information regarding their sources of private funding. It forms part of a broader campaign to lobby for regulation of private funding to political parties.

...

⁴⁰ Para [8] above.

Idasa believes that this case will provide an opportunity to exercise [PAIA] and will also give the Court an opportunity to pronounce on a possible way in which to regulate private funding in South Africa.

*Idasa's litigation forms part of a broader campaign to lobby for regulation of private funding to political parties by a campaign group of civil society organizations...*⁴¹

[50] Thus it appears, on the applicants' own version, that the true purpose of the present litigation is threefold:

- (a) it provides the applicants with an opportunity to 'try out' the existing legislation in the form of PAIA, together with s 32 of the Constitution;
- (b) the applicants want the court to give guidance on suitable legislation to be enacted governing donor funding of political parties; and
- (c) the litigation will add impetus to a campaign aimed at lobbying the legislature to pass the necessary legislation.

⁴¹ Record p 415 para 13.2, read with pp 458–9.

[51] None of these purposes constitutes a legitimate basis for the relief sought in these proceedings. Moreover, the invitation ‘to pronounce on a possible way in which to regulate private funding in South Africa’ must be firmly declined as not being the function of this court, but of the legislature.

[52] To sum up as far as this aspect is concerned, I have not been persuaded by the applicants, on the facts of this case, that they reasonably require any of the records in question for the exercise or protection of any of the rights claimed by them. Donor secrecy does not impugn any of the rights contained in either ss 19(1) or (2) of the Constitution. Put differently, disclosure of donor funding is not a prerequisite to free and fair elections – a proposition borne out by the experience of our first 11 years of democracy, which included no less than three general elections that have universally been accepted as free and fair. In the circumstances, I conclude that the applicants are not entitled to the relief claimed.

[53] There are, in any event, further insurmountable obstacles in the way of granting the declaratory relief sought. First, the declaratory order sought is of an abstract nature and circumvents the processes set up by Parliament under PAIA. Second, inasmuch as the respondents are private bodies, no access to their records can be given to the class of persons reflected in prayer 2 (i.e. adult South African citizens) without a finding that the documentation is

‘required’ by each of the members of that class for the exercise or protection of their rights – something that is plainly not possible on the evidence presented in this application.

Appropriate Relief

[54] Even if I were to err in coming to these conclusions, the court hearing an application of this nature is authorised in terms of s 82 of PAIA to ‘grant any order that is just and equitable’. In this regard, the respondents have placed evidence before the court, showing that the question of whether funding of political parties should be publicly made known and, if so, in what manner, to whom and in respect of which donations, is a complex policy issue best dealt with by way of legislation, which properly balances the various interests at stake, rather than through court orders with retrospective effect. As I have indicated above,⁴² I share this view. Consequently, I am not persuaded that it would be just and equitable to grant the relief claimed.

[55] The respondents also resisted the relief claimed on a number of other grounds, *inter alia* that the records claimed by the applicants herein differ in material respects from the records claimed in their original requests in terms of PAIA as submitted to the individual respondents; that the third party

⁴² Para [51] above.

procedure laid down in PAIA has not been followed; and so on. In view of the conclusion reached above, it is not necessary to consider these aspects separately.

[56] It follows that the present application cannot succeed. From the respondents' side, the ANC asked in its answering affidavit as well as its heads of argument for an order, in the alternative to dismissal of the application, for a stay of these proceedings 'so as to allow the political and legislative process to follow the proper course necessary for the adoption of a national policy through legislation regulating the funding of political parties within the Republic of South Africa'. This suggestion was not seriously pressed during oral argument before me and, in any event, I do not regard it as appropriate to have this issue hanging in the air for an indefinite period in the absence of any clear indication that legislation to this effect is likely to be enacted in the immediate future.

Conclusion

[57] The above-mentioned conclusion does not mean that political parties should not, as a matter of principle, be compelled to disclose details of private donations made to their coffers. It merely means that, on my interpretation of existing legislation, the respondents are not obliged to disclose such records.

[58] This said, the applicants have nevertheless made out a compelling case – with reference both to principle and to comparative law – that private donations to political parties ought to be regulated by way of specific legislation in the interest of greater openness and transparency. In the United States, for example, the first federal disclosure law was enacted as long ago as 1910. It required political parties and organisations operating to influence congressional elections in two or more States to disclose names of all contributors of \$100 or more.⁴³ The rationale was stated as follows in the judgment of the US Supreme Court in *Buckley v Valeo*:⁴⁴

The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information ‘as to where political campaign money comes from and how it is spent by the candidate’ in order to aid the voters in evaluating those who seek federal office. It allows the voters to place each candidate in the political spectrum more precisely than is often possible solely than 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 more likely to be responsive and thus facilitate predictions of future performance in office.

⁴³ See *Buckley v Valeo* 424 US 1 (1976) at 62.

⁴⁴ *Supra* at 67–68.

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 favors that may be given in return. ...

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

The judgment highlights the complexity of the issues involved and the myriad ways in which they can be dealt with by legislation. It is precisely because of these complexities that the court is, in my view, ill equipped – compared with the legislature – to perform the task that the applicants are seeking to impose upon it.

Costs

[59] In their Notice of Motion, the applicants claimed an order for costs against the respondents jointly and severally. In the event of dismissal of the application, however, they submitted that no order as to costs should be made, on the basis that they acted herein *bona fide* and in the public interest. The

respondents resisted this request, arguing that the dispute was between private bodies and that costs should follow the result.

[60] The guiding principle in this regard appears to be that the question of costs in constitutional and public interest litigation remains a discretionary matter. However, parties who litigate to test the constitutionality of law or conduct usually seek to ventilate important issues relating to constitutional principle. Such persons should not be discouraged from doing so by running the risk of having to pay the costs of their adversaries, if the court takes a view which is different from the view taken by the petitioner.⁴⁵

[61] These principles have been applied uniformly where litigation is against an organ of State. The same principles apply in cases involving private litigants where a party litigates for public purposes and in the public interest. The court's discretion could be exercised against a private litigant, however, *inter alia* where the litigation was spurious or frivolous⁴⁶ or where such litigant has not acted in good faith or where it was apparently pursuing private commercial interests.⁴⁷

⁴⁵ 3 *Lawsa* (first re-issue) para 301. See also *DA v Masondo* 2003 (2) SA 413 (CC) para 35 and cases cited therein.

⁴⁶ *ANC v Minister of Local Government and Housing, KwaZulu-Natal* 1998 (3) SA 1 (CC) para 34.

⁴⁷ *SACCAWU and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) para 51; *First National Bank t/a Wesbank v Commissioner SARS & Another* 2001 (3) sa 310 (C) at 336A–C.

[62] In my view, the applicants in the present case raised matters of great public interest and concern – not for any benefit or advantage to themselves, but *bona fide* and for the common good, as perceived by them. Moreover, the points they raised, though ultimately unsuccessful, were not without merit. In line with the general approach outlined above, I am of the view that it would be fair if no order as to costs were made, thus leaving each party to pay its own costs.

Order

[63] For the reasons set out above, the application is DISMISSED. No order is made as to costs.

B M GRIESEL