Electoral Matters Amendment Bill

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Highlights

- This Bill was tabled very late in relation to the changes needed for the 2024 election.
- The Bill is being rushed through Parliament with unprecedented haste.
- The Bill includes controversial changes to the Political Party Funding Act that are not consequential to the inclusion of independent candidates by the Electoral Amendment Act of 2023.
- The President is given powers in relation to party funding that properly belong to Parliament, and that undermine the spirit and purpose of the Constitutional Court ruling in *My Vote Counts (2018)*.
- Powers are granted to the President in respect of sections 8(2) and 8(5) of the PPFA in two different places, in ways that contradict one another.
- The allocation of the monies from the Political Representatives Fund and the Multi-Party and Independents Democracy Fund (as they shall be named) is arbitrarily changed with the effect that the smallest parties are deprived of a substantial proportion of their income, and the largest party gains substantially.
- The definitions of “independent candidate” and “independent representative” are inconsistent, and vague at times, with unintended consequences.
- There are various other errors and omissions.

Aside from the “technical” corrections, it is recommended that the substantive amendments to the Political Party Funding Act be withdrawn from the Bill, to be considered at a point where Parliament may apply itself more fully to the ramifications.

Preliminary Comments

Late tabling

The Bill was tabled on December 8, 2023.

The first time that the consequential amendments in relation to the Electoral Amendment Act were mentioned was in the Portfolio Committee Meeting of February 8, 2022, when that Bill was first being considered by Parliament.

The need for the consequential amendments was mentioned again in committee on May 17, 2022, and July 12, 2022.

During 2023, the need for this Bill was discussed in committee on 7 February, 18 April, and 2 May. On 9 May, the Minister gave a very general briefing to the Portfolio Committee concerning Policy with regard to changes to the Political Party Funding Act. On 2 June, the Committee decided that this should proceed as an Executive Bill, as this process was already underway. The understanding was that the Bill could be drafted in six weeks.

On 6 June, 2023, the IEC presented proposals concerning administrative amendments to the PPFA, and consequential amendments to the Electoral Act and the Electoral Commission Act.

There were no further substantive discussions, and the Bill was approved by Cabinet on 29 November, 2023, 22 months after the Portfolio Committee first discussed the need, and 10 months after the National Assembly approved the final changes to the Electoral Amendment Act.

Haste in processing the Bill

It is undeniable that the Bill is being processed by Parliament with extraordinary haste. Clearly, this is related to the lateness in tabling, relative to the period in which elections may be held (May 22 to August 19).

It is clear from the information available, and the statements made in the Portfolio Committee on December 12, 2023, that there is no expectation that any substantive amendments will be made either during the National Assembly or the National Council of Provinces deliberations, which would require additional public consultations or possibly returning of the Bill of the national Assembly by the NCOP.

Controversial changes

The Bill contains two controversial changes (described below) in relation to s 24 of the Political Party Funding Act (read with regulations 7, 8, and 9 of Schedule 2, and the changes to the allocation of funds detailed in regulations 2, 3, and 4 of Schedule 2.

These are not required by the inclusion of independent candidates.

While there are certain other administrative changes similarly not required by the inclusion of independent candidates, these are unlikely to be of concern to anyone.

Given the lateness, the inclusion of unnecessary and controversial changes is at best strange. Procedurally, this is a problem, as the anticipated progress through Parliament implies ahead of time that potentially controversial and unnecessary amendments will not in any way be affected by the public input that will be sought. On the face of it, this invalidates the public consultation process, and potentially opens up the legislation to legal challenge .

Definitions

In my view, there are a few areas where the definitions of “independent candidate” and “independent representative” need to be simplified and improved. This would assist in interpretation in some places, as well as affecting the application of some of the rules in the various Acts.

Definition of an Independent Candidate

1. It is sufficient to state that an independent candidate has not been nominated by a party. Membership or otherwise of a party should not affect their legal status in relation to the affected legislation.
2. The condition of being nominated to contest an election (but not by a party) is simple and clear.
3. It is necessary and correct to cover the period before formal nomination. However, to do so by means of stating that a person “intends to contest” an election is too loose and subjective. For the purpose of the affected legislation, the Electoral Commission should be empowered to register a person as an independent candidate (in a manner similar to that of parties being registered, but necessarily with fewer conditions). This registration serves as the objective and formal designation of a person as an independent candidate, and prevents some of the provisions of the affected legislation from applying improperly to individuals, and potentially imposing obligations of which they may be unaware.

   Such registration of independent candidates should perhaps be opened two years before the anticipated date of an election (albeit that aspiring independent candidates could register after that time).
4. Regulations could deal with any of the contradictions arising from someone registered or nominated as an independent candidate also being nominated by a political party.

Definition of an Independent Representative

It is sufficient to state that an independent representative is not nominated by a political party.

This would avoid any potential confusion in relation to the compound logic of the given definition. Membership of a party can be the subject of some debate, whereas nomination or otherwise by a political party is unambiguous.

Definition of independent candidates vs independent representatives

In relation to campaigning for elections, there is not a clear enough distinction between an independent candidate and an independent representative.

Some of the proposed rules apply only to independent candidates, but not to independent representatives.

Therefore, it would be best for independent representatives to register as independent candidates (prior to nomination, as proposed above), and for them to be treated as independent candidates for any purpose where this would be relevant.

Inclusion of candidates for local government elections

The definition of “independent candidates” includes somebody contesting municipal elections.

This introduces changes and possible complications in relation to the Political Party Funding Act and to the Electronic Communications Act. For example, independent candidates in local government elections would have broadcast rights for the first time in terms of the Electronic Communications Act. This may or may not be a good thing, but the implications should be considered.

It should also be considered whether the onerous requirements concerning the regulation of donations should thus suddenly be imposed on candidates for local government elections, but NOT on independent candidates who are elected as councillors in municipal councils.

Consideration of funding rules for independents at local government level should be conducted as a separate exercise, with limits and thresholds more appropriate to that context being considered carefully.

Political Party Funding Act, 6 of 2018

Definition of “donation” and “donation in kind” not updated

Para (a)(ii) of the definition of “donation” should include a reference to independent representatives. It should also include a reference to section 34 of Act 10 of 2009, given that this expands on the constitutional injunctions.

The definition of “donation in kind” should include references to “independent candidate” and “independent representative”.

In particular, the absence of a reference to independent candidates and representatives in the definition of “donation in kind” would effectively exempt these from being included in the calculations in respect of donation limits and reporting threshold. This would be absurd.

Definition of “donation” for independent candidates and independent representatives

- The Act (with proposed amendments) does not sufficiently distinguish between the personal affairs of an independent candidate or independent representative, and their political activities.
- There is no provision for accounting for the expenditure of personal funds on political activities by an independent candidate or independent representative.

Therefore, the following changes should be considered:

1. For the purposes of the Act, donations should be defined as those made for the purpose of political activity. If it is specified that all such donations may be made only into a bank account established for this purpose (as described elsewhere in the Act), then this distinction should be easy. Independent candidates and independent representatives should not have to account for unrelated donations received, including those from family members.
2. All payments made from the personal bank account of an independent candidate or independent representative should be counted as a donation, and be subject to the same limits and reporting thresholds. This would have the effect of placing limits on the possibility of personal donations being made to circumvent the provisions of the Act.

s 12A(4)(b) – Statement of donations

An independent candidate should be required to submit an account of donations only for the period that they are registered an independent candidate, and only those donations intended for their political activity.

s 13(3) – Loose wording

There are three listed conditions, and then a response by two specified types of “respondent” must follow.

The conditions are separated by “or”, meaning that the specified response must happen if ANY of the conditions arises:

(a) A vacancy occurs. In terms of the Electoral Act, this could refer to a seat vacated by either an independent representative, or a party representative, or

(b) A member of a political party resigns from Parliament or a provincial legislature, or

(c) An independent representative resigns from Parliament or a provincial legislature.

The actions to be taken are applicable to a represented political party or an independent representative. The current wording does not clearly specify that this applies only to the actual seat being vacated.

The actions to be taken are:

i. Closing of books or records,

ii. Repaying unspent monies, and

iii. Submitting an audited financial statement of the books and records.

There are some observations and recommendations that can be made:

1. (a) above includes both (b) and (c) above. This makes (b) and (c) unnecessary. In other words, for the time being, it is enough to specify that a vacancy occurs.
2. The actions listed ONLY apply to independent representatives. Therefore, the reference to “represented parties” should be removed from section 13(3). The wording could perhaps be:

   “If a seat held by an elected representative is vacated, ...”
3. Clearly, if an independent representative vacates their seat, only their books need to be closed and submitted, and only their money needs to be repaid. The wording should specify this.
4. The wording should specify that the closure of books, repayment of monies and submission of audited statements should be done by the “**former** independent representative”, given that they are no longer “independent representatives” at the time they must carry out the actions.
5. There is no provision or instruction concerning how the closure of books, repayment, and submission of audited statements is to be done in the event of a vacancy arising from the death of an independent representative.

s 12A(4)(1)(b) – Clumsy wording

The wording of the proposed s 12A(4)(1)(b) is clumsy:

“all donations received by the candidate during the ~~previous~~ two financial years before his or her nomination”.

s 14 – Omission of independent representatives

It is not clear why the amendment to s 14 of the Act does NOT include independent representatives. There is no reason why the Commission would not monitor compliance with the Act by independent representatives as it must for independent candidates and political parties.

s 23(1) – Failure to include independent representatives in rules for funding by the National Assembly and provincial legislatures

Section 34 of Act 10 of 2009 is amended to include independent representatives in funding by the National Assembly and provincial legislatures.

There is no evident reason why section 23(1) has not been amended to include independent representatives in the prohibition of funding by legislatures other than by the legislative avenues specified. This implies that this would allow additional means of funding of independent representatives by the National Assembly and provincial legislatures. This is clearly not consistent with the intent of the amendments to the Act.

s 23(2) - Failure to include independent representatives in reporting of funding by the National Assembly and provincial legislatures

There is no evident reason why section 23(2) should not specify that the disclosures by the National Assembly and provincial legislatures in terms of sections 57(2) and 116(2) of the Constitution relate to independent representatives.

It can be observed that these sections in the Constitution do not anticipate independent representatives being members of Parliament or provincial legislatures. It can also be observed that section 34 of Act 10 of 2009 largely supersedes the rules of the National Assembly and of provincial legislatures in this respect.

Ideally, sections 57(2) and 116(2) of the Constitution should have been amended prior to Act 10 of 2009 (or at any time subsequently) to allow for national legislation to provide for the need mentioned, in addition to the stipulated rules and orders. Further to this, the original section 23(2) of the Political Party Funding Act should have made reference to section 34 of Act 10 of 2009.

Therefore, the following amendments should be made to section 23(2):

1. The phrase, “or of independent representatives” should be inserted after, “disclose any funding of represented political parties”.
2. The phrase, “, or of section 34 of Act 10 of 2009.” should be added after, “sections 57(2) and 116(2) of the Constitution respectively,”.

s 24(1) and Reg 7 - Duplication of mechanism to adjust donation limits

There are multiple problems with the proposed amendments relating to sections 8(2).

At face value, the amendments to Act 8 of 2018 contain two separate and conflicting mechanisms for adjusting the s 8(2) donation limit:

1. s 26 of the Bill proposes to amend s 24 of the Act in a manner that clearly implies that the Regulations that may be promulgated include the settings of the s 8(2) limit. If this was not the case, there would be no need to include para 24(1)(b), which sets out various numerical considerations. It is equally clear that section 24 in the original Act does not intent that the Regulations made by the President could directly set the limit referred to in section 8(2).
2. The substituted Regulation 7 in Sch 2 also purports to grant the President power to determine the limit contemplated in s 8(2).

Aside from the same power being granted in two separate places, there are inconsistencies:

1. The proposed s 24(1)(a) allows to the President to act on his own initiative, after consulting the relevant Portfolio Committee in the National Assembly, as well as the Minister. On the other hand, the proposed Regulation 7 allows the President to determine the limit only after a "Parliamentary resolution" (presumably, this should be, "a resolution by the National Assembly".
2. The proposed s 24(1)(b) requires the President to take into account the listed factors, whereas the proposed Regulation 7 permits the President to take into account the listed factors.
3. While being fundamentally the same, listed factors are described differently in the two places.

Adjustment of donation limits and reporting thresholds

Aside from the contradictory nature of the mechanisms to adjust donations limits and disclosure thresholds, the **principle** that the President may set these limits is deeply flawed.

Certainly, the proposed amendments to s 24 that give the President the power to determine the limits without the concurrence of Parliament is a violation of basic democratic accountability.

In either case, allowing the wide discretion to the President almost entirely undermines and contradicts the original purpose of the Act, which itself was promulgated in response to the Constitutional Court ruling in the *My Vote Counts* matter.

While it is trite that the passage of time naturally can give rise to valid adjustments of limits and thresholds, these constraints are central to the entire purpose of the Act, which is itself a critical pillar upholding democracy in South Africa. There should therefore be no scope for discretionary power to be exercised in the adjustments of the limits.

It is not sufficient that the President (or even Parliament) "must" (or "may") take the objective numerical factors into account. This would still allow scope for adjustments that would in practice render the Act toothless.

Therefore, the only permissible adjustments should be those constrained by an external or objective measure, such as the Consumer Price Index (CPI). If this is to be changed, then it could be done via a

parliamentary resolution, and subject to the condition that could not be higher than the previous values plus the cumulative effect of CPI in the interval since the previous values were set.

However, given the sensitive nature of these changes, and the far-reaching effect that they could have on democratic practices in South Africa, the amendments should be withdrawn now, to be considered at a time where proper consultation is possible.

Reg 2 – Allocation of Funds

- This is not required by the inclusion of independent candidates in the electoral system.
- The proposed amendment serves no valid purpose.
- This creates a grossly unfair change in the allocation of funds that favours the largest party, and harms all of the smallest parties.
- The motivation for such a change was discussed in the Portfolio Committee in only the most general terms, with no specific figures, and no explanation of the actual effect of including independent representatives.

The Bill proposes to amend Reg 2 to change the split in the allocation of the Funds from two-thirds allocated proportionally, and one-third equitably, to 90% proportional an 10% equitable.

The inclusion of independent representatives in the National Assembly and provincial legislatures will have a minor effect on the allocation of funds allocated in terms of Regulation 4. The likely effect is that the allocated funds will be divided among more recipients, although it is not clear how many there are likely to be. This would mean that each recipient will receive less from this allocation than has been the case previously.

It is not clear what problem is being solved by the change from the two-thirds / one-third split to 90% / 10%.

It is necessary to examine the actual numerical effect of the proposed change.

Smaller parties naturally derive a higher proportion of their moneys from the equitable allocation in terms of Regs 2(b) and 4 than they do from the proportional allocation in terms of Regs 2(a) and 3. Conversely, the larger parties receive a greater proportion of their moneys from the proportional allocation than they do from the equitable allocation.

This proposed change therefore has the following obvious and inevitable changes:

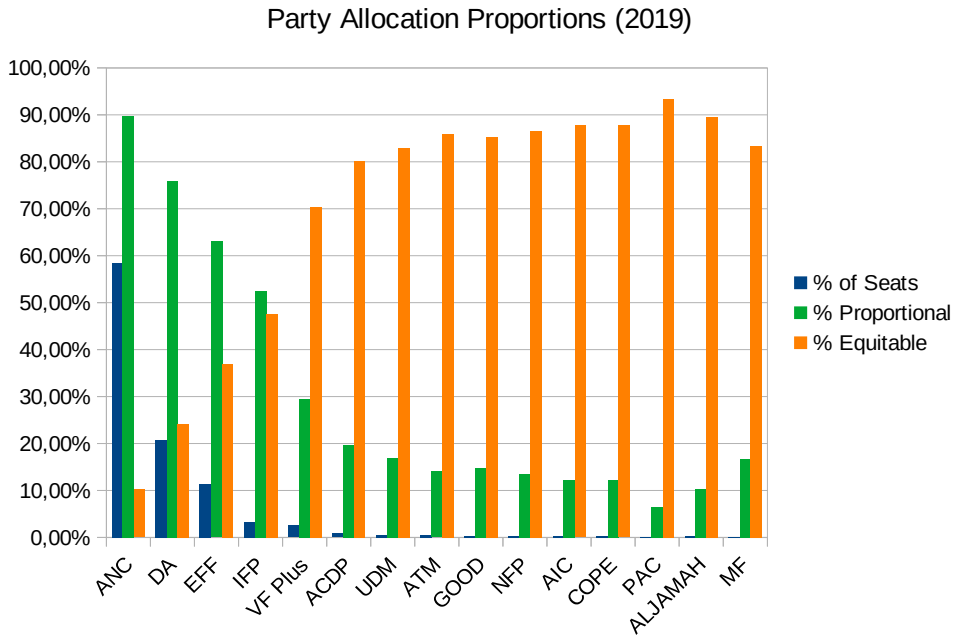
- Smaller parties will undergo a substantial reduction in their total allocations. The proposal reduces the equitable allocation to less than a third of what it is presently.
- Larger parties will tend to have their allocation increased, with the increase in the proportional allocation offsetting the reduction in the equitable allocation.

The factor that determines this effect is the relative proportion for each party of the proportional and equitable allocations. Irrespective of the amounts of money involved, these relative proportions can be calculated for a given seat allocation.

Therefore, for the seat allocations arising from the 2019 national and provincial elections, and not including independent representatives at this point, it is possible to determine the proportions. They are as follows:

Party	% of Seats	% Proportional	% Equitable
ANC	58,43%	89,80%	10,20%
DA	20,84%	75,84%	24,16%
EFF	11,33%	63,04%	36,96%
IFP	3,37%	52,46%	47,54%
VF Plus	2,53%	29,53%	70,47%
ACDP	0,84%	19,79%	80,21%
UDM	0,48%	17,00%	83,00%
ATM	0,48%	14,02%	85,98%
GOOD	0,36%	14,79%	85,21%
NFP	0,36%	13,46%	86,54%
AIC	0,24%	12,28%	87,72%
COPE	0,24%	12,28%	87,72%
PAC	0,12%	6,54%	93,46%
ALJAMAH	0,24%	10,37%	89,63%
MF	0,12%	16,67%	83,33%

This data is best understood in graphical form. This shows for each represented party the percentage of their total income from the Funds that comes from the proportional allocation, compared to the percentage that comes from the equitable allocation:



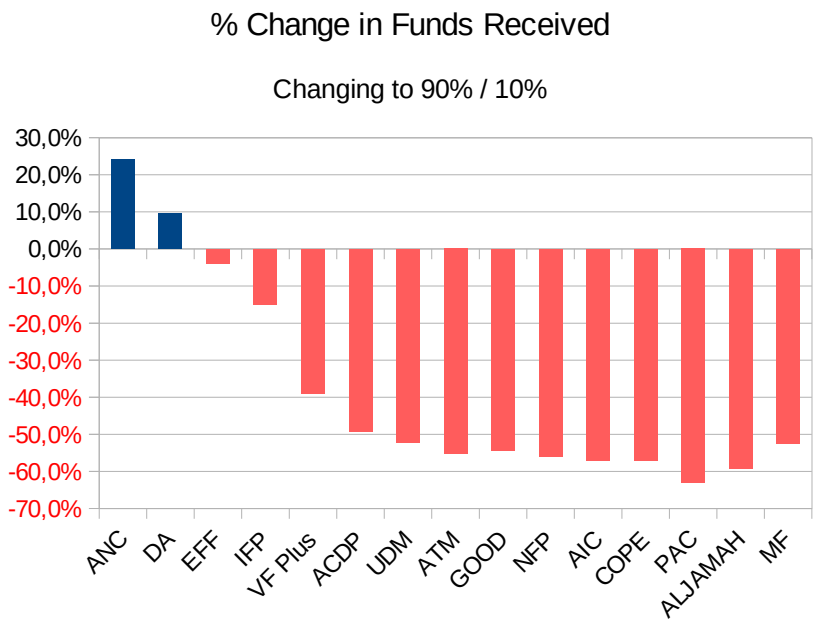
What we see is that for a few of the larger parties, the proportional allocation exceeds the equitable allocation. For most of the parties, the equitable allocation exceeds the proportional allocation, substantially. For those parties, if the total money available for the equitable allocation is substantially reduced, then their total income will be similarly reduced, as the increase in earnings from the

proportional allocation for those parties will be too small to offset the decline in earnings from the equitable allocation.

The following table shows the share each represented party has of the total allocation under the existing two-thirds / one-third allocation, and the share that each would have under the proposed 90% / 10% allocation. This allows us to see that change in actual income that each party would have if the proposed change was implemented:

Party	Share Present	Share Proposed	% Change
ANC	43,38%	53,92%	24,3%
DA	18,32%	20,09%	9,6%
EFF	11,98%	11,52%	-3,8%
IFP	4,29%	3,65%	-14,9%
VF Plus	5,71%	3,48%	-39,0%
ACDP	2,84%	1,44%	-49,2%
UDM	1,89%	0,90%	-52,2%
ATM	2,29%	1,02%	-55,3%
GOOD	1,63%	0,74%	-54,5%
NFP	1,79%	0,79%	-55,9%
AIC	1,31%	0,56%	-57,1%
COPE	1,31%	0,56%	-57,1%
PAC	1,23%	0,45%	-63,1%
ALJAMAH	1,55%	0,63%	-59,1%
MF	0,48%	0,23%	-52,5%

In graphical form:



Simply put, there is no need to make the change at all. The inclusion of independent representatives into the funding model will have a negligible effect on the structure of the allocation of funds. If there is a perceived need to accommodate for this, then a proper investigation should be carried out, with appropriate calculations and comparisons.

It can be observed that changing the proportions to a different figure, such as 75% / 25% would STILL result in a substantial drop in income for all but the largest four parties.

As it stands, the proposed change (or any variation thereof) would substantially prejudice several represented political parties, while inherently benefiting the largest party. This would be a profoundly anti-democratic change.

Reg 4(b) – Should be “independent representatives”

The reference should be to “independent representatives”, rather than to “independent candidates”.