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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

ADMINISTRATIVE AND PUBLIC LAW:
PAIA DECLARED UNCONSTITUTIONAL: POLITICAL PARTIES MUST DISCLOSE PRIVATE FUNDING

On 27 September 2017 the Western Cape Division of the High Court, Cape Town handed down judgment in *My Vote Counts NPC v President of the Republic of South Africa and Others* [2017] ZAWCHC 105.

BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:
WHO CALLS THE SHOTS?

In *Ex Parte Nell and Others* NO 2014 (6) SA 545 (GP) (28 July 2014), the board of a company passed a resolution placing it in business rescue in accordance with s129 of the Companies Act, No 71 of 2008. In terms of this section, a financially distressed company may, without any prior judicial oversight or consultation with its creditors, achieve a general moratorium against legal proceedings.

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In 2015, the applicant approached the Constitutional Court directly and sought an order compelling Parliament to enact legislation to regulate the disclosure of private funding information.

On 27 September 2017 the Western Cape Division of the High Court, Cape Town (High Court) handed down judgment in *My Vote Counts NPC v President of the Republic of South Africa and Others* [2017] ZAWCHC 105 (*MVC2*). It declared that information about the private funding of political parties is reasonably required for the effective exercise of the right to vote, and that the Promotion of Access to Information Act, No 2 of 2000 (PAIA) is constitutionally invalid to the extent that it does not allow for the continuous and systematic recordal and disclosure of this funding information.

The High Court agreed with the Constitutional Court in MVC1 that because of the unique and influential role of political parties in South Africa, information about their private funding is required for the exercise of the right to vote.

By way of background, in 2015, the applicant approached the Constitutional Court directly and sought an order compelling Parliament to enact legislation to regulate the disclosure of private funding information. The Constitutional Court affirmed that PAIA is the legislation which is intended to grant access to information in terms of s32 of the Constitution and held that, should the applicant wish to access this information, it is obliged to use PAIA's mechanisms or frontally challenge PAIA's consistency with the Constitution (see *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) (*MVC1*)).

The recent judgment by the High Court is the sequel to *MVC1*. The High Court was faced with three main issues:

- whether the Constitution requires the disclosure of private funding information;
- whether PAIA allows for the disclosure of private funding information for the effective exercise of the right to vote and make political choices; and
- whether PAIA is unconstitutional.

Does the Constitution require private funding information?

As a starting point, the High Court held that political parties are not part of the state, therefore information is not just there for the taking. The question for the High Court to decide was whether the relevant information on private funding is required for the exercise of the constitutional right to vote enshrined in s19 of the Constitution.

The High Court agreed with the Constitutional Court in *MVC1* that because of the unique and influential role of political parties in South Africa, information about their private funding is required for the exercise of the right to vote.

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The High Court found that PAIA does not provide for the disclosure of private funding information of political parties due to its inherently limited mechanisms and processes.

Does PAIA allow for the disclosure of private funding information?

The High Court identified a number of shortcomings in PAIA. Firstly, it found it problematic that political parties do not comfortably fit into the definition of either public or private bodies under PAIA. It agreed with the minority judgment of the Constitutional Court in *MVC1* that PAIA appears to have been drafted without political parties in mind.

After examining the mechanisms for requesting information under PAIA, the High Court also concluded that, even if a political party can be classified as a private body, PAIA does not create a process for continuous disclosure of private funding information. The current process of applying for specific, existing records known to the requester imposes "an onerous and unwarranted burden on citizens".

A further problem with PAIA is, according to the High Court, the fact that it restricts its application to "recorded" information. PAIA does not take into account the fact that it is possible for a record to be deleted or destroyed before an application is made for its disclosure, or to avoid the recordal of sensitive information altogether.

Finally, the High Court also identified the possibility of political parties relying on a number of the grounds for refusal set out in PAIA in order to refuse disclosure of the private funding information.

Overall the High Court found that PAIA does not provide for the disclosure of private funding information of political parties due to its inherently limited mechanisms and processes. Therefore, PAIA is not in sync with s32 of the Constitution read with s19. However, PAIA could only be declared unconstitutional if the limitations on these rights are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (under s36 of the Constitution).

Is PAIA unconstitutional?

The High Court was of the view that PAIA's limitation of the constitutional rights in question is not reasonable or justifiable because there is a possibility of a ruling party taking action to punish donors who support opposition parties. Therefore, PAIA was declared unconstitutional.

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The High Court's declaration of constitutional invalidity must be confirmed by the Constitutional Court. South Africa's apex court will therefore once again be confronted with these issues.

The High Court declined to order continuous and systematic disclosure of private funding information as this would breach the doctrine of separation of powers by prescribing the law to Parliament. The High Court suspended its declaration of invalidity for a period of 18 months to afford Parliament time to remedy PAIA's shortcomings as it deems fit.

However, *MVC2* was handed down shortly after the Draft Political Party Funding Bill, 2017 was published for public comment on 19 September 2017. The aim of the Draft Bill is to regulate both public and private funding of political parties. It provides for political parties to report donations to the Electoral Commission who in turn must publish this information on an annual basis.

In terms of s172(2)(a) of the Constitution, the High Court's declaration of constitutional invalidity must be confirmed by the Constitutional Court. South Africa's apex court will therefore once again be confronted with these issues.

Lionel Egypt and Sarah McGibbon

INVITATION TO COMMENT

The Ad Hoc Committee on the Funding of Political Parties is currently inviting public comments on the Draft Political Party Funding Bill, 2017. The aim of the Draft Bill is to regulate both public and private funding of political parties. The deadline for comments is 16h00 on 16 October 2017. They can be emailed to the Committee Secretary, Ms Cindy Balie, on cbalie@parliament.gov.za.

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Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

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The moratorium is a legitimate limitation on the rights of creditors to have access to courts as envisaged in s34 of the Constitution of the Republic of South Africa, 1996.

In *Ex Parte Nell and Others* NO 2014 (6) SA 545 (GP) (28 July 2014), the board of a company passed a resolution placing it in business rescue in accordance with s129 of the Companies Act, No 71 of 2008 (Companies Act). In terms of this section, a financially distressed company may, without any prior judicial oversight or consultation with its creditors, achieve a general moratorium against legal proceedings.

In seeking a declaratory order regulating control of the company pending the appeal, the Practitioner argued the notice of application for leave to appeal suspended the operation of the orders made by Thlapi J.

The moratorium is a legitimate limitation on the rights of creditors to have access to courts as envisaged in s34 of the Constitution of the Republic of South Africa, 1996. A business rescue launched by the passing of a resolution vests the power to control the company in an individual duly appointed by the company – namely a business rescue practitioner. In the *Nell* matter, the company appointed the first applicant as the business rescue practitioner (Practitioner) in the resolution placing the company under business rescue. Soon afterwards, two creditors of the company (ie affected persons) instituted urgent proceedings for an order nullifying the resolution in terms of which the business rescue proceedings had commenced and placing the company under final liquidation. The creditors based their application on the following grounds: the company was neither financially distressed nor was there a reasonable prospect of rescuing the company's business, in accordance with s130(1) read with s130(5) of the Companies Act.

The Practitioner opposed the application and also brought an application seeking an order for an extension of time within which to publish a business rescue plan.

The applications were both heard before Thlapi J, who dismissed the Practitioner's application for an extension of time, set aside the resolution in terms of which the business rescue proceedings had been launched and, finally, made an order placing the company under final liquidation. It is common cause that the Practitioner sought to appeal against the orders.

In seeking a declaratory order regulating control of the company pending the appeal, the Practitioner argued that in terms of s18(1) of the Superior Courts Act, No 10 of 2013 (Superior Courts Act), the notice of application for leave to appeal suspended the operation of the orders made by Thlapi J. Whereas, the creditors contended that control ought to vest in the Master until the appointment of a provisional liquidator, pending the appeal process. Importantly, s18(1) provides for the immediate suspension of the operation and execution of all court decisions upon the lodging of an application for leave to appeal.

As a starting point, the court noted that s150 of the Insolvency Act, No 24 of 1936 (Insolvency Act) was enacted to regulate appeals against sequestration orders.

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The court held that it was safer to vest control of the company in the liquidators, and found, ultimately, that the notice of appeal did not suspend the operation of the orders.

Section 150(3) provides that the provisions of the Insolvency Act shall nevertheless apply despite the noting of an appeal. Reference was also made to the matter of *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd and Others* 2001 SA 2 SA 768 W, where the court held that the provisions of s339 of the Companies Act, No 61 of 1973 (old Companies Act), rendered the provisions of s150(3) of the Insolvency Act applicable to winding-up proceedings.

On the question of the control of the company in the interim period, the court followed the reasoning in *Visser v Coetzer; GTR Investments and Others v Coetzer* 1982 (4) SA 805 (W), where the court considered s20(1)(a) of the Insolvency Act, under which a sequestrated estate vests in the Master and thereafter the trustee, and held that the insolvent was immediately divested of his assets despite the noting of an appeal. Similarly, and in the case of a company, a liquidation order divests the management or directors of the control of the insolvent entity and vests same in the hands of the Master until a liquidator has been appointed. The action of divesting and vesting is of particular importance in this context.

In this light, the court found that the process initiated pursuant to the s129(1) resolution takes only the interests of the company into account – a standpoint that is blatantly incompatible with the principle of *audi alteram partem*. Moreover, the court found that if the purpose of s18(1) of the Superior Courts Act had been to oust existing orders, the legislature could have been expected to put in place suitable measures to guard against any mischief or abuse thereof. The court also considered the inherent urgency of insolvency proceedings and found that the provisions of the Insolvency Act prevailed over s18(1) of the Superior Courts Act.

Furthermore, the court considered the likelihood of the Practitioner's susceptibility to the influence of the company's management and whether it was conceivable that the Practitioner could achieve objectivity in the circumstances. Thereafter, the court considered the legal position of liquidators as officers of the court and as notably independent persons who act primarily on creditors' instructions. The court held that it was safer to vest control of the company in the liquidators, and found, ultimately, that the notice of appeal did not suspend the operation of the orders.

There are some important considerations to take from this judgment. Delays caused by finalisation of appeal processes may result in hardship for the general body of creditors of a financially distressed company. As the court correctly pointed out, insolvency proceedings are inherently urgent. Another important point of interest is the effect of s18 of the Supreme Court Act as articulated in the judgment. One may argue that a liquidation order, which ultimately alters the status of a company, should be regarded as an exceptional circumstance viewed against the effects of s18 of the Supreme Court Act.

Kgosi Nkaiseng and Nqolokazi Nomvalo

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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