



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*

**CCT 385/21**

**Date of judgment: 20 September 2022**

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#### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Tuesday, 20 September 2022 at 10h00, the Constitutional Court handed down judgment in an application for the confirmation of an order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court). The application was brought by amaBhungane Centre for Investigative Journalism NPC (amaBhungane) and concerned the confirmation of the order of the High Court, declaring the Executive Ethics Code published under Proclamation No. R41 of 2000 (the Code) unconstitutional, to the extent that it does not require the disclosure, by members of the executive (members) who are subject to the Code, of donations made to campaigns for elections to positions within political parties. AmaBhungane sought the Constitutional Court to confirm the High Court's order of invalidity and to suspend the order of invalidity for a period of twelve months to allow the President to remedy the defects in the Code. The Johannesburg Society of Advocates was admitted as *amicus curiae*.

The factual matrix in this matter has its genesis from the 19 July 2019, Public Protector report 37 of 2019/2020 entitled: "Report on an investigation into a violation of the Executives Ethics Code through an improper relationship between the President and African Global Operation (AGO), formerly known as BOSASA" (the Report). One of the findings of the Public Protector 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 (CR17 campaign) that supported his election as President of the African National Congress (ANC). Aggrieved by the findings made in the Report, the President launched an application in the High Court to review the Report. AmaBhungane then brought a constitutional challenge to the Code by way of a conditional counter-application through an application to intervene in the review proceedings between the President and the Public Protector. The application was conditional on the interpretation that the High Court would give the relevant provisions of the Code, but more particularly, on whether the Code required members to make disclosure of donations made to internal party-political campaigns. In its conditional application, amaBhungane contended that, to the extent that

the Code did not require Cabinet members, Deputy members and Members of the Executive Council to disclose donations made to them for their benefit for political party positions, the Code was unconstitutional. 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 application on technical grounds, and did so without considering the merits. The Public Protector, as well as several other parties, sought leave to appeal to the Constitutional Court against the findings of the High Court in the review application. On appeal, the Constitutional Court dismissed the Public Protector's appeal and remitted amaBhungane's constitutional challenge to the High Court. The Constitutional Court held that the High Court ought to have considered the constitutional challenge on its merits as it was properly before the High Court. The Constitutional Court refrained from 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, the High Court found that the duty to disclose arises when any benefit, including that derived from campaign funding for a member's internal party-political campaign, is received by the member in his or her personal capacity. Additionally, the High Court understood the Constitutional Court's judgment in the review application to mean that there will be instances where such finding will not give rise to a duty to disclose. This, in the view of the Court, gave rise to a question concerning the constitutionality of the inherent limitations of the Code and thus the condition set by amaBhungane for its application was satisfied. The High Court upheld the challenge and proceeded to declare the Code unconstitutional and invalid. AmaBhungane then applied to the Constitutional Court to confirm the order of constitutional invalidity made by the High Court. AmaBhungane accepted that such a declaration of invalidity should have no retrospective effect.

Before the Constitutional Court, amaBhungane submitted that the provisions of the Executive Members' Ethics Act 82 of 1998 (Ethics Act) meant that the Code had to 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 was further submitted by amaBhungane that section 2(2)(c) of the Ethics Act plainly required the Code to cast a wide net in relation to financial interests a member of the executive could possibly have, by providing that the Code must require a member of the executive to disclose all of their financial interests upon assumption of office and after assumption of office. AmaBhungane further submitted that it was clear from paragraphs 5 and 6 of the Code that the Code was intended to require disclosure of gifts, sponsorships or benefits received by the Minister or MEC in their private capacity, so as 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 contended that, to the extent that the Code did not require the disclosure of all donations made to campaigns for positions within political parties, for the benefit of members of the executive, it breached sections 1, 7(2), 19, 32, 96 and 195 of the Constitution and the Ethics Act.

The President did not oppose the application before the Constitutional Court and he filed a notice to abide. The Johannesburg Society of Advocates was admitted as *amicus curiae*. The *amicus* contended that the judicial intervention that amaBhungane sought was impermissible, unwarranted and unfounded and thus asked the Constitutional Court to dismiss the application. The application stood to be dismissed, according to the *amicus*, for the following reasons. First, the Code did not breach the Ethics Act. Second, section 2(2)(c) of the Ethics Act was limited to donations or financial support given to the member of the executive for his or her personal interest. Not only was this in line with the values of transparency, but it also mitigated against the risk of corruption (as contemplated in section 2(2)(b)(iv)) and the risk of members of the executive seeking to improperly benefit their donors. The *amicus* submitted that the aforesaid risk, however, did not arise in instances when the member of the executive or their relatives did not benefit personally. Third, the *amicus* submitted that, even if there was a constitutional obligation, as contended by amaBhungane, the attack on the Code was misdirected because of the principle of subsidiarity

and because the Code was not the appropriate vehicle for giving effect to the constitutional obligation contended for. According to the amicus curiae, the Party Political Funding Act 6 of 2018 is the legislation that gives effect to the constitutional obligation contended for.

In a unanimous judgment penned by Majiedt J, the Constitutional Court held that the purpose of the Ethics Act's wide-ranging provisions 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. The Constitutional Court further held that concomitant with the need to enact legislation to fight corruption, is the need to regulate, by legislative means, the funding of candidates and political parties which is premised on both international and domestic obligations. The Constitutional Court highlighted that section 19 of the Constitution affords citizens the right to make political choices, including the right to vote in elections. The Court held that those rights must be exercised meaningfully and on an informed basis. The Constitutional Court held that closely related to the rights contained in section 19, is section 32(1)(b) of the Constitution which provides that everyone has a right of access to any information "that is held by another person and that is required for the exercise or protection of any rights".

In reaching its conclusion, the Constitutional Court had to consider what that Court previously held in the review judgment. In the review judgment, the Constitutional Court held that the duty to disclose imposed by the Code is only activated once a benefit is given to a member of Cabinet in his or her personal capacity. As such, the Constitutional Court's review judgment imposed only a partial disclosure obligation on members of the executive. The Constitutional Court then had to consider whether the partial disclosure in question was constitutional. In answering this question, the Constitutional Court held that at the centre of the debate was the meaning and effect of section 2(2)(c) and the obligation on members of the executive to disclose financial interests. The Court found that answering the central question required an interpretation of "financial interests" in section 2(2)(c) of the Ethics Act. The Court concluded that 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".

The Court stated that *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC) plainly established the constitutional standard of transparency, and the Code, in its current form, failed to meet that standard. In light of this, the Court concluded that the partial disclosure obligation imposed by the Court's review judgment was insufficient to meet the relevant constitutional and statutory obligations. This was so because the partial disclosure allowed Ministers and MECs to avoid having to make disclosures by structuring their campaign funding so as to place it outside the scope of the "personal benefit" requirement outlined by the Court in the review judgment. The Court held that such a disclosure obligation could be easily evaded by the member of the executive by setting up a separate legal entity to collect donations to support his or her campaign and then ensuring an arms-length relationship with that entity, which he or she could do by ensuring that he or she exercises no control over the funds and does not receive them directly. The Constitutional Court held that this would plainly undermine the constitutional and statutory obligations outlined. In summary – the Court found that the Code fell short of constitutional and statutory dictates of transparency, accountability and openness. The exclusion from disclosure of donations for internal political-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.

In the result, the Court confirmed the order of the High Court declaring the Code unconstitutional and invalid. It suspended the declaration of invalidity for a period of twelve months in order to enable the President to remedy the defect. The Court ordered the President to pay amaBhungane's costs in the Constitutional Court, which included costs of two counsel.