CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 385/21

In the matter between:

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Respondent

and

JOHANNESBURG SOCIETY OF ADVOCATES Amicus Curiae

Neutral citation:	*AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ
Judgment:	Majiedt J (unanimous)
Heard on:	31 May 2022
Decided on:	20 September 2022
Summary:	Executive Ethics Code, Proclamation No. R41 of 2000 — constitutionality of the Code — order of constitutional invalidity confirmed

Executive Members' Ethics Act 82 of 1998 — section 2(2)(c) — transparency — access to information — meaning of "any financial interest"

ORDER

On application for confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria (Mlambo JP, Keightley J and Matojane J):

1. The order of the High Court of South Africa, Gauteng Division, Pretoria, declaring the Executive Ethics Code published under Proclamation No. R41 of 2000, to be inconsistent with the Constitution and invalid to the extent that it does not require the disclosure of donations made to campaigns for positions within political parties, is confirmed.
2. The operation of the order is suspended for a period of 12 months to enable the respondent to remedy the defect.
3. The respondent must pay the applicant's costs, including costs of two counsel, in this Court.

JUDGMENT

MAJIEDT J (Kollapen J, Madlanga J, Mathopo J, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ):

[1] Politics and money make disquieting bedfellows. This case is about money in politics, more particularly money donated to election campaigns for positions within political parties. The central question for determination is whether there ought to be a duty in law to disclose those donations. In this regard, we must determine whether the

Executive Ethics Code (the Code), enacted in 2000 by the then President of the Republic of South Africa in terms of section 96(1) of the Constitution,[1] passes constitutional muster.

[2] The Full Court of the Gauteng Division, Pretoria (Full Court), declared that the Code was unconstitutional and unlawful to the extent that it did not require the disclosure of donations made to campaigns for positions within political parties. The declaration of unconstitutionality was suspended for 12 months. The matter is before this Court for confirmation of the declaration of invalidity. As will appear, the matter has travelled a circuitous route to end up here.

Parties

[3] The applicant is amaBhungane Centre for Investigative Journalism NPC (amaBhungane), a non-profit company incorporated under the Companies Act.[2] The respondent is the President of the Republic of South Africa. The President has filed a notice of intention to abide these proceedings. That prompted this Court to request the Johannesburg Society of Advocates (the Society) to appoint counsel to assist us by preparing written submissions and presenting oral argument in the confirmation proceedings. The Society graciously acceded to this request and counsel who appeared have been of commendable assistance to this Court, for which we are indebted. Before the Full Court, the President elected not to file answering papers, but confined his participation to the advancement of oral submissions by counsel in opposition to amaBhungane's constitutional challenge.

[1] Section 96(1) deals with the conduct of Cabinet members and Deputy Ministers. It states that "[m]embers of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation."

[2] 71 of 2008.

Litigation history

High Court: initial review application and constitutional challenge

[4] On 31 July 2019, the President applied to the Gauteng Provincial Division of the High Court, Pretoria (High Court), for extensive relief against the Public Protector, including reviewing and setting aside findings and remedial actions the Public Protector made in a report she rendered against the President. That report, number 37 of 2019/2020 and bearing the title "Report on an investigation into a violation of the Executive Ethics Code through an improper relationship between the President and African Global Operations (AGO), formerly known as BOSASA" (the Report), was released by the Public Protector on 19 July 2019. One of the key findings in the Report was that the President had breached his duties under the Code, in that, among other things, he had failed to disclose donations that had been made to an internal party-political campaign that supported his election as President of the African National Congress (ANC), commonly known as "the CR17 campaign".

[5] The Speaker of the National Assembly and the National Director of Public Prosecutions joined as applicants in that review application, while the Public Protector and the Economic Freedom Fighters (the EFF), a political party represented in the National Assembly, opposed the relief sought.

[6] On 6 November 2019, amaBhungane applied to intervene as a party or to be admitted as amicus curiae in the review application. It indicated in its intervention application that, if permitted to intervene, the following relief would be sought:

> "1. In the event that the Executive Ethics Code, 2000 ('the Code') is held not to require the disclosure of donations made to campaigns for positions within political parties:
>
> 1.1 It is declared that the Code is unconstitutional, unlawful and invalid to this extent."

[7] The basis for this relief, contended amaBhungane, was that "the Code . . . fails to meet the obligations imposed by the Constitution and the [Ethics Act] and/or is unconstitutionally and impermissibly vague". AmaBhungane thus brought a constitutional challenge to the Code by way of a conditional counter-application through an application to intervene in the review proceedings. The application was conditional on the interpretation placed on the Code and, more particularly, whether the Code required members of the executive to make disclosure of donations made to internal party-political campaigns.

[8] The High Court granted amaBhungane leave to intervene; and any party wishing to file an affidavit in answer to the relief sought by amaBhungane in the review application, was granted leave to file such affidavit. The President elected not to file an answering affidavit in response to the conditional constitutional challenge.

[9] The High Court granted the President's application to review the findings in the Report, including the finding that he had breached the Code by failing to disclose donations to the CR17 campaign. The High Court, however, dismissed amaBhungane's conditional counter-application on the basis that its constitutional challenge had not been properly raised and without determining the merits of that challenge.[3] Strangely though, nothing was said in the High Court's order about the relief sought by amaBhungane, but in its judgment, after describing amaBhungane's case as compelling, that Court dismissed the challenge as not having been properly raised.

This Court: initial review and constitutional challenge

[10] Having granted leave, on appeal, this Court dismissed the Public Protector's appeal and remitted amaBhungane's constitutional challenge to the High Court.[4] This Court held that the High Court ought to have considered the constitutional challenge on its merits as it was properly before that Court. This Court refrained from

[3] *President of the Republic of South Africa v Public Protector* 2020 (5) BCLR 513 (GP) (High Court judgment).

[4] *Public Protector v President of the Republic of South Africa* [2021] ZACC 19; 2021 (6) SA 37 (CC); 2021 (9) BCLR 929 (CC) (review judgment).

saying anything at all about the constitutional validity of the Code, mindful that this issue would still have to be decided by the High Court upon remittal.

Full Court: constitutional challenge to the Code

[11] At the directive of the Judge President of the Gauteng Provincial Division, a Full Court was constituted to hear amaBhungane's challenge to the constitutional validity of the Code.[5] The President again did not file any answering papers in response to this constitutional challenge. Legal argument was, however, presented on his behalf in opposition to the constitutional challenge. None of the other parties who were part of the review application in the High Court and the subsequent appeal to this Court played an active role in this second round of litigation on remittal to the High Court.

[12] The Full Court upheld the constitutional challenge and declared the Code unconstitutional and invalid. It granted an order as follows:

> "1. It is declared that the Executive Ethics Code, published under Proclamation No. R41 of 2000, is unconstitutional, unlawful and invalid insofar as it does not require the disclosure by Members who are subject to the Code of donations made to campaigns for their election to positions within political parties.
> 2. The declaration of invalidity shall have no retrospective effect and shall be suspended for a period of 12 months to allow for the defect to be remedied.
> 3. The respondent is directed to pay the applicant's costs, which are to include those of two counsel, one being Senior Counsel."

This Court: constitutional challenge to the Code

AmaBhungane's submissions

[13] According to amaBhungane, the legal question is whether the Code is constitutionally compliant in the manner in which it deals with the disclosure of donations to campaigns for positions within political parties. AmaBhungane explains

[5] *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] 1 All SA 706 (GP) (Full Court judgment).

that the relief is forward-looking and emphasises that its challenge is whether in future Ministers, Deputy Ministers and Members of the Executive Council (MECs) will be required to make public disclosure of donations made to campaigns for their election to internal party positions. The relief does not seek to reach into the past and will thus not prejudice any of the Ministers, Deputy Ministers or MECs who made disclosures in terms of the current Code, as they did so in accordance with the then extant Code.

[14] AmaBhungane contends that the provisions of the Executive Members' Ethics Act[6] (Ethics Act) require that the Code must ensure that members of the executive do not place themselves in positions that may compromise their ability to discharge their duties without any undue influence – including accepting undisclosed financial contributions. It is further submitted that section 2(2)(c) of the Ethics Act plainly requires that the Code cast a wide net in relation to the financial interests that a member of the executive may possibly have. It does this by providing that the Code must require members of the executive to disclose *all* of their financial interests on assumption of office and *any* financial interests after assumption of office. That section enumerates the type of financial interests that the disclosure should include. Consistent with the wide net the section seeks to cast, it provides that disclosure should not only be of the member concerned, but it should also be of persons within their family or others who may have a familial or close connection with that member. AmaBhungane contends that the breadth of these duties is confirmed when one considers South Africa's international law obligations with reference to Article 18 of the United Nations Convention Against Corruption.[7]

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[6] 82 of 1998.

[7] South Africa ratified the United Nations Convention Against Corruption on 22 November 2004. Article 18 of that Convention provides:

> "Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;
>
> (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order

[15] AmaBhungane further submits that the very point of the disclosure required in paragraphs 5 and 6 of the Code is to allow political parties, the media and the public to know which persons or entities are providing private financial support or benefits to those who hold public office. AmaBhungane stresses that this transparency is essential in order to guard against potential corruption, conflicts of interest and the like. It further contends that, to the extent that the Code does not require the disclosure of all donations made to campaigns for positions within political parties for the benefit of members of the executive, this breaches sections 1, 7(2), 19, 32, 96 and 195 of the Constitution; and it breaches the Ethics Act.

[16] AmaBhungane also submits that the imperative of section 7(2) of the Constitution, that requires the state to "respect, protect, promote and fulfil the rights" contained in the Bill of Rights, starkly illustrates the obligations on the state. The provisions of section 96, read with section 2(1) of the Ethics Act, and taking into account the provisions of Article 7(3) of the United Nations Convention Against Corruption,[8] confirm these obligations. Furthermore, amaBhungane submits that there are two added dimensions in the present case: the right to make political choices and to vote (section 19 of the Constitution); and the right of access to information (section 32 of the Constitution). As held by this Court in the review judgment, the Code only requires disclosure where there is a personal benefit to the Minister, Deputy Minister or MEC. This partial disclosure obligation, contends amaBhungane, is manifestly insufficient to meet the relevant constitutional and statutory obligations as it permits members of the executive to avoid having to make disclosure by structuring their campaign funding in such a way that it falls outside the personal benefit requirement.

> that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage."

[8] Article 7(3) of the Convention requires states to—

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

[17] In invoking *My Vote Counts II*,[9] amaBhungane contends that this Court has made plain that the reasons for requiring mandatory disclosure of party political funding donations are to enable members of the public to properly and meaningfully exercise their constitutional rights, and to act as a bulwark against corruption. AmaBhungane submits that neither of these aims can be achieved when members of the executive can structure their campaigns to avoid disclosure. It further submits that if the Code is to meet the obligation set by section 2(1) of the Ethics Act, to prescribe rules "promoting open, democratic and accountable government", it must require disclosure of all donations, whether personally beneficial or otherwise, made to internal campaigns within political parties.

[18] AmaBhungane submits that the Code is vague as it is extraordinarily difficult to know in advance when a member of the executive will have to disclose donations. It submits that this is a serious problem, not only for Parliament as it seeks to enforce the Code against Ministers, but also for the public media as they try to hold Ministers to account. AmaBhungane further submits that the vagueness of the Code in dealing with internal campaign donations assists no-one at all and undermines the very purpose of the Code. Additionally, amaBhungane points to the arbitrary manner in which the Code deals with campaign donations. It furnishes hypothetical examples of that arbitrariness.

[19] AmaBhungane emphasises that it should not matter whether the Minister, Deputy Minister or MEC ultimately wins or loses the internal party election and it also should not matter whether or not a win in the internal party election ultimately translates into more impressive executive office. AmaBhungane submits that what matters instead is that a private company is using its funds to contribute to a campaign to promote the candidacy of a particular person within party-political elections. Once that person becomes a member of the executive, the donation must be disclosed to the

[9] *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC).

public. It is only with this disclosure that the public will be "better able to detect any post-election special favours that may be given in return". And only with that disclosure will Ministers, Deputy Ministers and MECs be inclined to steer clear of "characters or entities that could influence them negatively, for the advancement of personal or sectoral interests" and thus be left "free to honour their declared priorities and constitutional obligations".

[20] Ultimately, amaBhungane submits that the Code fails to comply with the Ethics Act and the Constitution to the extent that it fails to require disclosure of all donations to internal campaigns within political parties. To this extent, the Code is unlawful, unconstitutional and invalid, as the Full Court rightly found.

[21] On the issue of an appropriate remedy, amaBhungane submits that in the circumstances, this Court is required to confirm the declaration of constitutional invalidity to the extent that the Code fails to require the disclosure of all donations made to campaigns for positions within political parties. AmaBhungane accepts that such a declaration of invalidity should have no retrospective effect. This is because national and provincial members of the executive took the Code as they found it. Therefore, it would be unfair to criticise them for not having made these disclosures under the Code as it currently stands. It also accepts that the declaration of invalidity should be suspended for 12 months to allow the President to remedy the defect, as he may deem appropriate.

Amicus Curiae: Johannesburg Society of Advocates' submissions

[22] In broad outline, the amicus submits that our Constitution contains no obligation for the public disclosure of donations made to campaigns for election to internal party positions. As a result, a failure to provide for such a requirement in legislation or subordinate legislation such as the Code does not violate the Constitution. In analysing section 2(2)(c), read with section 2(2)(b)(iv) of the Ethics Act, the amicus submits that they limit the disclosure of a member of the executive's financial interest. Section 2(2)(c) is limited to donations or financial support that is for the member of the

executive's personal interest in line with the values of transparency and in order to mitigate against the risk of corruption (as contemplated in section 2(2)(b)(iv)) and members of the executive seeking to improperly benefit their donors. This risk does not arise in instances when the member of the executive or their relatives do not benefit personally. The risk of corruption only arises when the member of the executive is aware of the persons from whom any donations and financial support is made to the member's political campaign. This can appropriately be addressed in the Code. The limitation that a disclosure need only be made when a member of the executive personally benefits from the funding of their campaign for a political party position ensures that donors or contributors are aware that their financial support would not be known to the persons they support and accordingly that they cannot ultimately improperly benefit.

[23] According to the amicus, a blanket requirement of disclosure, even when a member of the executive has prudently had their campaign run in a manner that does not allow them access to the information about specific donors and contributors to the campaign, creates an unnecessary risk of corruption because that member would end up knowing such detail, thus defeating the very purpose of the Code. A blanket disclosure exposes all members, regardless of whether they benefit personally, to a risk of improperly benefiting their private interests or the interests of their donors and such exposure is not in line with section 96 of the Constitution. This approach also safeguards the constitutional privacy rights of third parties who donate to campaigns in respect of which the member of the executive is completely unaware.

[24] On the basis of this explication of the Ethics Act, the amicus contends that the Code does not breach the Ethics Act. The ambit and purport of the disclosure requirement in the Code falls within the context, language and purpose of the Ethics Act, generally, and section 2(2)(c), read with 2(2)(b)(iv), specifically. Since the Ethics Act's constitutionality has not been challenged, that brings an end to amaBhungane's case.

[25] The amicus further subjects to close scrutiny each one of the various sections of the Constitution which amaBhungane contends is violated by the partial disclosure requirement under the Code (that is sections 1, 7(2), 19, 32, 96 and 195 of the Constitution), and submits that the challenge is devoid of merit in respect of all of them. In sum, this is because these sections do not provide for the constitutional obligation that requires public disclosure of donations made in an internal party election; and the Code does not breach the obligations set out in the respective sections.

[26] The amicus further contends that, even if a constitutional obligation exists as postulated by amaBhungane, the constitutional challenge against the Code is misdirected for the following reasons. First, the attack fails on the principle of subsidiarity and, second, the Code is not the appropriate vehicle for giving effect to the constitutional obligation. Furthermore, the amicus submits that there is no vagueness in the Code's provisions, and that its ambit and purport have been made clear by the judgments of this Court and the Full Court as far as paragraphs 5 and 6 of the Code are concerned. Those judgments have held that the Code only applies to campaign donations that constitute personal benefits. In any event, so the amicus contends, if there is a constitutional obligation for the disclosure of funding of an intra-party campaign, the proper vehicle for regulating such disclosure would be the Political Party Funding Act[10] (the PPFA). The enquiry would then be whether the PPFA fails to give effect to the constitutional obligation of disclosure. But the PPFA is not before this Court. The amicus contends that the PPFA, with suitable amendments, would be a more appropriate vehicle to cater for the regulation of disclosure as it is the legislation that specifically regulates political party funding, including donations.

[27] As to vagueness, the amicus submits that this Court has already concluded that it is not arbitrary or irrational that there is a distinction between donations made for a party candidate's personal benefit and those made for that candidate's campaign. When a donation is made without personally benefitting the candidate, and thus not creating a

[10] 6 of 2018.

risk of a conflict of interest or of a candidate seeking to improperly benefit the donor, it is not arbitrary for that donation to not be disclosed. The candidate would also not know of the donation. It is thus not irrational that Ministers, Deputy Ministers and MECs should not know who donates to their campaigns. Ensuring that they are not informed of the details and the amounts of the donations they receive would avoid the risk of conflict and patronage. To require disclosure in the manner sought by amaBhungane would compel Ministers, Deputy Ministers and MECs to know who has supported them. It is not arbitrary for the Code to seek to avoid this risk.

[28] According to the amicus, the wording of paragraphs 5 and 6 of the Code fits well with this Court's interpretation, as supported by the Full Court. The wording of the provisions properly recognises and gives effect to the purport of section 2 of the Ethics Act. The persons to whom the Code applies and for whose benefit it was promulgated can reasonably ascertain the meaning of paragraphs 5 and 6 of the Code. There is reasonable certainty about the meaning of the Code especially in the light of this Court's judgment; and it is plain when campaign donations will be exempt from disclosure and when not. The Code is thus written in a clear and accessible manner and is not in breach of the rule of law.

[29] In respect of jurisdiction, the amicus accepts that the matter is properly before this Court for the confirmation of the Full Court's order of constitutional invalidity. On the merits, ultimately, the amicus submits that amaBhungane's application is impermissible, unwarranted and unfounded and this Court ought to dismiss the application for confirmation, set aside the Full Court's order and substitute it with one dismissing amaBhungane's application.

Jurisdiction and leave to appeal

[30] These are proceedings for confirmation of a declaration by the High Court that conduct of the erstwhile President is constitutionally invalid. The Code was published under Proclamation No. R41 of 2000 by the then President in terms of section 2 of the Ethics Act. Section 172(2)(a) of the Constitution provides that a declaration that

conduct of the President is constitutionally invalid has no force unless confirmed by this Court. Therefore, as the publication of the Code by the President is conduct of the President, no leave to appeal is required, given the peremptory wording of the section. But it remains this Court's decision whether confirmation should follow – that is not a mere rubberstamping, mechanical exercise.[11]

Evaluation

The legislative framework

[31] A useful starting point is the legislation that finds application here, commencing with the provisions of the Constitution. It is instructive that in respect of suffrage, section 1(d) of the Constitution outlines as central founding values: "[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure *accountability, responsiveness and openness"*.[12] Section 7(2) of the Constitution refers to the state's positive duty to "respect, protect, promote and fulfil the rights in the Bill of Rights". Section 19 provides for citizen's

[11] In *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 8, this Court held:

> "Section 172(2) confirmation proceedings are not routine, for it does not follow that High Court findings of constitutional invalidity will be confirmed as a matter of course. This Court is empowered to confirm the High Court order of constitutional invalidity only if it is satisfied that the provision is inconsistent with the Constitution. If not, there is no alternative but to decline to confirm the order. It follows that a finding of constitutional invalidity by a High Court does not relieve this Court of the duty to evaluate the provision of the provincial Act or Act of Parliament in the light of the Constitution. A thorough investigation of the constitutional status of a legislative provision is obligatory in confirmation proceedings. This is so even if the proceedings are not opposed, or even if there is an outright concession that the section under attack is invalid."

[12] Emphasis added.

political rights.[13] Section 32 makes provision for the right of access to information.[14] Section 96 regulates the conduct of Cabinet members and Deputy Ministers.[15] Lastly, section 195 deals with public administration.[16] All these constitutional provisions have an important bearing on the context and purpose of the Ethics Act and the Code.

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[13] Section 19 provides:

> "(1) Every citizen is free to make political choices, which includes the right—
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> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[14] Section 32 reads:

> "(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."

[15] Section 96 provides:

> "(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
>
> (2) Members of the Cabinet and Deputy Ministers may not—
>
> (a) undertake any other paid work;
>
> (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
>
> (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

[16] Section 195(1) and (2) read:

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

[32] Due to its importance, the relevant provisions of the Ethics Act bear close scrutiny. The Ethics Act is the legislation contemplated in section 96(1) of the Constitution. Section 2 reads:

"**Code of Ethics**

2(1) The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.

(2) The code of ethics must—

(a) include provisions requiring Cabinet members, Deputy Ministers and MECs—

(i) at all times to act in good faith and in the best interest of good governance; and

(ii) to meet all the obligations imposed on them by law; and

(b) include provisions prohibiting Cabinet members, Deputy Ministers and MECs from—

(i) undertaking any other paid work;

(ii) acting in a way that is inconsistent with their office;

(iii) exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;

(f) Public administration must be accountable.

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

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—

(a) administration in every sphere of government;

(b) organs of state; and

(c) public enterprises."

(iv) using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person; and

(v) acting in a way that may compromise the credibility or integrity of their office or of the government.

(c) require Cabinet members and Deputy Ministers to disclose to an official in the office of the President designated for this purpose, and MECS to disclose to an official in the office of the Premier concerned designated for this purpose—

(i) all their financial interests when assuming office; and

(ii) any financial interests acquired after their assumption of office, including any gifts, sponsored foreign travel, pensions, hospitality and other benefits of a material nature received by them or by such persons having a family or other relationship with them as may be determined in the code of ethics; and

(d) prescribe that the financial interests to be disclosed in terms of paragraph (c) must at least include the information, and be under the same conditions of public access thereto, as is required by members of the National Assembly as determined by that House from time to time, but may prescribe the disclosure of additional information.

(3) The code of ethics may prescribe any matter that may be necessary for the effective implementation of the code of ethics."

[33] The Public Protector is empowered, in section 3 of the Ethics Act, to investigate breaches of the Code when a complaint is made in terms of section 4.[17] When the complaint relates to a Minister, Premier or a Deputy Minister, the Public Protector must report on her investigation to the President and if it relates to an MEC, she must report to the Premier concerned.[18] The President must submit a copy of the report on the Minister or Deputy Minister and any comments thereon, together with a report on any action to be taken in regard thereto, to the National Assembly.[19] The President must, after receiving a report on a Premier, submit a copy of the report and any comments

[17] Section 3(1) of the Ethics Act.

[18] Section 3(2)(a) and (b) of the Ethics Act.

[19] Section 3(5)(a) of the Ethics Act.

thereon to the National Council of Provinces.[20] The Premier must submit a copy of the report on an MEC and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature.[21]

[34] Paragraphs 5 and 6 of the Code are also of relevance here. Paragraph 5 reads:

> "5.1 Every member must disclose to the Secretary particulars of all the financial interests, as set out in paragraph 6, of—
>
> (a) the member; and
>
> (b) the member's spouse, permanent companion or dependent children, to the extent that the member is aware of those interests.
>
> 5.2 The first disclosure must be made within 60 days after the promulgation of this Code or of a member's assumption of office, or of a member becoming aware of such interest, as the case may be.
>
> 5.3 After the first disclosure, members must annually disclose particulars of their financial interests on or before a date determined by the Secretary.
>
> 5.4 Cabinet members and Deputy Ministers who are members of the National Assembly and are required to disclose particulars of their financial interests in terms of the Rules of Parliament, comply with paragraph 5.1—
>
> (a) by submitting to the Secretary a copy of those particulars on the same date as they are filed with the relevant parliamentary official; and
>
> (b) insofar as those particulars do not meet the requirements of paragraph 6 of this Code, by filing with the Secretary a statement containing the necessary additional disclosure.
>
> 5.5 Where any doubt exists as to whether particular financial interests must be disclosed, the member must consult the Secretary.
>
> 5.6 When a member makes a disclosure in terms of paragraph 5.1, the member must confirm in writing to the Secretary that the member receives no remuneration other than as a member of the Executive."

[35] Paragraph 6 provides for the disclosure of financial interests in the following terms:

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[20] Section 3(5)(b) of the Ethics Act.

[21] Section 3(6) of the Ethics Act.

"Members must disclose the following interests and details—

. . .

6.2 Sponsorships—

(a) The source and description of direct financial sponsorship or assistance from any source other than the member's party which benefits the member in his or her personal and private capacity; and

(b) the amount or value of the sponsorship or assistance.

6.3 Gifts and hospitality other than that received from a spouse or permanent companion or family member—

A description, including the value and source of—

(a) any gift with a value of more than R350;

(b) gifts received from a single source which cumulatively exceed the value of R350 in any calendar year;

(c) hospitality intended as a personal gift and with a value of more than R350; and

(d) hospitality intended as a gift and received from a single source, and which cumulatively exceeds the value of R350 in any calendar year.

6.4 Benefits—

(a) The nature and source of any other benefit of a material nature; and

(b) the value of that benefit.

. . .

6.6 Land and immovable property, including land or property outside South Africa—

(a) A description of and the extent of the land or property;

(b) area in which it is situated; and

(c) nature and value of interest in the land or property."

[36] As always, in interpreting any statutory provision, one must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution.[22] This is a unitary exercise.[23] The context may be

[22] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[23] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 52.

determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located.[24] Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.[25]

[37] The wide wording in section 2(2)(c) of the Ethics Act is telling, but not decisive. The legislature employs the words "all their financial interests when assuming office" in section 2(2)(c)(i), and "any financial interests acquired after their assumption of office" in section 2(2)(c)(ii), in relation to the duty upon members of the executive to disclose. This capacious ambit is extended further in the latter instance, after enumerating various types of financial interest by: first, adding the words "and other benefits of a material nature received"; and second, by including the receipt of such benefits beyond the member concerned ("or by such persons having a family or other relationship with them as may be determined in the code of ethics"). This wording appears to denote an unquestionably wide reach; and it appears to do so calculatedly.

[38] Placed in context, the purpose of the wide-ranging provisions of the Ethics Act is to ensure that members of the executive do not place themselves in compromising positions that may impair their ability to discharge their duties without any undue influence, which includes the acceptance of undisclosed financial contributions. Central to this objective is the fight against the endemic corruption that pervades our body politic. For, as this Court cautioned in *My Vote Counts II*:

> "Public- and private-sector corruption is a matter of grave concern around the world. And it appears that the political landscape, and by extension governance, has not been left untouched. . . . [C]orruption that flows from secret private funding could otherwise

[24] *AfriForum v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) at para 43.

[25] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para18, cited with approval in, amongst others, *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 64.

> stealthily creep into our political and governance space, toxify it and fossilise itself to our detriment, if it has not already done so."[26]

[39] That caveat must be understood against the backdrop of the requirement on the state, including the President, to take reasonable measures to combat and prevent corruption. That requirement is imposed by section 7(2) of the Constitution and explained in *Glenister II*:

> "Endemic corruption threatens the injunction that government must be *accountable, responsive and open*; that public administration must not only be held to account, but must also be governed by high standards of *ethics*, efficiency and must use public resources in an economic and effective manner."[27] (Emphasis added.)

[40] The constitutional requirement in section 96 for the enactment of legislative measures to establish a code of ethics for Cabinet members and Deputy Ministers that regulate their conduct, assumes particular importance when considered against our country's international obligations. Those obligations relate to the need to comply with Article 18 of the United Nations Convention Against Corruption, ratified here on 22 November 2004.[28] In addition, the African Union Convention on Preventing and Combatting Corruption[29] (AU Convention) pertinently acknowledges in its preamble that "corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent". The preamble to the Southern African Development Community Protocol against Corruption (SADC Corruption Protocol) refers to "the adverse and destabilising effects of corruption throughout the world on the culture, economic, social and political foundations of society", and recognises that "corruption undermines good governance which includes

[26] *My Vote Counts II* above n 9 at para 4.

[27] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 176.

[28] Above n 8.

[29] The AU Convention was adopted on 11 July 2003. South Africa signed the Convention on 16 March 2004, ratified the Convention on 11 November 2005 and it entered into force on 5 August 2006.

the principles of accountability and transparency".[30] Domestically, the preamble to the Prevention and Combating of Corrupt Activities Act[31] strikingly records that corruption and related corrupt activities undermine rights; the credibility of governments; the institutions and values of democracy; and ethical values and morality; and jeopardise the rule of law. They endanger the stability and security of societies; jeopardise sustainable development; and provide a breeding ground for organised crime. The preamble notes further that corruption is a transnational phenomenon that crosses national borders and affects all societies and economies; that it is equally destructive within both the public and private spheres of life; and that regional and international co-operation is essential to prevent and control corruption and related crimes.

[41] In *Glenister II*, this Court extensively explicated on the state's international commitments and obligations in section 7(2) of the Constitution, to combat and prevent corruption. It said, albeit in the context of the need to establish an independent anti-corruption unit, but equally relevant here:

> "The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the State to fulfil it in the domestic sphere. In understanding how it does so the starting point is section 7(2), which requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the State and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection'. Implicit in section 7(2) is the requirement that the steps the State takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective.
>
> And since in terms of section 8(1), the Bill of Rights 'binds the legislature, the executive, the judiciary and all organs of State', it follows that the executive, when

[30] The SADC Corruption Protocol was signed by the Heads of State of all 14 SADC member states on 14 August 2001. South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.

[31] 12 of 2004.

> exercising the powers granted to it under the Constitution, including the power to prepare and initiate legislation, and in some circumstances Parliament, when enacting legislation, must give effect to the obligations section 7(2) imposes on the State.
>
> Now plainly there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the State, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable.
>
> . . .
>
> [C]orruption in the polity corrodes the rights to equality, human dignity, freedom, security of the person and various socio-economic rights. That corrosion necessarily triggers the duties section 7(2) imposes on the State. We have also noted that it is open to the state in fulfilling those duties to choose how best to combat corruption. That choice must withstand constitutional scrutiny."[32]

[42] Concomitant with the need to enact legislation to fight corruption, is the need to regulate the funding of candidates and political parties by legislative means. This is premised on both international and domestic obligations. Internationally, there is the obligation imposed by Article 7(3) of the United Nations Convention Against Corruption to enact legislative measures for enhanced transparency in respect of the individual candidatures for public office and the funding of political parties. Domestically, section 19 of the Constitution affords citizens the right to make political choices, including the right to vote in elections. Those rights must be exercised meaningfully on an informed basis. In *My Vote Counts II*, this Court explained:

> "By its very nature, the proper exercise of the right to vote is largely dependent on information. . . . There is wide coverage of electoral campaigns on all media platforms and they are fundamentally about sharing information so that the electorate know more about those public office seekers.

[32] *Glenister II* above n 27 at paras 189-191 and para 200.

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

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

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

Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation's strategic objectives, sovereignty and ability to secure a 'rightful place' in the family of nations. Our freely elected representatives must thus be so free that they would be able to focus and deliver on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivation.

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

> would be enabled by a regime that compels a disclosure of information on the private funding of political players."[33] (Footnotes omitted.)

[43] Closely related to the rights contained in section 19, is section 32(1)(b) of the Constitution which provides that everyone has the right of access to any information "that is held by another person and that is required for the exercise or protection of any rights". Informed decisions by voters as envisaged in *My Vote Counts II* must be based on adequate information, including that gleaned in connection with internal political party campaign funding. Before undertaking closer scrutiny of the relevant provisions of the Ethics Act and the Code to explain this observation, it is necessary to have regard to this Court's judgment in the preceding litigation, the review judgment, as well as that of the Full Court, pursuant to this Court's review judgment.

This Court's judgment in the review application

[44] This Court heard argument on two distinct issues in the main review application.[34] First, it had to interpret the Code to decide the issues on review as between the President and the Public Protector. Second, this Court had to consider the constitutionality of the Code, as raised by amaBhungane. It decided the first issue in favour of the President. In light of its decision to remit that part of the case to the High Court for hearing, this Court did not make any pronouncements on the constitutionality of the Code. That is the issue now before us.

[45] The central feature of this Court's judgment in interpreting the Code is that not all donations made towards internal campaigns for election to political party positions are disclosable under the Code. This Court held that "[u]nder the Code, the duty to disclose is activated once a benefit is given to a member of Cabinet *in his or her personal capacity*".[35] This finding was repeated several times throughout the judgment.

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[33] *My Vote Counts II* above n 9 at paras 37-42.

[34] Review judgment above n 4 (emphasis added).

[35] Id at para 80.

[46] The Court dismissed, in no uncertain terms, the EFF's submissions that the President could not avoid disclosure by wilfully remaining ignorant of donations made to the CR17 campaign:

> "The issue is not whether the President deliberately kept himself ignorant of matters he was required to disclose. Instead, the question is whether there was proof that he personally benefited from the CR17 campaign donations. The EFF did not point to any evidence on record which established that the President *benefitted in his personal capacity* because such evidence was not placed on record. It does not exist.
>
> Without proof of that kind, it cannot be said that the President failed to disclose benefits he was under a duty to disclose. It bears emphasis that there must first be a benefit to a member of Cabinet for him or her to be obliged to make a disclosure in terms of the Code. In the absence of proof of a *personal benefit* to the President, the High Court concluded that he did not fail to make a disclosure.
>
> In the entire report the Public Protector has not even once referred to any evidence that indicates that the President *benefitted personally* from the CR17 campaign donations. The absence of such evidence was expressly raised in the representations made by the President in response to the interim report."[36] (Emphasis added.)

[47] This Court pointed out:

> "In the final paragraph of the Public Protector's reasoning quoted above, she suggests that the President received donations which he was obliged to disclose under the Code and the [Ethics] Act. This is a finding made without a shred of evidence supporting it. On the contrary, the evidence placed before the Public Protector which is also reflected in the report, establishes that the President did not receive donations. Therefore, the argument advanced by the President was in line with the evidence on record. On the basis of the undisputed evidence, *it was the CR17 campaign that received donations and not the President*.
>
> It is a leap in logic to hold that the President *personally benefitted* from the donations made to the CR17 campaign. That campaign, on the undisputed evidence, existed separately from the President. And there was no evidence that it was appointed to act

[36] Id at paras 81-83.

> as his agent. There is therefore no basis in law to regard donations to the CR17 campaign as *personal benefits* to the President."[37] (Emphasis added.)

[48] This Court rejected "the contention that the President personally benefitted from donations made to the CR17 campaign because one of the campaign's objectives was to promote his candidacy to becoming President of the ANC, a step towards becoming President of the country", holding that "the contention rests on a number of assumptions that are without factual and legal foundation".[38] In sum, this Court's review judgment imposes only a partial disclosure obligation on members of the executive. That obligation only arises when a member derives personal benefits from campaign donations.

[49] To be clear, the limited disclosure this Court referred to was based on the interpretation it was required to give to the Code in its current form – this Court was not called upon to test the constitutionality of the Code at all. This Court therefore was not required to nor did it endorse the acceptance of this partial disclosure.

Full Court proceedings regarding the constitutional challenge to the Code

[50] The Full Court identified the issues before it as follows:

> "15.1. According to the Constitutional Court, does the Code impose a duty to disclose private internal party-political funding for Members of the Executive?
> 15.2. If there is a partial duty to disclose, is amaBhungane's constitutional challenge triggered, or is it non-suited in view of the nature of the condition upon which the challenge is based?
> 15.3. If amaBhungane is not non-suited, and the constitutional challenge is properly before the High Court, is the Code, as interpreted by the Constitutional Court, unconstitutional?"[39]

[37] Id at paras 87-88.

[38] Id at para 90.

[39] Id at para 15.

[51] Broadly speaking, amaBhungane's constitutional challenge before the Full Court was founded on the following central premises emanating from the Constitution – that section 1(d) recognises that accountability, responsiveness and openness are core values of our democracy. The related constitutional need for ethical government is recognised in section 96, which requires the adoption of a code of ethics, and which prohibits members of the executive arm of Government from exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests. The disclosure of such information facilitates transparency and openness, and is consistent with the right of access to information held by both public and private persons as outlined in section 32(1) of the Constitution. It also enhances the right to make political choices, both for persons involved in the internal activities of their chosen political party and, more broadly, for all members of the public who have the right to participate in national elections, which rights are guaranteed in section 19 of the Constitution.[40]

[52] AmaBhungane developed its argument before the Full Court by contending that, on this Court's interpretation of the Code in the review judgment, the duty to disclose is partial in effect, applying only to campaign donations that constitute personal benefits. AmaBhungane argued that a partial disclosure obligation to this limited extent undermines the constitutional imperatives of accountability, openness and transparency, in that it permits members of the executive to avoid having to make disclosure by structuring their campaign funding in such a way that it falls outside the "personal benefit" contours laid down by this Court.

[53] The President, on the other hand, contended that absent an unqualified finding by this Court in the review judgment - that disclosure of donations to campaigns for positions within political parties are not, under any circumstances, disclosable under the Code - the conditionality of amaBhungane's counter-application was not met. Thus, the Full Court should not consider the merits of the constitutional challenge.

[40] Full Court judgment above n 5 at para 30.

[54] Regarding the merits, the President contended that the standard of personal benefit adopted and applied by this Court in the review judgment is broad enough to meet what the Constitution requires. According to the President, actual money received is not necessary to constitute a benefit for purposes of triggering the duty to disclose. The President contended that, by and large, most campaign donations for internal party-political elections will be disclosable under the Code as it exists on this basis. The vast majority of such donations, he suggested, will fall into the category of constituting a personal benefit for the member concerned, and there is no need to change the Code to deal with what he described as "outliers", as exemplified by the CR17 campaign. Implicit in this submission is the notion that the Code in its present form is a reasonable and effective measure for achieving accountable, transparent and open government required by the Constitution and to guard against the risk of corruption.

[55] The Full Court, in considering this Court's review judgment, held that the judgment established that the duty to disclose arises when any benefit, including that derived from campaign funding for a member's internal party-political campaign, is given to her in her personal capacity. In terms of the Full Court's analysis of this Court's review judgment, it is clear that this Court did not find that members are under an automatic duty to disclose all internal party-political campaign funding linked to them. This means that there will be instances where such funding will not give rise to a duty to disclose. To this extent, the question arises as to the constitutionality of the inherent limitations of the Code and whether the condition set by amaBhungane for its application was satisfied. The President's contention to the contrary was consequently rejected.

[56] In a careful analysis of this Court's findings in its review judgment, the Full Court explained the effect of those findings on the Code's meaning:

> "24. If one turns these findings around, it seems that the Constitutional Court recognised that benefits would be personal to a Member, and attract a duty to disclose under the Code where:

> 24.1. the benefits are financial, rather than politically beneficial;
>
> 24.2. the benefits are given to, or held or used by the Member directly;
>
> 24.3. alternatively, even if not given to, or held or used directly by the Member, she or he has control over, or a claim to the funding;
>
> 24.4. further alternatively, the campaign structure receiving the funding acts as the Member's agent.
>
> 25. This means that financial donations to a campaign in support of a Member's election to a position in his or her own party are not *per se* disclosable under the Code. Equally, however, they are not *per se* exempt from disclosure. If, on a consideration of factors such as those highlighted in the Constitutional Court's judgment, the donations can be categorised as a personal benefit, there is a duty on a Member to make disclosure of them under the Code. The reason why the CR17 donations did not attract a duty to disclose under the Code is that, on the facts before the Court, they lacked the characteristics necessary to establish them as personal benefits."[41]

[57] This leads me to an assessment of the impugned provisions and the central issue.

Is the Code constitutional?

[58] At the centre of the debate before us is the meaning and effect of section 2(2)(c) of the Ethics Act and the obligation on members of the executive to disclose financial interests. Section 2(2)(c) sets out two obligations. The first is to disclose "all their financial interests when assuming office"; and the second is to disclose "any financial interests acquired after their assumption of office". A non-exhaustive list (denoted by the word "including") then follows. As stated, the use of the words "all" and "any", and their apparent wide reach, must not be overstated as if they provide a final, definitive answer to the issue before us. Equally, nothing turns on the listing of types of financial interest in section 2(2)(c)(ii) or differentiating the types of financial interest that require disclosure before and after assuming office. That exposition simply

[41] Full Court judgment above n 5 at paras 24-25.

enumerates some of the types of interest that require disclosure after assuming office. It does not purport to be a closed list.

[59] Answering the central question here requires an interpretation of "financial interests" in section 2(2)(c). The question arises whether such interests include campaign contributions made on an arms-length basis to an entity that the office holder neither controlled, ran nor had knowledge of the identities of contributors. AmaBhungane says that it is wide enough; the amicus says it is not. In addition to those submissions, it was questioned whether this Court has determined that question in its review judgment. In respect of the latter, as stated, the answer must unequivocally be in the negative. This Court, having decided the central issue before it, deliberately refrained from making any finding at all about the constitutional validity of the Code, mindful that this issue would still have to be decided by the High Court upon remittal. This Court did not decide what the relevant provisions of the Ethics Act mean and whether the Code is consistent with the Ethics Act. Section 2(2)(c)(ii) of the Ethics Act must plainly be interpreted to go further than the Code by its inclusion of the words "any financial interest". This aspect is fundamental to the central question before us.

[60] A close scrutiny of the legislation suggests that determining whether an office holder has a financial interest in campaign funding raised to secure appointment to a party office simply on the basis of whether the entity that raised the donations is a separate entity from the office holder and the office holder does not control that entity, provides no answer to the central question. Drawing an analogy with a trust – where the office holder is a beneficiary of that trust, a financial interest on the part of the office holder arises, even though the trust and its assets are entirely separate from the office holder who, as beneficiary, exercises no control over the trust. By parity of reasoning, if funding is raised through an entity that is separate from the office holder but which benefits the office holder by supporting her bid for party office, that benefit constitutes a financial interest. This is akin to a *stipulatio alteri* (an agreement for the benefit of a third party). The benefit flowing from that kind of agreement gives rise to a financial interest that would be subject to disclosure. This is in essence what is meant by "other

benefits of material nature received by them". Thus, once the office holder had knowledge of the campaign to raise funds and was willing to allow the entity involved to do so, the office holder accepted the benefits of the campaign funding and the funding then forms part of "their financial interest".

[61] In the normal course of events, a candidate running for office requires funding for her campaign. If that campaign is launched and run with the knowledge or blessing of the candidate, then it can hardly be denied that she accepts the benefit of what is done and that she receives the benefit of the funding for her campaign, thus a financial interest arises. It matters not that the office holder's funding campaign is run through a separate entity and is not controlled by the office holder or that the office holder is ignorant as to the identity of those who have given; so long as the benefit is accepted, it is a financial interest that is subject to disclosure.

[62] During the hearing, the amicus raised the question whether third parties who raised money to promote a candidate, without donating to the candidate or his campaign, could be said to give rise to a financial interest. That would be an exceptional, borderline case that need not be decided on the facts before us. It is common cause that an extensive campaign was run for the benefit of the President to raise funding for his campaign to be elected President of the ANC. On the common cause or uncontroverted facts, the campaign ran completely separately from the President, it did not act as his agent, there was no evidence that he had himself received any donations and he had control over the funds. These factors weighed heavily with this Court in its ultimate finding in the review judgment that the President did not receive a disclosable benefit. That finding and its underlying reasoning will be discussed presently to consider their effect on this case.

[63] I have alluded to the Full Court's meticulous reasoning in its assessment of the meaning of this Court's primary findings in the review judgment. That line of reasoning and consequent findings can hardly be faulted and are in my view unassailable. There can be no quarrel with its conclusion that "financial donations to a campaign in support

of a member's election to a position in his or her own party are not *per se* disclosable under the Code. *Equally, however, they are not per se exempt from disclosure*".[42]

[64] The need for transparency in campaign donations must be understood against the backdrop of and in the context of the pressing need to curb and strive towards eradicating corruption. It is necessary to return briefly to *My Vote Counts II.* The principles enunciated there are of importance in this case. The vital role played by an automatic requirement for disclosure in combatting corruption was highlighted. This Court held that the right to access to information, read with the entitlement to exercise an informed right to vote, implicitly demanded that information on the private funding of political parties and independent candidates be recorded, preserved and made reasonably accessible to the public. The Court highlighted the centrality of information to the electoral process and warned against political candidates being able to decide what information should be made available to voters.

[65] As I read *My Vote Counts II*, this Court plainly established the constitutional standard of transparency, which the Code, in my view, in its current form fails to meet. It appears to me that "any financial interest" must be interpreted broadly to include all donations, not just those giving rise to a personal benefit. The requirement in section 39(2) of the Constitution that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights" must lead to this conclusion. In light of section 39(2) of the Constitution, sections 1(d), 7(2), 19, 32, 96 and 195 of the Constitution must, therefore, be relevant when interpreting section 2(2)(c)(ii) of the Ethics Act. To interpret the Ethics Act narrowly in the way advocated by the amicus, would go against constitutional imperatives and undermine transparency. The Ethics Act ought to be interpreted purposively. The amicus conceded that transparency was frustrated by the Code. The amicus also accepted that

[42] Full Court judgment above n 5 at para 25 (emphasis added).

the Code would be constitutionally deficient if "any financial interest" were not to be interpreted broadly by this Court as submitted by amaBhungane.

[66] The partial disclosure obligation imposed by this Court's review judgment on the basis of the Code as it stands, is clearly insufficient to meet the relevant constitutional and statutory obligations. It permits Ministers and MECs to avoid having to make disclosure by structuring their campaign funding in such a way that it falls outside the "personal benefit" requirement outlined by this Court. On that approach, the disclosure obligation can be easily evaded by the member of the executive through the setting up of a separate legal entity to collect donations to support her campaign, and by an arms-length relationship with that entity by ensuring that she exercises no control over the funds and does not receive it directly. This would plainly undermine the constitutional and statutory obligations outlined. The amicus' contention that the ambit and purport of the disclosure requirement in the Code falls within the context, language and purpose of the Ethics Act, generally, and section 2(2)(c), read with section 2(2)(b)(iv), specifically and that the Code does not breach the Ethics Act, cannot be sustained. Furthermore, its submission that there is no constitutional obligation for public disclosure of donations made to campaigns for election to internal party positions and that, as a result of a failure to provide for such a requirement in legislation or subordinate legislation such as the Code is not a violation of the Constitution, also falls to be dismissed.

[67] Ultimately, the question is about the source of the money and the party who benefits, personally or otherwise. The structures through which the money flows and the walls that may be erected hardly matter. In the fight against corruption it is the connection between the source and the beneficiary that matters and the optics are just as important.

[68] In *My Vote Counts II,* this Court pointed out:

> "The loophole or leeway 'not to hold' or not to preserve information, and the consequential non-disclosure of information relating to private funding or quantifiable support in kind, constitutes fertile ground for undermining or even subverting the real 'will of the people' that is expressible through voting."[43]

[69] This is precisely the effect that the shortcomings of a partial disclosure obligation would have.

[70] In summary – the Code falls short of constitutional and statutory dictates of transparency, accountability and openness. The exclusion from disclosure of donations for internal party elections undermines the Ethics Act and the conflict of interest regime that is essential to promote transparency and to deal with the pervasive corruption bedevilling us.

Other issues

[71] AmaBhungane raises the question of the Code's impreciseness on disclosure. The amicus, in turn, raises issues of subsidiarity, separation of powers, and recourse to the PPFA instead of a challenge to the Code. In view of the conclusion reached on the constitutionality of the Code, these issues need not be considered. But there is one last important aspect on the merits that does bear consideration. That is the question whether this Court's review judgment has already interpreted the Code, in particular whether it has interpreted clause 6.4 and the reference there to "any other *benefit of a material nature*",[44] to mean that a duty to disclose only arises when a personal benefit is received. Can it be said that "benefit of a material nature" in clause 6.4 of the Code is broader than "any financial interest" in section 2(2)(c)(ii) of the Ethics Act?

[72] The essence of this enquiry is whether these are two pieces of legislation with substantially similar wording, which leads to the question whether the outcome here is reconcilable with that in the review judgment. Put differently: does the latter judgment

[43] *My Vote Counts II* above n 9 at para 47.

[44] Emphasis added.

constrain our assessment of the meaning of clause 6.4? I think not. The earlier case that culminated in the review judgment and this case are different. There is thus no danger here of interpreting like cases differently. I disagree with any suggestion that "benefit of a material nature" in clause 6.4 of the Code is broader than "any financial interest" in section 2(2)(c)(ii) of the Ethics Act. The term "any financial interest" is broad and unqualified. However, a "benefit of a material nature" needs to be a personal benefit in order for a duty to disclose to arise, as determined in the review judgment. Furthermore, and of some significance, "any financial interest" in section 2(2)(c)(ii) of the Ethics Act includes "other benefits of a material nature" within its ambit, which implies that "any financial interest" is a broader concept than "benefit of a material nature".

[73] There is, in my view, no difficulty in interpreting "any financial interest" to be broader than "benefit of a material nature" and, as such, the interpretation in the review judgment does not constrain us here. There is no inconsistency between these two outcomes. They decide different issues in two differently worded pieces of legislation with different meanings and purview. The CR17 campaign is a good example. It can hardly be described as a "benefit of a material nature", given the manner in which it was structured. Great care was taken in setting the campaign up as a separate entity to collect donations to support the President's campaign and to ensure that he exercised no control at all over the funds, or to have the funds channelled to him directly. The President had no say and no knowledge at all over who donated what to the campaign and how the monies raised were to be spent. That much is clear from this Court's review judgment and those findings have not been assailed before us. But the funds raised through the CR17 campaign undoubtedly fall within the broad concept of "any financial interest" in the Ethics Act.

Remedy

[74] This Court is duty bound by section 172(1)(a) of the Constitution to declare any law or conduct unconstitutional and invalid to the extent of its inconsistency. In light of the reasons given and conclusions reached, we are thus required to confirm the

declaration of constitutional invalidity to the extent that the Code fails to require the disclosure of all donations made to campaigns for positions within political parties. In addition, as amaBhungane correctly submits, the interests of fairness and certainty require that we do so prospectively. This declaration of invalidity should be suspended for a period of 12 months to afford the President time to remedy the defect. The President is best placed to decide how these corrective amendments should be effected, in accordance with the separation of powers principle. Costs should follow the outcome. Although the President did not oppose this confirmation application, and sought in correspondence to this Court to avoid a costs order on this particular basis, this Court has held to the contrary in *Levenstein*:

> "It is the norm to award costs in favour of a successful applicant for a confirmation and there is no reason why this principle should not apply in this matter. The fact that the Minister has not opposed the confirmation proceedings does not in itself provide a sufficient basis for this Court to deviate from this principle. In the circumstances the Minister should pay the costs of the confirmation proceedings."[45]

Order

[75] The following order is made:

1. The order of the High Court of South Africa, Gauteng Division, Pretoria, declaring the Executive Ethics Code published under Proclamation No. R41 of 2000, to be inconsistent with the Constitution and invalid to the extent that it does not require the disclosure of donations made to campaigns for positions within political parties, is confirmed.
2. The operation of the order is suspended for a period of 12 months to enable the respondent to remedy the defect.
3. The respondent must pay the applicant's costs, including costs of two counsel, in this Court.

[45] *Levenstein v Estate of the Late Sidney Lewis Frankel* [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC) at para 79.

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