



**IN THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Reportable

CASE NUMBER: 0011/23 EC

In the matter between:

ELECTORAL COMMISSION OF SOUTH AFRICA

First applicant

CHIEF ELECTORAL OFFICER

Second applicant

And

AFRICAN INDEPENDENT CONGRESS

First respondent

AFRICAN NATIONAL CONGRESS

Second respondent

AFRICAN TRANSFORMATION MOVEMENT

Third respondent

CONGRESS OF THE PEOPLE

Fourth respondent

NATIONAL FREEDOM PARTY

Fifth respondent

PAN AFRICANIST CONGRESS OF AZANIA

Sixth respondent

486 OTHER RESPONDENTS AS LISTED IN ANNEXURE 'A'

Neutral citation: *Electoral Commission of South Africa v African Independent Congress and others* (0011/23EC) [2024] ZAEC 11 (10 May 2024)

CORAM: Zondi JA, Modiba J and Adams AJ, Professor Ntlama-Makhanya and Professor Phooko, Additional Members

Heard: Decided in chambers on the papers.

Delivered: 10 May 2024 – This judgment was handed down electronically by circulation to the parties' representatives via email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 10 May 2024.

Summary: Whether the respondents have complied with their obligations in terms of s 12 read with Regulation 10 of the Political Parties Function Act 6 of 2018 to account for their income - The circumstances under which the Electoral Commission may approach this Court for an order imposing administrative penalties on the respondents - Whether a proper case is made out for this Court to impose administrative penalties on the respondents as prayed for by the applicants.

ORDER

- 1 It is declared that the respondents have failed to comply with their obligations in terms of section 12 of the Political Party Funding Act 6 of 2018, read with Regulation 10 of the *Regulations regarding the funding of political parties* (published in GenN 950 of 2022, in Government Gazette 46167).
- 2 The 1st to 6th respondents shall each pay to the Commission pay, an administrative penalty in the amount of R40 000.
- 3 The respondents listed in Categories B and D to the annexure hereto shall each pay to the Commission an administrative penalty in the amount of R40 000.
- 4 The respondents identified in Category C, E and F excluding the 336th respondent, shall each pay to the Commission an administrative penalty in the amount of R10 000.
- 5 There is no order as to costs.

JUDGMENT

Modiba J (Zondi JA and Adams AJ and Professor Ntlama-Makhanya and Professor Phooko, (additional members) concurring):

Introduction

[1] On 21 January 2018, the Parliament of South Africa enacted the Political Party Funding Act¹, (“Funding Act”) with 1 April 2021 as its date of commencement. The Funding Act imposes an obligation on all political parties who are registered with the Electoral Commission of South Africa (“the Commission”) to account for their income. They are also required to disclose all donations received and account for donations above the prescribed threshold. Since funders of political parties may influence party policies and decisions, these requirements empower voters to make an informed decision when voting by ensuring access to information regarding persons and entities who fund the party, they intend voting for. These requirements

¹ Act 6 of 2018.

are also aimed at preventing corruption as funders of political parties may exert pressure on political parties to act in their private interests once elected to public office.

[2] Section 12 of the Funding Act, as read with Regulation 10 of the Regulations issued in terms of the Funding Act² (“Regulations”), requires political parties to keep proper books of account. Their books must be audited by an auditor registered and practicing in terms of the Auditing Professions Act³ (“Auditing Act”). They are required to provide the Commission with the auditor’s opinion together with Audited Financial Statements (“AFS”) within six months of the financial year end.

[3] Unless otherwise specified, in this judgment, all references to statutory and regulatory provisions are to this Act and Regulations.

[4] The Commission and its Chief Electoral Officer (“CEO”) as applicants, seek various orders in terms of s 18(1) read with s 18(2), imposing administrative fines on the respondents for failure to comply with s 12 read with Regulation 10. The applicants allege that the respondents have all failed to submit their AFS either timeously or at all, and/or the auditor’s opinion as prescribed in terms of s 12 read with Regulation 10, and/or discharge their other prescribed peremptory obligations. For convenience, I interchangeably refer to the applicants as such or as the Commission as dictated by the context.

[5] The 1st to 6th respondents are registered political parties. They also enjoy representation in the national and/or provincial parliaments. None of these respondents have filed opposing papers.

[6] In their papers, when necessary to distinguish between these respondents and the remaining ones, the applicants referred to them as registered political parties or respondents. In this judgment, I adopt the same nomenclature where necessary.

² Regulations regarding the Funding of Political Parties Issued in terms of Section 24(2) of the Act and Date of Commencement of the Funding Act GN 64 of 2021, GG 44125 of 29 Jan 2021.

³ 26 of 2005.

[7] These respondents enjoy certain rights and benefits in terms of the Funding Act. Their rights include an allocation of funds by the Commission commensurate with their representation in Parliament. This application does not turn on their rights and benefits under the Funding Act. It is for that reason that I do not delve on the relevant provisions of the Funding Act. The application solely turns on their obligations to account for their income in terms of s 12 read with Regulation 10.

[8] The 7th to 486th respondents do not enjoy any representation in the national and provincial parliaments. Most of them are relatively small and tend to lack the necessary resources to effectively function as political parties. In their papers, the applicants refer to them as unrepresented respondents or political parties. I adopt the same nomenclature where necessary.

[9] Only the 338th, 348th and 388th respondents have filed answering affidavits. Several other respondents responded to this application by letter or email. As the applicants point out, none of these respondents seriously dispute the applicants' version that they have failed to comply with their obligations that form the subject of this application. The remaining respondents have not responded to the application at all. Therefore, largely, this application turns on the applicants' version as well as written submissions. It is for that reason that this Court resolved to determine the application on the papers filed without hearing oral argument.

[10] The regulatory framework that the applicants rely on is the appropriate subject to follow this introduction. I then deal with the respondents' non-compliance with the Funding Act as alleged by the applicants. Thereafter, I consider the reasons advanced by the respondents (who responded to this application) regarding why they have not complied with their obligations under the Funding Act as alleged by the applicants. Lastly, I consider the relief the applicants seek. Then, an order concludes the judgment.

The Regulatory framework

[11] Section 11 imposes a general disclosure obligation on political parties. It reads as follows: 'In order for the Commission to monitor compliance with this Act, a political party must, at the prescribed times, furnish the Commission with any information

and documentation that is prescribed, or required in terms of a direction issued under section 15.’

[12] Section 12 imposes obligations on political parties to account for their income. It provides as follows:

- (1) A political party must –
- (a) deposit all donations received by that political party, membership fees and levies imposed by the political party on its representatives into an account with a bank registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990), in that political party’s name;
 - (b) keep a separate account with a bank registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990), into which all money allocated to it from the Funds must be deposited;
 - (c) appoint an office-bearer or official of that political party as its accounting officer; and
 - (d) appoint an auditor registered and practising as such in terms of the Auditing Professions Act, 2005 (Act No. 26 of 2005), to audit its books and financial statements.
- (2) The accounting officer contemplated in subsection (1)(c) must –
- (a) account for all income received by the political party;
 - (b) ensure that –
 - (i) any money allocated from the Funds is not paid out for a purpose not authorised by this Act; and
 - (ii) the political party complies with this Act;
 - (c) keep separate books and records of account, in the prescribed manner, in respect of money allocated from the Funds and all transactions involving that money; and
 - (d) within the prescribed period –
 - (i) prepare a statement showing all money received by the represented political party from the Funds during the previous financial year, the application of that money and the purposes for which the money has been applied;
 - (ii) prepare a statement showing all donations and membership fees, and any levy imposed by the political party on its elected representatives during that financial year; and
 - (iii) submit those statements and the books and records of account to an auditor appointed in terms of subsection (1)(d).

- (3) On receipt of the statements, books and records contemplated in subsection (2)(d)(iii), the auditor must perform an audit of the financial statements and express an opinion on those statements –
- (a) indicating whether the donations received by the political party comply with section 8(1);
 - (b) listing the donations required to be disclosed in terms of section 9(1);
 - (c) listing the donations under the threshold prescribed in section 9(1);
 - (d) indicating whether any income was received by the political party other than provided for in terms of this Act;
 - (e) indicating whether the transactions in the financial statements related to the money allocated from the Funds are in accordance with this Act; and
 - (f) indicating whether any money lent to a political party is on commercial terms.
- (4) The accounting officer must submit the auditor's opinion and audited financial statements to the Commission within the prescribed period.
- (5) The Auditor-General may at any reasonable time audit any represented political party's books, records of account and financial statements relating to money allocated to the party from the Represented Political Party Fund.'

[13] Section 8 prohibits parties from receiving certain donations. It provides as follows:

'Prohibited donations

- (1) Political parties may not accept a donation from any of the following sources:
- (a) Foreign governments or foreign government agencies;
 - (b) subject to subsection (4), foreign persons or entities;
 - (c) organs of state; or
 - (d) state-owned enterprises.
- (2) A political party may not accept a donation from a person or entity in excess of the prescribed amount within a financial year.
- (3) A political party may not accept a donation that it knows or ought reasonably to have known, or suspected, originates from the proceeds of crime and must report that knowledge or suspicion to the Commission.
- (4) Subject to subsection (5), nothing in subsection (1)(b) prevents a political party from accepting donations from foreign entities for the purpose of-
- (a) training or skills development of a member of a political party; or
 - (b) policy development by a political party.

(5) The total donations contemplated in subsection (4) is limited to a prescribed amount within a financial year.'

[14] Section 9(1) requires political parties to disclose all the donations received. It provides as follows:

'Disclosure of donations to political party

(1) A political party must disclose to the Commission all donations received-

- (a) above the prescribed threshold; and
- (b) in the prescribed form and manner.

(2) A juristic person or entity that makes a donation above the threshold prescribed in terms of subsection (1) (a) must disclose that donation to the Commission in the prescribed form and manner.

(3) The Commission must publish the donations disclosed to it in terms of subsections (1) and (2)-

- (a) on a quarterly basis; and
- (b) in the prescribed form and manner.

(4) Nothing in this section detracts from rights given effect to by the Promotion of Access to Information Act, 2000 (Act 2 of 2000).'

[15] The following obligations flow from s 12, read with s 8(1) and s 9(1):

'15.1 A political party may not accept a donation from a foreign government or agency, organs of state or state-owned enterprises.

15.2 A political party may receive a donation from a foreign person or entity for the purpose of training or skills development of a member of a political party or policy development by a political party.

15.3 Donations received by political parties may not exceed the prescribed amount of R15 million per year.

15.4 A party must disclose to the Commission all donations received from each donor above the prescribed threshold of R100 000 cumulative, per annum, in the prescribed form and manner.

15.5 An entity that donates to a political party more than the prescribed amount of R100 000 cumulative, per annum, must disclose it to the Commission in the prescribed form and manner.

15.6 A party is required to keep bank accounts for the receipt of donations, fees, levies, and allocations from the Funds, and appoint an accounting officer and auditor.

- 15.7 A party's accounting officer must keep books of account and prepare statements of the various income received including all donations it has received.
- 15.8 A party must submit its statements, books and records of account to the appointed auditor.
- 15.9 The auditor must perform an audit of the financial statements and express an opinion on those statements that addresses the specific prohibition and disclosure requirements in ss 8 and 9.
- 15.10 After receipt of the audited financial statements and auditor's opinion, the party's accounting officer must submit this information to the Commission.
- 15.11 When a political party or accounting officer does not comply with the obligations in terms of s 12(1), (2) or (4), they commit an offence in terms of s 19(1)(b) and are subject to a fine or imprisonment in terms of s 19(2)(b).'

[16] In terms of s 24(2), the Commission is empowered to make regulations on any matter that may or must be prescribed by notice in the Gazette. It issued the Regulations referenced in paragraph 2 above. The applicants correctly contend that the Regulations constitute administrative action.⁴ They are binding on all political parties until reviewed and set aside by a competent Court.⁵ Regulation 10 details how political parties are to comply with their obligations under s 12. It provides as follows:

- '(1) The accounting officer of a represented political party, duly appointed in terms of section 12(1)(c) of the Funding Act, must keep separate books and records of account, in accordance with generally recognised accounting practice (GRAP), in respect of money allocated from the Funds and all transactions involving that money.
- (2) The accounting officer of a political party must -
- (a) submit the details of the political party's office bearers, its official addresses and the auditors appointed in section 12(1)(d) in forms substantially similar to PPR8, PPR9, PPR10 and PPR11. In the event of a change in respect of any details, the onus rests on the accounting officer to inform the Electoral Commission within a period of one (1) calendar month of a change thereof;
 - (b) prepare the statements contemplated in section 12(2)(d)(i) and (ii) and submit them to the appointed auditor within three months of end of the financial year;
 - (c) in the preparation of the statements specifically account for the following -

⁴ *Esau v Minister of Cooperative Government and Traditional Affairs* 2021 (3) SA 593 (SCA) para 82-4.

⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] 3 All SA 1 (SCA).

- (i) any donations not accepted by the political party under section 8(1), (2) and (3);
 - (ii) any donations received from foreign entities for the purposes permitted in terms of section 8(4) and what those donations were used for;
 - (iii) all donations received in aggregate or otherwise that exceed the disclosure threshold;
 - (iv) any income received by the political party other than that provided for in the Funding Act;
 - (v) any loans made to the political party and the terms on which the money was lent; and
 - (vi) a list of the bank accounts in which all donations, the membership fees, and levies imposed by the political party are deposited into a bank account opened in the name of the political party or that receive donations on behalf of the party or for use by the party in the form substantially similar to Form PPR3A;
- (d) submit the auditor's opinion and audited financial statements to the Commission within six months of the end of the financial year in a form substantially similar to Form PPR12.'

[17] Section 12 read with Regulation 10(2)(d) requires political parties to submit audited AFS and an audit opinion within the prescribed 6-month period. The prescribed period for submission of the AFS and an audit opinion is within 6 months after the end of a financial year. The submission date is 30 September annually.

Non-compliance with the disclosure requirements

[18] The applicants allege that all the respondents have for different reasons, which I will detail shortly, failed to comply with their obligations in terms of s 12 read with Regulation 10. They have failed to do so despite several efforts by the Commission, including convening workshops nation-wide to promote political parties' awareness of their obligations under the Funding Act, and informing them of the importance of complying with their obligations. During the workshops, the Commission engaged with political parties regarding their obligations under the Funding Act. Several political parties alluded to the difficulties that impeded them from complying with their obligations. In their responses to this application, several respondents confirm these efforts by the Commission.

[19] The Commission took legal advice regarding the practical difficulties that prevent political parties from submitting audited AFS. It was advised that s 12 requirements are peremptory. It is for that reason that the Commission issued a general notice to all political parties advising them that compliance with s 12 was peremptory. The Commission further informed political parties that it was not authorised to accept any other method of accounting. Political parties are required to account for their income in the manner prescribed in the Funding Act and Regulations, irrespective of any impediment, financial or otherwise, a political party faced.

[20] During 2022 and 2023, the Commission also entered into correspondence with various political parties regarding their non-compliance with the Funding Act. None of them seriously dispute their alleged non-compliance.

[21] Subsequently, the Commission issued all the respondents with a directive in terms of s 15 requiring that they comply to avoid a sanction.⁶ They have all failed to do so.

Reasons for non-compliance with the Funding Act

[22] In its founding papers, the applicants have set out in detail the nature of the alleged non-compliance by each respondent. Detailing the allegations in this judgment would render it unnecessarily repetitive and prolix. In their papers, the applicants have clustered the reasons into themes. I adopt the same approach in this judgment. The applicants have also segmented the respondents into six categories according to the alleged basis of non-compliance as set out below:

'22.1 Category A: 1st to 6th respondent (represented political parties);

⁶ Section 15 provides as follows: "15 Commission's power to issue directions

- (1) The Commission may issue a direction to a political party in the prescribed manner in order to avoid imposing a sanction-
 - (a) after affording that party an opportunity to make representations; and
 - (b) if it is of the opinion that the party fails to comply with this Act.
- (2) The direction contemplated in subsection (1) must indicate which of the following sanctions that the Commission may impose if the political party fails to comply with that direction:
 - (a) Suspension of payment of allocated money under section 16;
 - (b) the recovery of money irregularly accepted or spent under 17; or
 - (c) the imposition of an administrative fine in terms of section 18."

22.2 Category B to F: 7th to 486th respondent (unrepresented political parties):

22.2.1 Category B respondents failed to submit AFS and/or the auditor's opinion without any explanation;

22.2.2. Category C respondents failed to submit AFS and/or an auditor's report because of alleged financial challenges;

22.2.3 Category D respondents failed to submit to AFS and/or an auditor's report because of alleged lack of understanding of the relevant provisions of the Funding Act, their obligations, and consequences for non-compliance;

22.2.4 Category E respondents failed to submit AFS and/or an auditor's report because of alleged non-functionality as political parties;

22.2.5 Category F respondents failed to submit AFS and/or an auditor's report because of alleged failure to appoint an auditor.'

[23] I adopt a two-pronged approach in dealing with the versions of the respondents who have by way of affidavit, letter, or email, responded to this application. Firstly, I deal with the respondents' thematic reasons for non-compliance. Then, I deal with those respondents who have raised different reasons from those commonly raised by the rest of the respondents.

Reasons commonly raised by respondents

Lack of funds

[24] Several respondents blame their failure to comply with their obligations under the Funding Act on lack of financial resources. They complain that as unrepresented parties who do not receive any funding from the Commission under the Funding Act, they cannot afford to procure the services of a registered and practising auditor to audit their books and financial statements.

[25] The Commission contends that non-compliance due to lack of financial resources ought to be inexcusable. A Court does not have a general power to condone non-compliance with a statutory provision unless the statute expressly or impliedly grants the Court such a power. It relies on *Scoin Trading (Pty) Ltd v Bernstein* where the SCA held that: "The law does not regard mere personal incapability to perform as constituting impossibility"⁷ and *Van Zyl*,⁸ where the

⁷ 2011 (2) SA 118 (SCA) para 22.

⁸ *Van Zyl* para 121, quoting Craies on Statute Law (Sweet & Maxwell, London 1971) p 268.

Constitutional Court upheld the principle that a party will only be excused from the duty to comply with a statutory obligation if the circumstances which led to its non-compliance were objectively beyond the control of that party.⁹ Therefore, a claim by a party that it lacks the means to fulfil a statutory obligation is a subjective excuse not covered by the impossibility doctrine.¹⁰

[26] The Commission also relies on the Constitutional Court decision in *Mohlomi*, where the Constitutional Court made the following obiter statement:¹¹

'It appears to have presupposed a power inherent in the Courts to condone defaults of the kind covered which needed to be preserved. But Courts have no such inherent power, and none derived from any source unless and until it is conferred on them. That the sub-section grants them the power in the circumstances mentioned must necessarily be implicit in its terms, however, since they make no sense otherwise.'

[27] The Commission further relies on the following remarks the Constitutional Court made in *Phillips*:¹²

'Whatever the true meaning and ambit of section 173, I do not think that an Act of Parliament can simply be ignored and reliance placed directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law.... I doubt that the inherent jurisdiction of the court under section 173 is such that it empowers a judge of the high court to make orders which negate the unambiguous expression of the legislative will.'

[28] The above decisions support the Commission's case. Lack of funding constitutes subjective impossibility. It is trite that the law draws a distinction between subjective and objective impossibility: the former occurs when one of the parties, because of their subjective circumstances, cannot meet their obligation while another party can. An objective impossibility occurs when it is impossible for anyone to perform the duties under a statute or contract. Unless the power to condone non-compliance is expressly or impliedly set out in the legislation, a Court has no authority to condone non-compliance. Subjective impossibility does not justify non-compliance.

⁹ Ibid.

¹⁰ See *Slabbert v Ma-Afrika Hotels t/a Rivierbos Guest House* [2022] ZASCA 152.

¹¹ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 17.

¹² *Phillips v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) paras 51-2.

[29] As the applicants further point out, the obligations imposed by the applicable statutory and regulatory provisions are peremptory as illustrated by the repeated use of the word “must” in s 12 and regulation 10. Our Courts have held that in general, the use of this word connotes that the provisions are mandatory.¹³ The fact that non-compliance may invite a sanction further supports this interpretation.¹⁴ The applicable statutory and regulatory provisions apply to all registered political parties, whether they are represented in parliament or not.

[30] I therefore find that this Court lacks the power to condone any noncompliance with the provisions of s12 read with Regulation 10.

Unfairness of the Funding Act

[31] Several respondents contend that the Funding Act does not draw a distinction between represented political parties and unrepresented parties in relation to the obligations imposed by s 12. This is unfair because unrepresented political parties tend to be smaller and therefore do not have the same resources as larger and represented political parties. Some of these parties are also inactive.

[32] Indeed, as the Commission also concedes, the Funding Act does not distinguish between obligations imposed on represented and unrepresented political parties. Section 12 applies indiscriminately to all registered parties. None of the respondents who raised this issue have impugned the constitutionality of s 12. The indiscriminate application of s 12 is an election made by the legislature. Unless, declared unconstitutional based on a frontal challenge by any party, this Court is duty bound to enforce this statutory provision.

[33] Therefore, the fact that s 12 does not draw a distinction between the cohorts of respondents referenced above does not justify non-compliance with this statutory provision.

¹³ *Sutter v Scheepers* 1932 AD 165 at 173-174; *Standard Bank Ltd v van Rhyn* 1925 AD 266.

¹⁴ Where a political party or accounting officer does not comply with the obligations in s 12(1), (2) or (4), they commit an offence in terms of s 19(1)(b) and are subject to a fine or imprisonment in terms of s 19(2)(b).

Dormancy and lack of representation

[34] Some of the respondents contend that they are dormant and not functional. The Commission's response to this contention is that dormant political parties have the option of de-registering as political parties and re-registering when they are active and able to meet their statutory obligations.

[35] For the reason the Commission advanced, I agree that this ground of defence also does not justify non-compliance with section 12.

Ignorance

[36] There are respondents who have blamed their non-compliance with s 12 on ignorance on their part.

[37] As contended by the Commission, their ignorance also does not justify non-compliance. The Commission took measures to familiarise political parties with their obligations in terms of s 12. It also sent them a notice and directive, affording them an opportunity to remedy their non-compliance. The fact that the Commission sent a general notice to all political parties is a trifling defence. Section 15 does not require the Commission to issue individualised notices. The respondent who has raised this defence does not impugn the notice for non-compliance with s 15, which provides as follow:

'Commission's power to issue directions

- (1) The Commission may issue a direction to a political party in the prescribed manner in order to avoid imposing a sanction-
 - (a) after affording that party an opportunity to make representations; and
 - (b) if it is of the opinion that the party fails to comply with this Act.
- (2) The direction contemplated in subsection (1) must indicate which of the following sanctions that the Commission may impose if the political party fails to comply with that direction:
 - (a) Suspension of payment of allocated money under section 16;
 - (b) the recovery. of money irregularly accepted or spent under 17; or
 - (c) the imposition of an administrative fine in terms of section 18.'

Non-service of the directive

[38] Several respondents complain that they did not receive service of some of the documents the applicants rely on in this application.

[39] The Commission effected service on all documents it relies on in this application by email to the email addresses the respondents supplied when they registered as political parties. Complaints that some of the respondents did not receive any of the documents cannot be blamed on the Commission.

Respondents who have cited other reasons

Our City Masters – 338th respondent

[40] Our City Masters' ("OCM") has filed an answering affidavit deposed to by its former chairman. It intends accepting in good faith this Court's ruling but has requested the Court to consider its peculiar circumstances when making its ruling. Its circumstances are a relevant consideration in the exercise of this Court's discretion whether to impose an administrative penalty on this respondent. It is for that reason that I consider OCM's circumstances in the next section of this judgment.

Conservatives in Action - 348th respondent

[41] This respondent was registered as a political party in 2008 under the name People's Alliance. It changed its name to the current name on 10 September 2022. It raises the fact that it has since been deregistered as a point in *limine*. It contends that these proceedings are a nullity as a result. It further contends that in any event, it has not received any income.

[42] The deponent to Conservatives in Action's affidavit contradicts himself by stating that its former chairman funded party expenses out of personal funds. Therefore, the deposition that it has not received any income is incorrect. The funds it received from its former chairman fall within the ambit of s 8 and ought to have been declared and accounted for in terms of s 12 read with Regulation 10. Conservatives in Action submitted to the Commission a letter by its registered auditors dated 12 October 2023, stating that it has not received any funding for the period until 23 September 2023. This letter is not supported by any AFS. The statement by its auditors is silent on compliance with ss 8 and 9. To the extent that

audit opinion fails to state that its former chairman funded the party, the audit opinion also fails to comply with the applicable statutory and obligatory obligations.

[43] Conservatives in Action's point in *limine* lacks merit. The fact that this respondent has since been deregistered is of no moment. Subsequent deregistration does not absolve a party from not complying with its obligations under the Funding Act.

[44] I am satisfied that the Commission has made out a proper case that this respondent failed to comply with its obligations in terms of s 12 read with Regulation 10.

Democratic People's Movement - 352nd Respondent

[45] This party is cited as "The People's Movement". Its registered name is Democratic People's Movement. It has also since been deregistered.

[46] Its former chairman takes issue with its incorrect citation. From the papers filed, this respondent does not dispute that the applicants' allegations relate to the Democratic People's Movement. Its former chairman has received the application and answered to it. No prejudice lies against this respondent from the fact that it is incorrectly cited.

[47] This respondent alleges that it received funding from its former chairman and members who were on the party list for the 2021 local government elections. For convenience, I simply refer to these members as "members". On 20 September 2022, the former chairman submitted her personal bank statements to the Commission together with a letter from the auditor to comply with the requirements of s 12. No financial statements were submitted.

[48] The documents this respondent submitted to the Commission do not constitute compliance with s 12 because the former chairperson's personal bank account statement was submitted to the Commission. AFS were not submitted. This does not constitute properly accounting for the donation received from its chairman as required in terms of s 12 read with Regulation 12. Further, on the respondent's

version, donations made by members on the party lists, do not seem to have been accounted for at all.

[49] I therefore find that this respondent failed to comply with the applicable statutory and Regulatory provisions.

Relief sought

[50] As already stated, the Commission seeks an order imposing administrative penalties on the respondents for reasons set out in this judgment. In its heads of argument, it requests that an order should be preceded by a declarator stating that the respondents have been duly found to be non-compliant with the provisions of the Funding Act in line with the draft order.

[51] Although the prayer for a declaratory order was not contained in the notice of motion, a proper case is made out for it. It is therefore competent for this Court to grant it.¹⁵

[52] The Commission requests this Court to determine whether it enjoys a discretion to excuse non-compliance with s 12. It opines that the Funding Act does not expressly state whether the Commission has a discretion to excuse non-compliance. It is likely that no such discretion exists. The Commission also requests this Court for advice in respect of the circumstances under which it may excuse non-compliance with the Funding Act and Regulations. I address these issues next.

Whether the Commission enjoys a discretion to excuse non-compliance with s 12 and the circumstances under which it may do so

[53] The Commission's questions come as a surprise because its case in this application is that non-compliance with the Funding Act may not be condoned. This simply means that non-compliance may not be excused. Whether the Commission may punish non-compliant parties by approaching this Court to impose administrative penalties is rather a different question. An answer to it lies in s 18. It provides as follows:

'Administrative fines

¹⁵ *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (3) BCLR 259 (CC) paras 210-11.

- (1) The Commission may institute proceedings to request the imposition of an administrative fine in respect of any contravention of this Act.
- (2) The Electoral Court may impose an administrative fine in accordance with Schedule 1 in respect of a contravention or a repeated contravention of this Act.'

[54] Use of the word 'may' mostly connote the bestowal of a discretion. There is no ambiguity in the language used in s 12. The Funding Act gives the Commission a discretion to institute proceedings to request this Court to impose an administrative fine against any party who contravenes the Funding Act. Since the legislature did not set out the circumstances under which the Commission may exercise this discretion, it conferred a discretion in the wide sense. The Commission ought to exercise it having regard to the circumstances of each case. It is not for this Court to pre-empt circumstances that may be appropriate for the exercise of the Commission's discretion to excuse non-compliance with the Funding Act and/ or Regulations. Doing so may impede the Commission from exercising its wide discretion by considering the circumstances of each case. It may even have an unintended effect in that the circumstances enumerated by this Court may be regarded as exhaustive.

[55] The Commission is at liberty to draw guidance from judgments of this Court to determine whether it should approach the Court to enforce non-compliance with the Funding Act and Regulations.

Whether a proper case is made out for the exercise of this Court's discretion to impose administrative penalties

[56] The bestowal of powers on the Commission and this Court in terms of s 12, is expressed in similar terms. The Commission contends that s 18(2) clearly affords this Court a discretion not to impose an administrative fine, despite the Commission's request. This is indeed so. As with any discretion, this Court's discretion must be exercised judiciously considering all the relevant factors. When exercising its discretion to impose administrative penalties, this Court should be guided by the need to give effect to the purpose and objective of the Funding Act and to prevent future incidents of non-compliance. Therefore, this Court should promote the interest of justice when exercising its discretion.

[57] The Funding Act was enacted to safeguard political rights. The staggering number of parties who have not complied with their obligation in terms of s 12 is of concern to this Court. So is the number of respondents who have not responded to this application. Those who did have not cited meritorious grounds of opposition. It is important that non-compliant political parties are dealt with firmly, to buttress the importance of meeting their statutory obligations. Otherwise, political parties may continue ignoring their s 12 obligations with impunity, thus undermining the very important objectives of the Funding Act, to the peril of South Africa's constitutional democracy.

[58] Elevating substance over form, particularly where there has been substantial compliance and the purpose and objectives of the Funding Act are not imperilled, as in the case of OCM, which I deal with below, would not serve the interests of justice.

[59] The facts OCM has placed before this Court warrant the exercise of this Court's discretion not to impose an administrative penalty on this respondent.

[60] OCM admits that it has not strictly complied with the requirements of s 12 due to lack of funding as well as being non-functional. It is an unrepresented political party. It contested the 2021 local government elections. It does not intend contesting the 2024 national and provincial elections. It intends deregistering as a political party and has sought guidance from the Commission on the deregistration process. It has not received any income including in the form of donations and membership levy and fees.

[61] On 23 June 2023, it furnished the Commission with its AFS. It has attached its AFS to its answering affidavit. The AFS seem to be complied by its chairman and not its auditors as required in terms of s 12 read with Regulation 10. The AFS represent its financial position to be nil. On the same date, it submitted to the Commission an audit opinion confirming that it did not receive any funding in the period under review. However, the opinion is also not in the prescribed format.

[62] OCM's chairman pleads with this Court not to impose the administrative penalty prayed for by the applicants in the amount of R10 000.

[63] The applicants confirm OCM's version in its replying affidavit. The Commission also confirms that OCM has since been dissolved.

[64] The above facts distinguish OCM from the other respondents. OCM did not ignore the Commission's notice and directive. Nothing in the papers before this Court suggests that it misrepresented its financial position. It has substantially complied with its obligations in terms of s 12 read with Regulation even before this application was instituted, albeit not in the prescribed format. The declaratory order sought by the Commission is sufficient to record OCM's non-compliance. Imposing the proposed administrative penalty on OCM would serve no further purpose. It would elevate substance over form. It would not serve the objectives of the Funding Act. There is no prospect of OCM reoffending as it has been dissolved.

[65] The applicants have prayed for different amounts to be imposed in respect of administrative penalties. None of the respondents have taken issue with the proposed amounts. I am satisfied that the Commission has made out a proper case for administrative penalties as prayed for in the notice of motion to be imposed on the remaining respondents. The status of a party as well as the nature of non-compliance justify the imposition of administrative penalties in different amounts.

[66] Non-compliance by registered political parties is aggravating because these parties receive funding under the Funding Act. Further, they are relatively larger. For these reasons, they are in a position to carry the disbursements that are necessary to comply with the Funding Act, even if their only funding is that received under the Funding Act as well as membership fees. They have ignored the Commission's efforts to get them to comply and have not explained reasons for their failure to comply with their obligations in terms of this Act and Regulations to this Court.

[67] Aggravating factors in respect of parties that fall under categories B and D also justify the imposition of a higher amount on these parties. Having regard to the effort the Commission took to raise awareness on the obligations of political parties in terms of the Funding Act, there is no justification to their claim that they are not aware of the provisions of the Funding Act. Ignoring the Commission's efforts and

not offering any explanation for non-compliances to this Court displays utter disregard for the noble objectives of the Funding Act and the rule of law.

Costs

[68] Customarily, cost orders are not made in this Court. There is no pertinent reason that warrants a departure from this approach, more so that the applicants are also not seeking such an order.

Order

[69] In the premises, the following order is made:

1. It is declared that the respondents have failed to comply with their obligations in terms of s 12 of the Political Party Funding Act 6 of 2018, read with Regulation 10 of the *Regulations regarding the funding of political parties* (published in GenN 950 of 2022, in Government Gazette 46167).
2. The 1st to 6th respondents shall each pay to the Commission pay, an administrative penalty in the amount of R40 000.
3. The respondents listed in Categories B and D to the annexure hereto shall each pay to the Commission an administrative penalty in the amount of R40 000.
4. The respondents identified in Category C, E and F excluding the 336th respondent, shall each pay to the Commission an administrative penalty in the amount of R10 000.
5. There is no order as to costs.

MODIBA J
JUDGE OF THE ELECTORAL COURT

Appearances

For the applicant

M Tsele

Instructed by:

DMO Attorneys, Bryanston