



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

Case number: 2024/029892

- (1) REPORTABLE: **NO**  
(2) OF INTEREST TO OTHER JUDGES: **NO**

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**L.J. DU BRUYN**

**30 MARCH 2024**

In the matter between:

**DEMOCRATIC ALLIANCE**

Applicant

and

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

First Respondent

**SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED**

Second Respondent

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**ORDER**

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- [1] The forms, service and time periods prescribed by the Uniform Rules of Court are dispensed with and the application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.
- [2] Regulation 4(2) of the National and Provincial Party Election Broadcasts and Political Advertisement Regulations, 2014 [regulation 4(2)], published by the First Respondent under the Electronic Communications Act 36 of 2005 on 26 February 2024, is declared unconstitutional and invalid.
- [3] Regulation 4(2) is set aside.
- [4] Regulation 4(2) is to be read as follows:
- “A political party or an independent candidate that intends to broadcast a PEB must submit the same to the broadcasting service licensee at least five (5) working days prior to the broadcast thereof.”
- [5] The First Respondent is ordered to pay the costs of the application, including the costs of two counsel.

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## JUDGMENT

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### DU BRUYN AJ:

[1] This is an urgent application in which the Applicant, the Democratic Alliance (DA), seeks the following orders:

- “1 The forms, service and time periods prescribed in the Uniform Rules of Court are dispensed with and the application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.
- 2 It is declared that regulation 4(2) of the National and Provincial Party Election Broadcasts and Political Advertisement Regulations, 2014 (**‘regulation 4(2)’** and **‘Regulations’**, respectively), published by the first respondent (**‘ICASA’**) under the Electronic Communications Act 36 of 2005 (**‘ECA’**) on 26 February 2024 is unconstitutional and invalid.
- 3 Regulation 4(2) is set aside.
- 4 Regulation 4(2) is to be read as it stood prior to the amendment and thus provide that **‘[a] political party or an independent candidate that intends to broadcast a PEB must submit the same to the broadcasting service licensee at least five (5) working days prior to the broadcast thereof.’**”

[2] In this judgment, I adopt the terms defined by the DA in the above-quoted passage.

[3] The DA initially also sought other relief unrelated to what is quoted above. That relief was, however, abandoned at the hearing of the application.

[4] The DA cited ICASA and the South African Broadcasting Corporation SOC Limited (SABC) as the First and Second Respondent, respectively. ICASA opposes the relief sought by the DA. The SABC filed a notice to abide the decision of this Court.

[5] ICASA raised two points in the answering affidavit that I shall refer to as “preliminary points”. Counsel appearing for ICASA did not pursue the preliminary points at the hearing of the application other than stating that the points were raised in the answering affidavit. I am of the view that there is no merit in either of the preliminary points.

[6] ICASA raised the first preliminary point in these terms in the answering affidavit:

- “4. The DA launched these proceedings without citing other political parties who may have a direct and substantial interest in the outcome of this matter. The DA’s core case is that the amended regulation infringes upon sections 16 and 19 of the Constitution. The amended regulation applies to political parties and independent candidates. Whilst I accept that the full extent of independent candidates who are going to be canvassing and contesting elections might not be known to the DA, the DA surely knows all of the political parties that are represented in Parliament and the various provincial legislatures. At a minimum, the parties that are represented nationally and in the Gauteng legislature should have been cited in these proceedings.
5. This application is flawed inasmuch as the DA fails to cite these parties that are in Parliament and those that are represented in the Gauteng provincial legislature.
6. The Court should simply decline to exercise its jurisdiction until all interested and affected parties are properly cited.”

[7] The Supreme Court of Appeal held unanimously in ***South African History Archive Trust v South African Reserve Bank and Another (17/19) [2020] ZASCA 56; [2020] 3 All SA 380 (SCA); 2020 (6) SA 127 (SCA); 2020 (12) BCLR 1427 (SCA) (29 May 2020)*** at para [30] that:

“The test for joinder of necessity was restated by Brand JA in *Bowring NO v Vrededorp Properties CC* [2007 (5) SA 391 (SCA)] ([2007] ZASCA 80) para 21]:

‘The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned...’

[8] The question is therefore whether any political party or independent candidate might be prejudicially affected by a judgment on the application. ICASA did not advance any submissions on how a judgment on the application might prejudicially affect any political party or independent candidate. I am of the view that no relief granted in the application could have a prejudicial effect on any political party or independent candidate. For the reasons set out in this judgment, I am

convinced that the position of political parties and independent candidates would be better under the pre-amendment version of regulation 4(2) than it is under the amended version of the regulation. This means that an order in favour of the DA will not have a prejudicial effect on any political party or independent candidate. As a result, there is no merit in the first preliminary point.

[9] The second preliminary point raised by ICASA relates to urgency and compliance with the provisions of Rule 16A of the Uniform Rules. The answering affidavit reads, in relevant part:

“11. The relief sought by the DA is significant. Although the DA says that it will post the application on its website, and at court, so that it is brought to the attention of interested parties, it is important not to lose sight of the purpose of Rule 16A. The Constitutional Court has described the purpose of this rule ‘to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge in order that they may take steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of Chapter 2 right and adduce evidence in support thereof.

12. The Authority [ICASA] should be afforded appropriate time periods to adduce evidence in support of the amendment to regulation 4(2) of the regulations. (See *Shaik v Minister of Justice and Constitutional Development and others* 2004 (3) SA 599 (CC) at [24]).

...

99. I accept that the elections are imminent and the matter probably requires to be disposed of on an urgent basis. I do wish to raise the complaint that the time periods unilaterally determined by the DA are wholly inadequate to enable the Authority [ICASA] to file a proper affidavit.”

[10] The Constitutional Court held in ***Shaik v Minister of Justice and Constitutional Development and Others* (CCT34/03) [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC); 2004 (1) SACR 105 (CC) (2 December 2003)** at para [24] that:

“The minds of litigants (and in particular practitioners) in the High Courts are focussed on the need for specificity by the provisions of Uniform Rule 16A(1). The purpose of the rule is to bring the case to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a Chapter 2 right and adduce evidence in support thereof.”

[11] As mentioned, counsel appearing for ICASA did not pursue the preliminary points at the hearing of the application other than stating that the points were raised in the answering affidavit. ICASA

did not submit why “*the time periods unilaterally determined by the DA are wholly inadequate to enable [ICASA] to file a proper affidavit.*” ICASA also did not submit how much time would have been adequate “*to enable [ICASA] to file a proper affidavit.*” ICASA did not apply for a postponement of the hearing to afford it more time for obtaining evidence in support of its case. In addition, ICASA did not specify any evidence that it would have wanted to adduce but was unable to adduce as a result of the application being heard on an urgent basis.

[12] I am satisfied that the application is urgent. The DA could not be afforded substantial redress at a hearing in due course. This was not seriously contested by ICASA in the answering affidavit. No submissions regarding urgency were advanced by ICASA at the hearing of the application. Consequently, I dispense with the forms and service provided for in the Uniform Rules of Court and dispose of the application in the manner and in accordance with the procedure adopted by the DA, also with regard to the requirements of Rule 16A.

[13] I now deal with the merits of the application.

[14] At the hearing of the application, counsel for the DA and ICASA were in agreement that the application is a reasonableness review, not a rationality review. The difference between these two types of review is significant for the approach this Court should adopt in deciding the application. The Constitutional Court explained the distinction between rationality and reasonableness review in ***Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development*** (CCT 122/13, CCT 123/13) [2014] ZACC 2; 2014 (3) SA 134 (CC); 2014 (4) BCLR 430 (CC) (20 February 2014):

“[6] The Constitution allows judicial review of legislation, but in a circumscribed manner. Underlying the caution is the recognition that courts should not unduly interfere with the formulation and implementation of policy. Courts do not prescribe to the legislative arm of government the subject-matter on which it may make laws. But the principle of legality that underlies the Constitution requires that, in general, the laws made by the Legislature must pass a legally defined test of ‘rationality’:

‘The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function

of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature.'

- [7] A rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. It is a less stringent test than reasonableness, a standard that comes into play when the fundamental rights under the Bill of Rights are limited by legislation.
- [8] In those cases the courts have a more active role in safeguarding rights. Once a litigant has shown that legislation limits her fundamental rights, the limitation may only be justified under section 36 of the Constitution. Section 36 expressly allows only limitations that are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.
- [9] The challenge to the constitutionality of the Act is not clearly demarcated along the lines set out above. However, closer consideration shows that the attack on the constitutionality of the Act as a whole is founded on rationality review, and the attack on sections 2 and 4 specifically on reasonableness review."

[15] It is clear from para [8] of the Constitutional Court's above-quoted judgment that, if the DA shows that the amended regulation 4(2) limits its fundamental rights, that limitation may only be justified under s 36 of the Constitution. The onus to show that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, would rest on ICASA. In this regard, the Constitutional Court held in ***Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*** (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004) at para 34:

"Counsel for the applicants submitted that the Minister has the onus of proving that the admitted limitation of the right to vote is reasonable and justifiable and, if this cannot be established, the application must succeed. Although 'onus' is not infrequently used in this context it is, as this Court has had occasion to point out previously, an onus of a special type. It is not the conventional onus of proof as it is understood in civil and criminal trials where disputes of fact have to be resolved. It is rather a burden to justify a limitation where that becomes an issue in a section 36 analysis. That is how it is described by Somyalo AJ in *Moise v Greater Germiston Transitional Local Council* [2001 (4) SA 491 (CC); [2001] ZACC 21; 2001 (8) BCLR 765 (CC) para 19], who said:

'It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this

reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity - indeed an obligation - to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary *onus*, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.”

- [16] The application revolves around important issues at the heart of South Africa’s electoral process. It concerns the regulation of political election broadcasts, referred to as PEBs, by ICASA under the Electronic Communications Act 36 of 2005. ICASA has regulatory authority over broadcasting in the run-up to elections.
- [17] PEBs are produced by political parties or independent candidates to further their campaigns. The Regulations define a PEB as “*a direct address or message broadcast free of charge on a broadcasting service during an election period and which is intended or calculated to advance the interests of any particular political party or an independent candidate*”. It is not contentious in the application that PEBs ensure that all contestants in an election are given an opportunity to communicate their ideas, principles and values – in short, their campaign – to the electorate. This provides voters with information that enables them to exercise their rights in terms of s 19 of the Constitution.
- [18] PEBs should be distinguished from political advertisements, referred to as PAs. According to the Regulations, a PA is “*an advertisement broadcast on a broadcasting service which is intended or calculated to advance the interests of any particular political party or independent candidate, for which advertisement the relevant broadcasting service licensee has received or is to receive, directly or indirectly, any money or other consideration*”. Thus, while PEBs are broadcast free of charge, political parties or independent candidates must compensate broadcasting service licensees in the form of “*money or other consideration*” for the broadcasting of PAs.



[19] PEBs are broadcast by broadcasting service licensees, or BSLs, during slots. There are three categories of BSLs. The first category is state-owned or public BSLs. During an election period, these BSLs are legally obliged to broadcast PEBs. The second and third categories of BSLs are commercial and community BSLs. These BSLs are not legally obliged to broadcast PEBs, but they may elect to do so. If commercial and community BSLs elect to broadcast PEBs, they must notify ICASA of their intention to do so.

[20] ICASA amended regulation 4(2) on 26 February 2024. It is not in dispute that ICASA had the requisite authority to effect the amendment. Prior to its amendment, regulation 4(2) read:

“A party that intends to broadcast a PEB must submit same to the broadcasting services licensee at least five (5) working days prior to the broadcast thereof.”

After its amendment, regulation 4(2) reads:

“A political party or independent candidate that wishes to have its PEB broadcast must submit same to BSL within five (5) calendar days after the publication of the list of BSLs that will be carrying the PEBs in the Gazette.”

[21] Under the pre-amendment regulation 4(2), the DA would only be required to submit a PEB to the relevant BSL five working days prior to the broadcast of the PEB. Under the amended regulation, the DA is required to submit all its PEBs five working days after the publication of the list of BSLs that will broadcast PEBs.

[22] The gist of the DA's case is this: Under the pre-amendment regulation 4(2) it was possible for the DA to be responsive to the changing dynamics during the run-up to the election. The DA submits that, in contrast, the effect of the amended regulation 4(2) is that the DA *“cannot broadcast PEBs concerning events which occur after the five day-period from the date on which the list of participating BSLs is gazetted.”* According to the DA, this *“constitutes an outright restriction on the content which can form part of a PEB.”* This is elaborated upon as follows in the founding affidavit:

- “33 ... Any event which occurs subsequent to the five day-period from the date on which the list of participating BSLs is gazetted will, of necessity, not form part of a PEB.
- 34 Plainly, this violates the section 16(1)(b) constitutional right to impart and receive ideas. It also infringes the section 19(1)(c) right to campaign for a political cause, since it restricts the range of issues a political party or independent candidate can address in the course of their campaign. PEBs will be ossified and unresponsive to election dynamics. This undermines the right to free and fair elections in section 19(2).”

[23] ICASA admits at para 146 of the answering affidavit that, under the amended regulation 4(2), the DA “cannot amend or adjust” its PEBs once they have been finalised and submitted. Nonetheless, ICASA contends at para 45 of the answering affidavit that “[t]he amendment to Regulation 4(2) does not result in the limitation of sections 16 or 19 of the Constitution.” Elaborating upon this, ICASA submits at para 79 of its heads of argument that “[t]he DA continues to exercise and enjoy the right to generate its PEBs and to broadcast them. It is the removal of the ability to do so throughout the election broadcast period that has been effected by the amendment to the regulation.”

[24] At the hearing of the application and at para 67 of its heads of argument, ICASA contended that the DA’s “complaint can be distilled into this: The DA complains that it is unable to respond to the ‘election dynamics’.” ICASA’s response to this is set out at paras 68 and 69 of its heads of argument:

- “68. The complaint fails to consider the following key factors.
- 68.1 The amended regulation was promulgated on 26 February 2024. Since then, the parties have known that they will be required to submit their PEBs if they wished to broadcast same, to the BSL within five calendar days from the publication of the list of BSLs. This enabled them at a very minimum to cover all aspects they consider relevant for their targeted market.
- 68.2 The parties know their constituencies, the language of their constituencies and the message they wish to broadcast to those constituencies. The parties should be able to anticipate issues that they wish to address with their constituencies in their preferred languages.
- 68.3 The DA fails to take into account the fact that it has available to it throughout the election period political advertisements and political commentary.
- 68.4 The fact that the parties are required to submit their PEBs by the cut-off date does not constitute an outright restriction on the content of the PEB. They

remain able to generate their PEBs, submit them for consideration to the BSLs and raise issues they wish to raise in the language they prefer to use.

68.5 The difference is that pre-amendment they could do so throughout the election broadcast period. Now they have to do it before the cut-off date, otherwise they forfeit the slot.

69. The DA remains able to impart information and ideas and to structure their PEBs in a manner that responds to the 'election dynamics'. They have also available to them political commentary opportunity as well as political advertising."

[25] I do not agree with ICASA that the amended regulation 4(2) does not infringe the DA's rights in terms of ss 16(1)(b) and 19(1)(c) of the Constitution. In my view, the amended regulation 4(2) infringes the DA's rights in terms of ss 16(1)(b) and 19(1)(c) of the Constitution. It might be true that the DA has known since 26 February 2024 that it will be required to submit its PEBs within five calendar days "*after the publication of the list of BSLs that will be carrying the PEBs in the Gazette.*" But this does not change the admitted fact that, under the amended regulation 4(2), the DA "*cannot amend or adjust*" its PEBs once they have been finalised and submitted. This means that, contrary to the position under the pre-amendment regulation 4(2), the DA will not be able to respond to the changing dynamics during the run-up to the election. No matter how well the DA might know its constituency, it is not possible for the DA to anticipate unexpected issues that might become relevant during the run-up to the elections.

[26] It is no answer for ICASA to contend that the DA may make use of PAs and political commentary to address changing dynamics during the run-up to the elections. The DA's ability to make use of PAs and political commentary is not relevant to the relief sought in this application. The fact that the DA still has PAs and political commentary at its disposal does not mean that the DA's rights in terms of ss 16(1)(b) and 19(1)(c) of the Constitution are not infringed by the amended regulation 4(2).

[27] I am satisfied that the DA has shown that the amended regulation 4(2) limits the DA's fundamental rights. I now consider whether or not ICASA has been able to justify the limitation under s 36 of the Constitution.

[28] In justification of the limitation, ICASA contends as follows in the answering affidavit:

"30.2 The process of submission of PEBs five (5) working days before the broadcast date has resulted in the low usage of PEBs due to their not being submitted on time, not being submitted in the correct format amongst other issues and generally tended to place an undue administrative burden on BSLs, more specifically the SABC, in terms of processing PEBs during the entire election broadcast period. The low usage of PEBs also resulted in BSLs losing revenue generating opportunities because unused allocated airtime could not be repurposed for any other purpose on such short notice.

...

30.4 The benefits of the cut-off dates include the extended number of days for the election broadcast period within which PEBs could be broadcast and thus additional PEBs available for allocation.

31. The Authority [ICASA] resolved to maintain a once-off cut-off date for submission of PEBs to ensure that BSLs are given sufficient time to process the PEBs audit, the number of PEBs that have met the requirements and schedule their broadcast thereof ahead of time allotment.

...

34. Any costs related to committing resources to dealing with PEBs, pre-amendment, will no longer be incurred as a result of the amendment.

...

38. ... By introducing the cut off date the Authority [ICASA] seeks to achieve the optimum use of the slots allocated for PEBs; to reduce the margin of error of submitting incorrectly formatted PEBs; to reduce and/or eliminate administrative burdens on BSLs that come with processing PEBs throughout the election period. More importantly, minimise the risk of financial losses incurred by BSLs as a result of non-usage of allocated slots.

...

54. ICASA is enjoined in terms of section 57(4) to ensure that all political parties (including independent candidates) are treated equitably. The position post-amendment is intended to ensure, amongst others, that the broadcast period for PEBs is longer and thus create more slots for the broadcast of PEBs.

...

57. The Authority [ICASA] considered other possible scenarios in trying to achieve a balance of ensuring that sufficient slots are made available for allocation while taking into cognisance the financial impact on BSL. ... An example is the increase of slots through reduction of duration per slot ... ."

[29] ICASA baldly alleges that one of the consequences of the pre-amendment regulation 4(2) was *“the low usage of PEBs due to their not being submitted on time, not being submitted in the correct format amongst other issues”*. ICASA did not tender the evidence of a BSL in support of these allegations. According to ICASA, a further consequence of the pre-amendment regulation 4(2) was that it placed *“an undue administrative burden on BSLs, more specifically the SABC, in terms of processing PEBs during the entire election broadcast period.”* Again, ICASA did not tender the evidence of a BSL in support of these allegations. Significantly, as already stated, the SABC filed a notice to abide the decision of this Court. If it was true that the pre-amendment regulation 4(2) placed *“an undue administrative burden on ... the SABC”*, one would have expected the SABC to oppose the application instead of filing a notice to abide. ICASA alleges that *“[t]he low usage of PEBs also resulted in BSLs losing revenue generating opportunities”*. This allegation is also not supported by the evidence of a BSL.

[30] According to ICASA, *“[t]he benefits of the cut-off dates include the extended number of days for the election broadcast period within which PEBs could be broadcast and thus additional PEBs available for allocation.”* ICASA did not explain how the *“cut-off dates”* has the effect of extending the number of days for the election broadcast period or how it causes additional PEBs (or slots) to be available for allocation. In addition, ICASA also did not explain how *“a once-off cut-off date for submission of PEBs ... ensure[s] that BSLs are given sufficient time to process the PEBs audit”*. There is no evidence to this effect.

[31] A further submission by ICASA is that *“[a]ny costs related to committing resources to dealing with PEBs, pre-amendment, will no longer be incurred as a result of the amendment.”* ICASA did not explain this bald statement or tender evidence in support thereof. It was also contended by ICASA that *“[b]y introducing the cut off date the Authority [ICASA] seeks to ... minimise the risk of financial losses incurred by BSLs as a result of non-usage of allocated slots.”* ICASA did not

tender the evidence of a BSL in support of the alleged “*risk of financial losses incurred by BSLs as a result of non-usage of allocated slots.*” In any event, I am not convinced that “*the risk of financial losses incurred by BSLs as a result of non-usage of allocated slots*” justifies the limitation of the DA’s fundamental rights.

[32] No explanation has been proffered by ICASA on why the effect of the pre-amendment regulation 4(2), as opposed to the amended regulation, would be that all political parties and independent candidates are not treated equally.

[33] Section 36 of the Constitution provides:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

[34] I now deal, in turn, with each of the factors listed in s 36(1) of the Constitution.

### The Nature of the Rights

[35] The DA relies, *inter alia*, on its rights in terms of ss 16(1)(b) and 19(1)(c) of the Constitution. In ***Democratic Alliance v African National Congress and Another* (CCT 76/14) [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC)** the Constitutional Court held:

“Being able to speak out freely is closely connected to the right to vote and to stand for public office. That right lay at the core of the struggle for democracy in our country. Shamefully, it was for centuries denied to the majority of our people. In celebrating the democracy we have created, we rejoice as much in the right to vote as in the freedom to speak that makes that right meaningful. An election without as much freedom to speak as is

constitutionally permissible would be stunted and inefficient. For the right to freedom of expression is one of a 'web of mutually supporting rights' the Constitution affords."

The Court went on to hold that:

"[S]uppressing speech in the electoral context will inevitably have severely negative consequences. It will inhibit valuable speech that contributes to public debate and to opinion-forming and holds public office-bearers and candidates for public office accountable".

And, critically for present purposes, the Court held that, in the context of an election, the imperative to facilitate open and vigorous dialogue about political matters is given a –

"more immediate, dimension. Assertions, claims, statements and comments by one political party may be countered most effectively and quickly by refuting them in public meetings, on the internet, on radio and television and in the newspapers."

[36] In ***My Vote Counts NPC v Speaker of the National Assembly and Others (CCT121/14) [2015]***

**ZACC 31**, Cameron J explained that the import of these *dicta* is that the right to free expression –

"is what 'makes [the right to vote] meaningful': only if information is freely imparted, and citizens are kept informed, are their choices genuine. As Mogoeng CJ has also noted on behalf of the Court, 'the public can only properly hold their elected representatives accountable if they are sufficiently informed of the relative merits' of the issues at stake. The same is necessarily true when the public decides which representatives to elect by exercising the right to vote."

### **The Importance of the Purpose of the Limitation**

[37] The Constitutional Court has held on various occasions, such as in *NICRO* and in ***Mohlomi v Minister of Defence 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC)***, that administrative and financial inconvenience alone cannot justify a severe limitation of rights.

[38] The administrative and financial convenience of BSLs is comparatively insignificant and cannot justify the severe limitation of the DA's rights in terms of ss 16(1)(b) and 19(1)(c) of the Constitution, as caused by the amended regulation 4(2).

### **The Nature and Extent of the Limitation**

[39] The amended regulation 4(2) effects a limitation of rights of the most serious kind:

- 39.1 First, it altogether precludes the broadcast of PEBs concerning events that occur after the five day-period for submission of PEBs, and from addressing matters raised in PEBs of other parties.
- 39.2 Second, the Constitutional Court held in *DA v ANC* that “*suppressing speech in the electoral context will inevitably have severely negative consequences*”. It impedes the meaningful exercise of the right to vote and diminishes the capacity of the electorate to hold Government to account.
- 39.3 Third, as the Constitutional Court held in ***Kham and Others v Electoral Commission and Another (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC)***, without the right to meaningfully and robustly campaign for a political cause, the freedom and fairness of elections is compromised.

### **The Relation Between the Limitation and its Purpose**

[40] The justifications proffered by ICASA for the amendment of regulation 4(2) are not rationally served by the regulation:

- 40.1 First, the administrative burden on BSLs is compounded rather than alleviated by the amended regulation 4(2). BSLs previously received PEBs on a staggered basis and thus did not have to assess all PEBs at once. The amended regulation 4(2) does not reduce the work required to conduct this assessment but requires all PEBs to be assessed at once and within five days.
- 40.2 Second, the alleged extension of time within which PEBs can be broadcast is a meaningless benefit if political parties and independent candidates are unable to



timeously submit PEBs or if PEBs that are submitted fail to meaningfully communicate with the electorate.

### **Less Restrictive Means to Achieve the Purpose**

[41] There are less restrictive measures available to achieve the alleged purpose:

41.1 The pre-amendment regulation 4(2) provided a less restrictive measure of achieving the alleged purpose. It protected and promoted the DA's rights under ss 16(1)(b) and 19(1)(c) of the Constitution by allowing it to submit PEBs during the election period, and thus about issues which arise during that period. It also ensured that PEBs could be appropriately tailored to the relevant audience. It protected the administrative and financial interests of BSLs by ensuring that they received PEBs on a staggered basis, and not all at once, as well as giving them some opportunity to consider the PEBs before broadcasting.

41.2 Even if the regime under the pre-amendment regulation 4(2) did not adequately manage these concerns, the requirement that all PEBs are submitted upfront is a disproportionate response to the perceived problem. BSLs could, for example, be afforded 48 instead of 24 hours to consider PEBs; or PEB slot times could be reduced.

[42] ICASA has failed to justify the limitation of the DA's fundamental rights under s 36 of the Constitution. I am satisfied that the DA has made out a case for the relief it seeks.

[43] In the circumstances, the following order is made:

[1] The forms, service and time periods prescribed by the Uniform Rules of Court are dispensed with and the application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

- [2] Regulation 4(2) of the National and Provincial Party Election Broadcasts and Political Advertisement Regulations, 2014 [regulation 4(2)], published by the First Respondent under the Electronic Communications Act 36 of 2005 on 26 February 2024, is declared unconstitutional and invalid.
- [3] Regulation 4(2) is set aside.
- [4] Regulation 4(2) is to be read as follows:
- “A political party or an independent candidate that intends to broadcast a PEB must submit the same to the broadcasting service licensee at least five (5) working days prior to the broadcast thereof.”
- [5] The First Respondent is ordered to pay the costs of the application, including the costs of two counsel.

*This judgment is handed down electronically by uploading it on CaseLines.*

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L.J. du Bruyn  
Acting Judge of the High Court of South Africa  
Gauteng Division, Johannesburg

Date heard : 28 March 2024  
Judgment delivered : 30 March 2024  
For the Appellant : Mr N Ferreira  
Mr M de Beer  
briefed by Minde Shapiro & Smith Inc  
For the First Respondent : Mr B Makola SC  
Mr A Nase  
Briefed by Mkhabela Huntley Attorneys Inc.