25 January 2024

Hon. Mr. M.S Chabane
The Portfolio Committee on Home Affairs

Hon. Ms. S Shaikh
Select Committee on Security and Justice

For Attention: Mr Eddy Mathonsi
Per Email: Electoralmattersbill@parliament.gov.za

Dear Hon. Mr Chabane and Hon. Ms Shaikh

Re: MY VOTE COUNTS' SUBMISSION ON THE ELECTORAL MATTERS AMENDMENT BILL [B42 – 2023]

We write to you in response to the Portfolio Committee on Home Affairs and Select Committee on Security and Justice's call for written submissions on the Electoral Matters Amendment Bill [B42 – 2023] ("The Bill").

My Vote Counts (MVC) is a non-profit organisation (NPC 2014/046956/08) that endeavours for a democracy where every adult has equal power to influence decisions that affect them, and the principles of accountability and transparency are paramount. We believe that the electorate should have access to all information that they need to exercise their political rights and make political choices from an informed position. We believe that political parties, decision-makers, and public representatives should openly share all necessary public information timeously and in accessible formats for all. Lastly, we believe that power should be equally shared and that social mobility barriers must be removed. We believe that people must lead the drive for ensuring their rights are met, and we support popular participation, the building of grassroots organisation, and equipping all people with tools to hold public representatives to account, and to be part of decision-making.

This submission is divided into three sections that speak to the consequential amendments made because of the introduction of independent candidates to contest elections in national legislature and provincial legislatures, namely; amendments to the Political Party Funding Act of 2018, amendments to the Electoral Act of 1998, and amendments to the Electronic Communications Act of 2005.

The authors of this submission are Ms. Boikanyo Moloto (Political Systems Researcher) and Ms. Robyn Pasensie (Political Party Funding Researcher) at MVC.

1. Political Party Funding Act (PPFA)

Clause 1: Definitions

1.1 Section 1(a) of the PPFA defines a donation as including a "donation in kind" and does not include the membership fee of the political party or any levy imposed by the political party on its elected representatives. It further defines a donation in kind as (i) any money lent to the political party other than on commercial terms; (ii) any money paid on behalf of the political party for any expenses incurred directly or indirectly by that political party; (iii) the provision of assets, services or facilities for the use or benefit of a political party other than on commercial terms; or (iv) a sponsorship provided to the political party. The amendment does not address the necessary inclusion of independent representatives and independent candidates as they can both be recipients of donations and donations in kind.

Recommendation

1.2 The definition of "donation" and "donation in kind" should be amended to include independent candidates and independent representatives.

Clause 9: Purposes for which money from Funds may be used

1.3 In Clause 9 of the Bill, it stipulates how money contemplated in terms of Section 6(7) of the PPFA, may be used by an independent representative. This is a consequential amendment which is necessary to make independent representatives comply with the same norms and standards applicable to political parties in terms of Section 7 of the PPFA. The proposed addition of Section 7(3)(a), (b), and (c) all refer to independent representatives, however Section 7(3)(d) includes political parties in the following way:

> "for a purpose as may be prescribed: Provided that any money received from the Fund may not be used for personal use or to cover any costs related to any litigation against the political party or independent representatives."

1.4 The insertion of political parties is ill-suited and should be placed in a separate subsection. MVC recommends that it be placed in Section 7(2) of the PPFA.

Recommendation

1.5 Remove the inclusion of "political party" in proposed amendment Section 7(3)(d) and create a separate subsection or equivalent paragraph for litigation against the party. Section 7(2)(d) of the PPFA only refers to legal costs relating to internal political party disputes and makes no mention of litigation against the party.

Clause 14: Prohibition on donation to member of political party and Clause 24: Offences and penalties

1.6 Clause 14, which refers to Section 10 of the PPFA, prohibits donating on the expectation that the donor will be able to influence the "awarding of a tender, licence, approval, consent or permission, or the relaxation of a condition or restriction in relation thereto, in the said person or entity's favour". It further prohibits making donations to a member of a political party directly, appropriating donations for oneself and accepting donations to circumvent the provisions of Chapter 3 of the PPFA. The proposed clause substitutes Section 10 of the PPFA.

1.7 Clause 14 does not include independent candidates and representatives therefore excluding them from the explicit provision guarding against undue influence. However, in Clause 24, which seeks to amend Section 19 of the PPFA, it includes independent candidates and independent representatives along with

political parties. Since Clause 24, with reference to the proposed addition, namely Section 19(3), provides the offences and penalties for contraventions of Clause 14, the exclusion of independent candidates and independent representatives in Clause 14 is inconsistent with this proposed addition. The proposed amendment of Section 19(4) is also only applicable to political parties and makes no mention of independent candidates/representatives. Similarly, the proposed amendment of Section 19(5) which prohibits any member of a political party to accept a donation to circumvent Chapter 3 and appropriate the funds for him or herself, does not include the same provision for independent representative and independent candidates.

Recommendation

1.8 Given that the Bill does not differentiate between the personal bank account and the operational bank account of the independent candidate/representative, the proposed amendment of Section 19 of the PPFA of inserting subsection 4, is only applicable to political parties. To ensure that independent candidates and representatives are subject to the same transparency requirements as political parties, they should have separate bank accounts, as discussed in paragraph 1.9 and 1.10 below, and should also be included in this subsection of the PPFA. Similarly, they should be included in subsection 5.

Clause 18: Insertion of Section 12A in Act 6 of 2018

1.9 The proposed amendment of Section 12 of the PPFA seeks to ensure that independent representatives and independent candidates account for their income. This is a necessary amendment to ensure that effective mechanisms for transparency are extended to independent candidates and representatives in the same manner as political parties. The PPFA emphasises this by requiring all registered political parties to deposit all donations received into a bank account in the name of the political party with no money being deposited into the personal bank account of any party member.

1.10 Clause 18 of the Bill requires that independent representatives must deposit all donations received into a bank account registered in their name. The proposed amendment does not require, nor stipulates, that this account be separate from the personal account of the independent representative which would also carry the name of the independent representative. This could create problems when differentiating between monies paid by the independent to themselves for political purposes and those of a personal nature. Similarly, it allows for a possible obfuscation of funds received by donors to independents where this may be indistinguishable from other funds received. The spirit of transparency contemplated in Section 12(1)(a) and (b) of the PPFA therefore is not carried over in the inclusion of Section 12A as proposed in Clause 18.

Recommendation

1.11 The Constitutional Court judgment in the matter of *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* noted that "transparency in the area of the private funding of political parties and independent candidates helps in the detection or discouragement of improper influence and the fight against corruption". It goes further to state that:

> "Politicians who use public office in the furtherance of the agendas of benefactors, at the expense of the best interests of all, are very likely to be found out where there is transparency. The recordal, preservation and disclosure of information on the private funding of political players will thus keep voters better equipped to make out the real interests these politicians are likely to serve."

1.12 Transparency is therefore crucial for the public in determining the interests of the politicians, political parties and independent candidates/representatives whom they elect and support. The insertion of Section 12A should therefore be amended to ensure that the personal account of the independent be

separate from the account used for donations to the independent. Furthermore, Section 12A should be amended to include both independent candidates and independent representatives, who as recipients of donations would both need to account for their income.

Clause 20: Commission's monitoring and inspection powers

1.13 The inclusion of only "independent candidates" in Clause 20 and not that of "independent representatives" is another example of the inconsistent use and application of these terms in the Bill. Since both independent candidates and independent representatives can be recipients of private donations, they should both be subject to monitoring and inspection by the Commission. Excluding independent representatives under this clause allows for the uneven application of the enforcement to the PPFA by the Commission which may reduce the level of transparency and accountability the Act seeks to engender.

Recommendation

1.14 Clause 20 should be rewritten to explicitly include independent representatives along with independent candidates and political parties.

Clause 26: Regulations

1.15 Clause 26 amends Section 24 of the PPFA and seeks to provide guidelines for the President in the exercising of his/her discretion in amending the prescribed threshold and the upper limit. Clause 29(g) seeks to amend regulation 7(1) of Schedule 2. These amendments raise several issues:

i. The amendments introduce the ability of the President to take into account, amongst other things, inflation and the "the costs associated with participating as a political party, independent representative or independent candidate in elections and the democratic process in South Africa." The latter element is gauged by reference to submissions of actual costs by political parties. This allows for greater opportunity for potential abuse and undue influence by private interests. Political parties and independents could use this as an opportunity to justify and source greater private funding to cover all the costs associated with running a party therefore increasing the private sector influence on our politics. While the intention to use elections and other political activities as a reference for adequate funding may be in good faith it nonetheless carries with it the potential to bring in vast amounts of private money that could unduly influence the political process. The Bill does not include some of the key factors (if not the key factor) which need to be considered in setting any upper limit: being, the potential for the (level of the) donation unduly to influence or to corrupt political discourse or state action;

ii. MVC in its founding affidavit on the matter of constitutional inconsistencies in the PPFA, had noted that any limitation to disclosure of private funding sources is unconstitutional in that it prohibits transparency and proper access to information necessary for the exercise of the right to make an informed political decision. The proposed amendment does not address this and instead keeps the disclosure in place and allows the President the potential to increase this limit thereby increasing the potential for secrecy in funding and further stymieing access to critical information for the public;

iii. In determining the threshold and upper limit the new amendments allow the President to do so after a "Parliamentary resolution". The purpose and content of such a resolution are unclear. It does not seem that the resolution will be substantive in character as the determination of the thresholds and upper limits remains the prerogative of the President. These provisions give rise to impermissible vagueness;

iv. The amendment represents a potential conflict of interest having a President who is also the head of the majority party empowered to determine the upper limit and the disclosure threshold. The President acts as both leader of his party and of the country and there is an institutional bias which cannot be avoided without taking the power away from the President;

v. There is an inconsistency between the newly proposed Section 24(1)(a) and the proposed Regulation 7(2), both in terms of the actual factors to be taken into account, and whether it is peremptory or permissive to take the factors into account.

vi. The amendments do not address any of the additional necessary reporting requirements and do not require the use of funds strictly for legitimate political party purposes.

vii. The introduction of Clause 29 which amends Schedule 2 of the PPFA introduces the phrase "from time to time" in relation to changing disclosure and upper limits. There is lack of clarity on under what circumstances and when or how frequently the President may effect these changes. This phrase has the potential to be open to political abuse due to its vagueness.

1.16 Generally, the Bill does very little to remedy the fundamental concerns raised in MVC's founding papers in relation to (i) the prescribed threshold for disclosure; (ii) the prescribed amount of the upper limit on donations; and (iii) the President's power to stipulate those amounts.

Recommendation

1.17 This clause has far-reaching implications for the proper functioning of the PPFA and needs further contemplation. The President should not be allowed to have extensive and/or significant powers to change the core provisions of the PPFA in the absence of rigorous independent oversight. The Bill also does not grapple with the key underlying factors requiring limits on donations or any other issues raised in MVC's court papers.

Clause 29: Schedule 2

1.18 Clause 29 is an amendment to Schedule 2 of the PPFA which seeks to redefine the allocation formula for the Funds distributed under the Act. The PPFA established an allocation formula which distributed the Funds in the following manner: two thirds proportionally and one third equitably. This was to ensure that smaller parties, who had fewer seats in the National or Provincial legislature would not be penalized by their smaller proportion of representation and would still be able to receive a portion of the Funds. Clause 29 increases the proportionality of the allocation from 66.6% to 90% and decreases the equitable allocation from 33.3% to 10%. This is a significant shift in the allocation formula and takes it back to a greater disparity in public funding. The PPFA explicitly made this change to create a more level playing field. In practice this will mean that bigger parties, with the largest share of seats in national and provincial legislature will receive an even greater share of the Funds while smaller parties will see their portion decline. This amendment is retrogressive and does not provide an appropriate solution for the distribution of Funds and instead entrenches the status quo.

Recommendation

1.19 The reconfiguration of the allocation formula is not a consequential amendment and therefore should not be included in the Bill. If the allocation formula were to change as described, independent representatives and smaller parties would see their public funding dramatically decrease. The consideration of how to fund small and emerging political parties and independent candidates/representatives needs further consideration and should not be contemplated in this Bill

which should only seek to create the necessary amendments for the inclusion of independent candidates and representatives.

Section 23: Funding of represented political parties by legislatures

1.20 Section 23 of the PPFA prohibits Parliament or any provincial legislature from funding a represented political party other than through stipulated legislation. Section 23(2) stipulates the responsibilities of the accounting officers to report annually. Neither of these makes mention of independent representatives.

Recommendation

1.21 An amendment should be added to the Bill addressing this omission.

2. Electoral Act

Clause 31B: Unequal signature thresholds

2.1 We note that in the *One Movement South Africa NPC v President of the Repulbic of South Africa and Others (CCT 158/23)[2023]ZACC 42 (4 December 2023)* Constitutional Court ruling, Section 31B(3)(a)(i) and (ii) of the Electoral Act 73 of 1998 were declared invalid and inconsistent with the Constitution. Parliament was then given 24 months (up to 3 December 2025) to rectify the defect, however a *read in* remedy was provided and came into effect immediately unless parliament "amends the section" prior to the deadline. Further to this, the court ruled that because of this immediate application of the aforementioned *read-in* remedy, there was no urgency to include it the statute book before the session of the sixth parliament ends. The Constitutional court indicated that the order was limited to the facts before it, and thus only dealt with the issue on unequal thresholds in relation to Independent Candidates only and did not make a similar order in relation to unrepresented political parties under Section 27(2)(cB) of the same Electoral Amendment Act. As a result, parties who are contesting for the first time will still be required to fulfil the 15% signature requirement while independent candidates are only required to obtain 1000 signatures per region.

Recommendation

2.2 The Constitutional Court previously ruled that the Electoral Act must be consistent with the Constitution in the equality of political association meaning that independent candidates and parties must be treated equally. Following this rationale, while the court's ruling to lower the threshold for independent candidates is welcomed, it has now caused another disparity between independent candidates and unrepresented political parties. We therefore recommend that Section 27(2) (cB) must be amended prior to the 2024 elections in order to ensure that there is parity amongst the different categories so that elections that are constitutionally sound, are held.

3. Electronic Communications Act

Clause 35(b) & 35(d): Definitions

3.1 Section 1 of the Electronic Communications Act of 2005 has been amended through the insertion of the definitions of the terms "independent candidate" and "independent representative". The amendment to the definitions provided in Clauses 35(b) and 35(d) show an uneven application of this insertion. Both

the definitions for the terms “election broadcast” and “political advertisement”, respectively, do not include the term “independent representative”.

Recommendation

3.2 The Bill should be amended to include the term independent representative to the definitions of “election broadcast” and “political advertisement”.

Clause 38 – Clause 40

3.3 The amendments made in the substitution for Section 57, Section 58 and Section 59 of the Electronic Communications Act, 2005 do insert or include the term “independent representative” under the provisions made for public broadcasting on election broadcasts. Section 57(1), (2), (3), and (4); Section 58(1), (2), and (3); Section 58(7); Section 59(1), (2)(a), and (2)(b), and (3) all do not include the term “independent representative”.

Recommendations

3.4 The provisions on the Bill should be amended to include the term “independent representative”.

4. Appearing Before the Committee

4.1 MVC requests that the organisation be given the opportunity to make an oral presentation to the Committees, based on our submission.

Contact details:

Please refer correspondence to the authors of this submission:

Ms. Boikanyo Moloto: boikanyo@myvotecounts.org.za [redacted]

Ms. Robyn Pasensie: robyn@myvotecounts.org.za [redacted]

5. Consultation and Support

5.1 MVC has consulted extensively in developing this submission, including with other civil society organisations, our legal team, and individuals with expertise and knowledge of political party funding, our electoral system, and related matters.

6. Conclusion

6.1 We recognise the difference between independent candidates and representatives, represented and unrepresented parties, along with the challenges that these differences present. Inevitably, focusing on amending a particular section of an Act is likely to cause disparities which must be immediately addressed in order to ensure that there is consistency in how the law is developed and applied.

6.2 MVC thanks both Committees for the opportunity to make a written submission on what are incredibly important and consequential amendments to several pieces of legislation. While each paragraph

speaks to a specific point, the overall thrust of our submission is that, as far as possible, political parties, independent representatives and independent candidates should be treated the same, in terms of accountability and transparency.

[ENDS]