POLITICAL PARTIES IN SOUTH AFRICAN LAW

By

Zaahira Tiry

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Supervisor: Prof PHG Vrancken

DECLARATION

I, Zaahira Tiry with student number 202323951, hereby declare that the dissertation for Masters in Law to be awarded is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

Zaahira Tiry

CONTENTS

SUMMARY

This dissertation is a literature study of the legal regime of political parties in post-apartheid South Africa. A constitutional perspective is adopted throughout the study in order to confine the topic to the realm of South African law. Hence, the focus of the study is to identify legal rights contained in chapter two of the Constitution and to also identify other provisions of the Constitution that have a bearing on political parties.

As mentioned in the conclusion, section 19 of the Constitution, set the scene for the development of this study. An analysis of the constitutional provisions highlighted in this study, case law and present legislation dealing with political parties reveals that there is a need for comparative research and the adoption of adequate legislation to regulate the functioning of political parties in South Africa. It is submitted that the regulation of parties by statute is required to ensure a just political order whereby the functioning of political parties is in line with the Constitution.

CHAPTER 1
INTRODUCTION

1.1 INTRODUCTION

> ***Today we are entering a new era for our country and its people. Today we celebrate not the victory of a party, but a victory for all the people of South Africa.***
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> ***~ Nelson Mandela - Inaugural speech* (1994)**

The 27 April 1994, known today as Freedom Day, is a day of significance in the history of South Africa. On this day, the Interim Constitution[1], that made provision for the enforcement of political rights for all South African citizens, "came into force"[2]. Moreover, on the 27 April 1994, South African citizens "of all races went to the polls together for the first time in the country's history ... to elect a Government of National Unity".[3]

Under our constitutional dispensation "the Constitution is the supreme law".[4] "Parliamentary sovereignty which existed under the previous constitutional dispensation has thus been replaced by a system in which Parliament and all government bodies are subordinate to the Constitution".[5] The South African constitutional dispensation is characterised by a multi-party system and proportional representation. In *UDM v President of the Republic of South Africa & Others*[6], the Constitutional Court expressed the view that "[a] multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public

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1 Interim Constitution of the Republic of South Africa, 1993.

2 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-5.

3 H Janse van Rensburg and D Burger *South Africa Yearbook* (1995) Second Edition, South African Communication Service chapter 3, 39. Also see P De Vos, J Murphy and N Steytler *Introduction – Free and fair Elections* in N Steytler, J Murphy, P De Vos & M Rwelamira (eds) *Free and fair Elections* Kenwyn Juta (1994) xv.

4 Section 2 of Constitution of the Republic of South Africa, 1996. *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC).

5 H Janse van Rensburg and D Burger *South Africa Yearbook* (1995) Second Edition, South African Communication Service chapter 3, 44.

6 *UDM v President of the Republic of South Africa & Others* 2002 11 BCLR (CC); 2003 1 SA 495 (CC).

debate and participate in free and fair elections".[7] According to Rautenbach and Malherbe "[p]olitical parties seek to represent the people in government and are the vehicle for the mobilisation of the voters to participate in elections".[8]

1.2 OBJECTIVES

The dissertation "Political Parties in South African Law" will focus on *inter alia* legal rights, such as for example political rights and the right to freedom of expression, which have a bearing on the functioning of political parties. The objective of this study is to identify the legal rights contained in chapter two of the Constitution and to further identify other provisions of the Constitution which are applicable to political parties. By doing so, the study proposes to clarify the key role of political parties as reflected by South African law. Furthermore, the dissertation will incorporate topics which are of importance to political parties, such as electoral matters.

1.3 RESEARCH QUESTIONS

i) How are political parties governed by the Constitution?

ii) What legislation has been formulated for the regulation of political parties in accordance with South African law?

   a) What does such legislation encompass?
   b) What areas, if any, need yet to be addressed by legislation?

1.4 IMPORTANCE OF THE STUDY

The South African political landscape has undergone changes in order to reflect a just political order. For the past decade all South African citizens regardless of race, colour or creed have had political choices and opportunities

[7] *Ibid* par 26.
[8] RM Rautenbach and EFJ Malherbe *Constitutional Law* (2009) Fifth Edition 130.

such as the right to stand for public office. The research questions identified in 1.3 above will illustrate the impact that the Constitution has had on the regulation of political parties in post apartheid South Africa. It will furthermore help determine the present legal regime of political parties and such assessment will assist in providing recommendations for future advancement or improvement.

1.5 METHODOLOGY

The study will be a combination of various methodologies. A desktop research will be utilised taking into consideration both primary and secondary sources. Journals, legislation, law reports and the internet will be relied on throughout the study. The topic will be researched from a constitutional perspective.

1.6 LIMITATIONS

(a) There is limited legal literature available on political parties in South African law and

(b) There is to date very little South African legislation regulating political parties.

CHAPTER 2
POLITICAL PARTIES AND THE FREEDOM TO MAKE POLITICAL CHOICES

2.1 INTRODUCTION

The Constitution provides that the "Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".[1]

The Interim Constitution[2] provided that "[e]very citizen shall have the right ... freely to make political choices".[3] The wording of the Interim Constitution was amended to incorporate a broader definition of political rights in the Constitution.[4] Section 19(1) of the Constitution provides that "[e]very citizen is free to make political choices, which includes the right – (a) to form a political party; (b) to participate in the activities of, or recruit members for, a political party; and (c) to campaign for a political party ...". Citizens (including members of political parties) therefore have the freedom to make political choices which includes, but is not limited to, the political rights listed in section 19(1).[5]

The incorporation of section 19(1) in the Bill of Rights gives higher status to rights of a political nature. According to Maduna, the section 19(1) "cluster of [political] rights lies at the heart of a democratic constitution...".[6] As a result, there is a link between the section 19(1) political rights and the founding

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1 Section 7 of the Constitution.

2 Interim Constitution of the Republic of South Africa, 1993.

3 Section 21 of the 1993 Constitution.

4 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-6.

5 P Maduna "Political Rights" in MH Cheadle, DM Davis and NRL Haysom (eds) *South African Constitutional Law The Bill of Rights (*2005), Second Edition, Lexisnexis Butterworths, 14-2 fn 7: the "general statement of the right [section 19(1)] is qualified by the phrase 'which includes the right to'. The use of 'includes' means that the list that follows is exemplary, not exhaustive".

6 *Ibid* 14-1.

democratic constitutional values.[7] The latter must therefore "be promoted when a court interprets the provisions [of section 19(1)] of the Constitution".[8] This also means that any "constitutional amendments affecting political rights may need to satisfy the procedural requirements, not just of amendments impinging on the Bill of Rights, but also of amendments to the founding values".[9]

Although the Constitution defines the freedoms with regard to political parties or the making of political choices, it does not define what a political party is. In the *Argus Printing and Publishing Case*,[10] the Appellate Division of the Supreme Court stated that "[t]here is no generally applicable legal definition of a political party, although definitions may be found in particular statutes".[11] In its pursuit to interpret the meaning of the term "political party", the court stated that "[i]t may, however, be suggested that an essential element of a political party is that it proposes candidates for election to governmental bodies".[12] It was further stated that "Inkatha may be described as a political body in the wide sense in that it enters into debates of national and international significance, and in the narrow sense in that Inkatha puts up candidates for participation in local authority and parliamentary elections...".[13]

Furthermore, section 19(1) of the Constitution is "a freedom right and a special political species of the rights to equality, freedom of expression, belief,

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7 Section 1(d) of the 1996 Constitution. Also see T Roux "Democracy" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 1, Juta & Co Ltd, 10-54.

8 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-7. Also see C Roederer "Founding Provisions" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 1, Juta & Co Ltd, Chapter 13.

9 Section 1 of the 1996 Constitution. Also see section 74(1) and 74(2) of the 1996 Constitution. Also see T Roux "Democracy" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 1, Juta & Co Ltd, 10-54.

10 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A).

11 *Ibid* 19.

12 *Ibid* 20.

13 *Ibid* 5. See *Glenister v President of the Republic of South Africa and Others* 2008 (Unreportable), available at http://www.saflii.org/za/cases/ZAGPHC/2008/143.pdf wherein various political parties were desirous of being admitted as amicus curiae, hence in an application to court for such admission, the political parties stated in their heads of argument that they envisaged their role as being "to educate, mobilise public participation, and lobby, together with NGO's, and other organs of civil society".[13]

opinion, assembly and association".[14] This political right therefore does not operate in isolation. "[O]ther rights, such as [for example] the right to freedom of expression, the right to freedom of association, and the right to assemble peacefully and unarmed, are also involved in the exercise of the right freely to make political choices".[15]

2.2 THE RIGHT TO FORM A POLITICAL PARTY

The registration of a political party forms a part of the formation process. The Electoral Act[16] provides that "[a] 'registered party' means a party registered in terms of section 15 of the Electoral Commission Act".[17] The Act further provides that "[a] party may contest an election only if that party-*(a)* is a registered party; and *(b)* has submitted a list of candidates in terms of section 27."[18] Registration is therefore a prerequisite for political parties "to put up candidates for election".[19] As proof of registration, the chief electoral officer issues all registered parties with a certificate of registration and the registration particulars of the party is published in the Government Gazette.[20]

Whilst the Constitution guarantees the right to form a party, legislation makes provision for the registration of parties.[21] However, the constitutional right to form a party and the registration requirement imposed by statute, overlap. The wording of the Electoral Commission Act does not state that compliance with the registration provision is peremptory.[22] The procedural requirements for registration are inter alia that the prescribed payment, the party's deed of foundation and the party's constitution be attached to the application for

14 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-30.

15 RM Rautenbach and EFJ Malherbe *Constitutional Law* (2009) Fifth Edition 131.

16 Electoral Act 73 of 1998 (hereinafter "the Electoral Act").

17 Section 1 of the Electoral Act.

18 Section 26 of the Electoral Act. Section 27 of the Electoral Act provides that "[a] registered party intending to contest an election must nominate candidates and submit a list or lists of those candidates for that election to the chief electoral officer...".

19 *Ibid.* P Maduna "Political Rights" in MH Cheadle, DM Davis and NRL Haysom (eds) *South African Constitutional Law The Bill of Rights (*2005), Second Edition, Lexisnexis Butterworths, 14-4.

20 Section 15(5) of the Electoral Commission Act.

21 Section 19 of the Constitution. Section 15(1) – (3) of the Electoral Commission Act.

22 Section 15-17 of the Electoral Commission Act.

registration.[23] These legislative "requirements for registration ... pose no substantive barriers to a person wishing to form a political party".[24] However, political parties who intend to participate in any election, must forward an application for registration of the party, to the chief electoral officer.[25] For example, the Congress of the People (abbreviated as COPE), registered the party in accordance with the Electoral Commission Act in order to participate in the elections.[26]

According to the Electoral Commission Act, the chief electoral officer cannot register a party if for example the name, symbols, constitution or the founding documents of the party contains anything "propagating or inciting violence or hatred, or which causes serious offence to any section of the population on the grounds of race, gender, sex, or other listed grounds, or which indicates that persons will not be admitted to membership or welcomed as supporters on the grounds of their race, ethnic origin or colour".[27] These restrictions prohibiting the chief electoral officer from registering a party may be regarded as reasonable upon taking the aforementioned "listed grounds"[28], into account.

In a recent case[29], *African National Congress v Congress of the People*, the ANC "applied for an interdict to restrain COPE from using the name Congress of the People as its name and/or persisting with its application under the [Electoral Commission Act] to register as a political party under"[30] the name of COPE. The objection of the ANC to the use of the name "Congress of the People" by COPE was due to "the historic Congress of the People that took place in June 1955. [This Congress namely] the Congress of the People

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23 Section 15(3) of the Electoral Commission Act. Section 27(2) of the Electoral Act.

24 Section 15-17 of the Electoral Commission Act. J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-32.

25 Section 15(1) of the Electoral Commission Act.

26 Electoral Commission Act 51 of 1996 (hereinafter "the Electoral Commission Act"). *African National Congress v Congress of the People and Others* 2009 (3) SA 72 (T) 2.

27 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-34. Section 16(1) (c) of the Electoral Commission Act.

28 *Ibid.*

29 *African National Congress v Congress of the People and Others* 2009 (3) SA 72 (T).

30 *Ibid* 3.

adopted the Freedom Charter".[31] According to Du Plessis J, "the mere use of the name Congress of the People does not convey that COPE actually is the 1955 Congress of the People. No reasonable voter, even those with but a passing knowledge of the relevant history, will think that COPE, a party established in 2008, is the event that took place in 1955. [Also those] that have no knowledge of the history will not be deceived because they will not know that the term Congress of the People might refer to a historic event".[32] Furthermore, in response to the arguments presented by counsel on behalf of the ANC as regards the name "Congress of the People", Du Plessis J reiterated that "the mere use of the name Congress of the People does not convey that [the political party] COPE has any exclusive claim to the 1955 event or to the Freedom Charter".[33]

As for the concept of unlawful competition as applicable to political parties, the court agreed that "the law of unlawful competition applies to political parties [and that] a political party may not employ unlawful means to attract votes".[34] For example, if COPE uses the name "Congress of the People" as a means to convey "a false message to the voters, [then] it will be competing unlawfully".[35] The question to be considered, as stated and determined by the court, was "whether, purely by its use of the name Congress of the People, COPE is conveying to the voters a false message [and in] order to determine whether the use of the name conveys a message and whether that message is false, the court must view it from the perspective of a reasonable voter who is reasonably informed".[36] In the papers before court, the ANC mentioned that in terms of section 16(1) (b) of the Electoral Commission Act "COPE will, once registered as a political party under that name, be entitled exclusively to use

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31 *Ibid* 5 wherein Du Plessis J descibed the Freedom Charter as "one of the most important documents in the history of this country. For some, it is the most important document in the history of this country. In it are embodied principles for which those who took part in the liberation struggle fought and suffered. Principles of the Freedom Charter underlie the Constitution of the Republic of South Africa, 1996".

32 *Ibid* 12.

33 *Ibid* 13.

34 *Ibid* 9.

35 *Ibid* 10.

36 *Ibid* 10.

the name Congress of the People as a name for a political party".[37] In this regard, the Electoral Commission Act provides that the "chief electoral officer may not register a party... if ... a proposed name, abbreviated name, distinguishing mark or symbol mentioned in the application resembles the name, abbreviated name, distinguishing mark or symbol, as the case may be, of any other registered party to such an extent that it may deceive or confuse voters".[38] The court found that the political party, COPE, was not guilty of unlawful competition on the ground that "Cope's use of the name Congress of the People does not convey a false message..."[39] as alleged by the ANC.[40] COPE was therefore entitled to register as a political party despite the ANC's attempt to prevent COPE from doing so.

Moreover, the limitation clause[41] contained in the Bill of Rights allows the limitation of rights "in terms of law of general application".[42] The effect of the limitation clause is such that any limitation of the right to form a political party should be just and reasonable. It can be argued that the statutory requirement for payment of a deposit by political parties that contest elections may be unreasonable if it creates a barrier to registration especially if the payment cannot be afforded by those wanting to register a party.[43] In my opinion, it is meaningless to form a party only to realise that affordability is an issue, thus preventing registration and participation in elections. Indeed, as stated above, the *Argus case* makes it clear that "an essential element of a

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37 *Ibid* 15.

38 Section 16(1)(b) of the Electoral Commission Act.

39 *African National Congress v Congress of the People and Others* 2009 (3) SA 72 (T) 16.

40 *Ibid.*

41 Section 36(1) provides that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose". (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

42 *Ibid.*

43 Section 15(3) of the Electoral Commission Act. Section 27(2) of the Electoral Act. J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-32.

political party is that it proposes candidates for election to governmental bodies".[44]

The Electoral Act provides that the commission is responsible for prescribing the amount of the deposit, if any.[45] The Act further provides that the amount "to be deposited by a registered party contesting an election of a provincial legislature, must be less than the amount for contesting an election of the National Assembly". It is recommended that legislation should stipulate a reasonable maximum amount for the deposit in order to avoid having the commission prescribe an excessive amount.

Another issue that creates a barrier to registration and participation in elections is that the deposit paid by registered parties is only refundable to those parties who secure a seat in the elections.[46] Self evidently, the risk of losing the deposit remains high for newly registered parties contesting elections as opposed to established parties who have secured seats in previous elections. This can be seen as yet another limitation to the right to form and register a party in order to participate in elections. To address this issue, legislation should ensure that the deposit is refundable to all registered political parties regardless of whether registered parties secure a seat in elections.

Presently the South African legal regime supports the unrestricted formation of political parties.[47] Indeed, section 19(1) (a) does not include any restrictions on the right of citizens to form a political party. In contrast, the German Basic Law provides that "[p]olitical parties shall participate in the formation of the political will of the people. They may be freely established. [Provided that their] internal organisation must conform to democratic principles...".[48]

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44 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 20.

45 Section 27(3) (a).

46 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-32.

47 Section 1(d) of the 1996 Constitution which states that South Africa is founded on "a multi-party system of democratic government..." Also see section 19(1) of the Constitution.

48 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-12. See Article 21(1) of Basic Law for the Federal Republic of Germany (Grundgesetz, GG)

Furthermore the German Basic Law makes provision for the following, "[p]arties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order...shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality".[49]

In South Africa, a political party and its members regulate the internal organisation of the political party.[50] A question to be considered is whether a Court should intervene in circumstances where the internal organisation of a political party is contrary to democratic principles. This is an area that has to date not been addressed by legislation or case law. Some authors express the view that, if a political party fails to adhere to democratic principles, the party "would fall foul of the foundational values of the Constitution".[51]

The *Democratic Alliance Case*[52] illustrates whether the courts will intervene in disputes affecting political parties and their members. The Democratic Alliance proceeded with an application to court because the representation of the party "on three committees [of the municipal council] was considerably diminished".[53] The party sought the courts intervention as an "attempt to redress the situation by having the resolutions of the council determining the composition of the committees in question set aside".[54] The court application was dismissed on the ground that "none of the applicant's[55] rights had been infringed by the decisions taken at the Council meeting ... and that the

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promulgated on 23 May 1949 (first issue of the Federal Law Gazette, dated 23 May 1949), as amended up to and including 20 December 1993.

49 Article 21(2) of Basic Law for the Federal Republic of Germany (Grundgesetz, GG) promulgated on 23 May 1949 (first issue of the Federal Law Gazette, dated 23 May 1949), as amended up to
and including 20 December 1993.

50 Section 19(1) (a) of the Constitution. The internal organisation of a political party may be classified as a "political choice" of the leader of the party.

51 Maduna P, "Political Rights" in Cheadle MH, Davis DM, Haysom NRL *South African Constitutional Law The Bill of Rights (*2005), Second Edition, Lexisnexis Butterworths, (Chapter 14) 14-4.

52 *Democratic Alliance v ANC and Others* 2003 (1) BCLR 25 (C).

53 *Ibid* 25 where it was stated that legislation approved by Parliament allowed for the occurrence of "a political realignment ... leading to a shift of power in the municipal council of the City of Cape Town".

54 *Ibid.*

55 Hereinafter "the Democratic Alliance".

[Democratic Alliance] had not made out a case for ... the relief sought by it".[56] Van Heerden J agreed with the respondents'[57] argument that "the Court should not allow itself to be dragged into matters which should be dealt with at a political or administrative level and not at a judicial level".[58] However, according to Mahomed CJ, "any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts".[59] In my view, "any citizen"[60] as referred to by the court can be interpreted as a broad term and therefore it makes provision for the protection of members of political parties by the courts, as political parties are composed of citizens.

With regard to disputes concerning the right to just administrative action, "the courts should attempt to ensure that the actions of the administration are carefully scrutinised for compliance with the constitutional requirements of lawful, reasonable and procedurally fair administrative action".[61] In order to provide further clarification on the role of the courts in the sphere of administrative disputes, the nature of the right to just administrative action as applicable to political parties will be examined. Thornton assessed whether political parties are bound by the constitutional right to just administrative action by examining various provisions of the Constitution.[62]. The functioning of the right to just administrative action does not operate in isolation, but in correlation with other constitutional provisions. These provisions indicate that political parties are "protected, supported and their interests are promoted by the Constitution".[63] An analysis of constitutional provisions establishing the

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56 *Democratic Alliance v ANC and Others* 2003 (1) BCLR 25 (C) 41.

57 *Ibid* 25 wherein the parties to the application were: "Applicant was the Democratic Alliance. First Respondent was the African National Congress; Second Respondent the New National Party; the third to the seventh respondents were the City Manager, the Municipal Council, the Speaker; the Mayor and the Executive Committee of the City of Cape Town. Eighth Respondent was the City of Cape Town."

58 *Ibid* 41. Also see *Bel Porto School Governing Body and Others v Premier, Western Cape and Others* 2002 (9) BCLR 891, 2002 (3) SA 265 (CC).

59 http://www.saflii.org/za/cases/ZASCA/1999/50.html par 14.

60 *Ibid.*

61 K Klaaren and G Penfold "Just Administrative Action" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta & Co Ltd, 63-5.

62 L Thornton "The Constitutional Right to Just Administrative Action – Are Political Parties Bound? (1999) 15 South African Journal of Human Rights 351.

63 *Ibid* 368.

link between political parties and the right to just administrative action, as indicated by Thornton, is discussed below.

The Constitution provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair".[64] Importantly, the right to just administrative action forms a part of the Bill of Rights.[65] Section 8(1), the application clause, provides that the Bill of Rights applies to "all organs of state".[66] The question is whether political parties can be classified as an organ of state. Section 239 (b) of the Constitution defines organ of state as "any other functionary or institution – (i) exercising a power or performing a function in terms of the Constitution or ... (ii) exercising a public power or performing a public function in terms of any legislation...".[67] Thornton found that it is unclear whether political parties are organs of state when exercising a power or performing a function in terms of the Constitution and political parties therefore do not satisfy section 239 (b) (i) of the definition of "organ of state".[68] However, upon reliance on section 239(b) (ii), in order for a political party to be defined as an organ of state, it must exercise a *public* power or a *public* function in terms of legislation. Thornton concludes that "*to the extent that a political party is exercising a public power or performing a public function in terms of legislation*, it is an organ of state".[69] Therefore, a political party would qualify as an organ of state when the procedure of "choosing of lists of candidates for national and provincial elections" is undertaken by the party, in accordance with electoral legislation.[70] As a result, when a political party meets the requirements of section 8(1) of the Constitution and section 239 (b) (ii), it follows that the party is an organ of state and as an organ of state the party has the right to just administrative action.[71]

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64 Section 33(1) of the Constitution.
65 Section 33 of the Constitution.
66 Section 8(1) of the Constitution.
67 Section 239.
68 L Thornton "The Constitutional Right to Just Administrative Action – Are Political Parties Bound? (1999) 15 South African Journal of Human Rights 354.
69 *Ibid* 356.
70 *Ibid* 353.
71 *Ibid* 355. Section 8 (1) of the Constitution.

In summary, bearing in mind Thornton's conclusion in respect of the application clause and section 239 (b) (ii), case law dealing with administrative action may then be applicable to political parties as well. In respect of the intervention of the courts in administrative disputes, Chaskalson P mentioned that "[a]s long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."[72] Thus, the South African legal regime supports the formation and functioning of political parties with no intervention by the judiciary, provided the dispute is outside the court's domain.

Thornton went further and assessed whether political parties may be bound by the right to just administrative action in terms of an alternative provision of the application clause. Hence, section 8(2) of the Constitution provides that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". Her analysis of section 33 of the Constitution revealed that the definition of the right to just administrative action as stated in the Constitution is not conclusive.[73] The nature of this right, in her view, covers "public and private administration" because the constitutional provision does not state that it applies exclusively to "public" or "private" administration.[74] Davis J supports Thornton's observation that both public and private institutions exercise power and that "[a]dministrative law principles are designed to protect us from the exercise of that power."[75]

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72 K Klaaren and G Penfold "Just Administrative Action" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta & Co Ltd, 63-16. Also see *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the RSA and Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at par 90.

73 L Thornton "The Constitutional Right to Just Administrative Action – Are Political Parties Bound? (1999) 15 *SAJHR* 359.

74 *Ibid*.

75 *Ibid*. *Max v Independent Democrat s and Others* 2006 (3) SA 112 at 117.

Thornton is therefore of the view that juristic persons such as political parties may be bound by the right to just administrative action.[76]

An example of the right to just administrative action as applicable to a political party as a juristic person arises when a party exercises the power to dismiss a member of a party who is a member of the legislature as well.[77] Davis J found Thornton's article relevant to the facts that arose in the *Independent Democrats and Others Case*[78]. This case dealt with the dismissal of a member of a registered party who was also a member of the provincial legislature.[79] The party suspended the member on the basis that he did not adhere to party obligations in his capacity as party member and party representative.[80] The disciplinary enquiry conducted by an independent person led to the handing down of a report summarising the outcome of the enquiry.[81] In terms of the report, the applicant was found guilty and immediate expulsion was recommended.[82] The aggrieved member then lodged an appeal and proceeded with an application to court relying on two contentions.[83] Firstly, the contention that the principles of administrative justice either in terms of PAJA, failing which, in terms of the common law is applicable to the disciplinary proceedings.[84] Secondly, that the "lodging of the appeal suspends the effect of the order against which the appeal is made".[85]

Davis J confirmed that the exercise of the power of dismissal by a party should to be in line with "modern administrative law, and more so, with the Constitution which enshrines a foundational principle of accountability and fairness".[86] Also the learned judge emphasised that if a party "expels a member, its decision has public implications in that the expelled person can no

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76 L Thornton "The Constitutional Right to Just Administrative Action – Are Political Parties Bound? (1999) 15 *SAJHR* 359.
77 *Ibid* 370. *Max v Independent Democrat s and Others* 2006 (3) SA 112 at 118.
78 *Max v Independent Democrat s and Others* 2006 (3) SA 112 .
79 *Ibid* 115.
80 *Ibid.*
81 *Ibid* 116.
82 *Ibid.*
83 *Ibid* 116 -117.
84 *Ibid* 116.
85 *Ibid* 117.
86 *Ibid* 122.

longer represent the electorate which voted for that particular party."[87] Accordingly, the consequences is such that in the event that the party member is "unfairly expelled from the party only to be restored to his position in the party upon appeal, this would be an action of the kind which could not be repaired. A vacancy in the legislature would not be available and applicant, therefore, could not be restored to membership of the legislature".[88] As a result, the court found that the circumstances of this case are such that the balance of convenience favours the aggrieved member.[89] The court order inter alia declared that: (1) no vacancy in respect of the applicant's seat exists in the provincial legislature; (2) an interdict is granted, prohibiting the party and others from filling the seat of the applicant in the provincial legislature, until finalisation of the internal disciplinary appeal and (3) the award of the nominated person who dealt with the disciplinary proceedings, is "suspended pending the finalisation of the internal appeal".[90]

However, although the above constitutional provisions may indicate that "in certain circumstances, political parties are bound by the right to just administrative action because they are considered organs of state in some of those circumstances and in others because the Constitution is applicable to them as juristic persons"[91], the above analysis was not supported by the court in the *Ismail Case*[92]. In this case, the party charged the applicant for inter alia "breach of party discipline".[93] Prior to the commencement of the disciplinary hearing and at the first hearing, the applicant requested a public hearing.[94] The party regarded the dispute as an internal party matter with no bearing on public interest and thus, refused the applicant's request.[95] A stay of the

87 *Ibid* 122.
88 *Ibid 124.*
89 *Ibid* 124.
90 *Ibid* 125.
91 L Thornton "The Constitutional Right to Just Administrative Action – Are Political Parties Bound? (1999) 15 *SAJHR* 351.
92 *Ismail v New National Party in the Western Cape and Others* [2001] JOL 8206 (C).
93 *Ibid* 2.
94 *Ibid* 4.
95 *Ibid* 4 and 7.

disciplinary proceedings was agreed to between the parties.[96] The applicant then proceeded with an application to court.[97]

In the review application, counsel for the applicant referred to Thornton's article and argued that disciplinary proceedings may be classified as administrative action, "within the meaning of section 33".[98] The crux of the applicant's contention is that the principles of administrative law apply when a party member who also represents the legislature, is dismissed by the party.[99] Binns-Ward AJ assessed whether "an internal function of a political party may result in the public being affected through a change in membership of the legislature".[100] The Constitution[101] provides that national legislation i.e. the Electoral Act[102] prescribe the electoral procedure[103] for party members to acquire a seat in the legislature.[104] The courts analysis revealed that the requirements for a party member to become a member of the legislature depend on the "proportional support obtained by the party to which the individual belongs, together with his or her position on the [party] list".[105] The learned judge stated that "[j]ust because [the compilation of a party list by a political party] is done in the context of relevant legislation does not render it p*er se* a public function (or the exercise of a public power) by the actor".[106] The court concluded that, although section 33 of the Constitution and the provisions of PAJA do not apply to disciplinary proceedings, common law administrative principles are applicable.[107] Thus, the court application was

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96 *Ibid* 8.
97 *Ibid* 7.
98 *Ibid* 23.
99 *Ibid* 24. L Thornton "The Constitutional Right to Just Administrative Action – Are Political Parties Bound? (1999) 15 *SAJHR* 370.
100 *Ismail v New National Party in the Western Cape and Others* [2001] JOL 8206 (C) 24.
101 Section 42, 46 and 105(1).
102 Act 73 of 1998.
103 Section 26 and 27 of the Electoral Act.
104 *Ismail v New National Party in the Western Cape and Others* [2001] JOL 8206 (C) 25.
105 *Ibid* 25.
106 *Ibid* 26.
107 *Ibid* 32. . Section 39(3) of the Constitution provides that "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill". Also section 39(2) provides that "[w]hen interpreting any legislation, and when developing the common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

dismissed and as a result, a public hearing of the disciplinary proceedings was not approved.[108]

In conclusion, two cases have been presented here, one which corroborates Thornton's argument and another which does not. In my opinion, although the court did not view the dismissal of a member of the party and legislature as a public function in the Ismail case, I agree with Thornton's argument. In my view, dismissing a party member and representative from the legislature may change the relationship between the party and the electorate. Therefore, the principles of just administrative action are applicable to political parties since dismissal of party members can be classified as a public power or public function, as it has an influence on the electorate.

2.3 THE RIGHT TO PARTICIPATE IN THE ACTIVITIES OF, OR RECRUIT MEMBERS FOR, A POLITICAL PARTY

Section 19(1) (b) of the Constitution provides that citizens have the right to participate in the activities of a political party and the right to recruit members for a political party. This political right firstly complements the right to freedom of association because section 19(1) (b) creates the option for citizens to choose whether to associate or not to associate with a political party. Secondly, section 19(1) (b) broadens the right to freedom of association because it categorises the association of citizens with political parties, more specifically it emphasises the making of political choices.

Section 18 of the Constitution provides that "[e]veryone has the right to freedom of association".[109] Both section 18 and section 19 of the Constitution have provisions in relation to freedom of association. However, section 18 has a broad provision on everyone's right freedom of association, while section 19 goes further to specify freedom of association in relation to political parties.

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108 *Ismail v New National Party in the Western Cape and Others* [2001] JOL 8206 (C) 34.

109 Article 22(1) of the International Covenant of Civil and Political Rights (hereinafter "ICCPR") provides that "[e]veryone shall have the right to freedom of association with others..." See also Article 20(1) of the Universal Declaration of Human Rights. This Article also provides that "[e]veryone has the right to freedom of ... association".

According to Patel DJP, a "political party is a voluntary association, and a voluntary association is founded on the basis of mutual agreement, which entails an intention to associate, and consensus on the essential characteristics and objectives of the association".[110] This expression, freedom of association, amounts to "a general capacity for citizens to join without interference ... in associations [such as political parties] in order to attain various ends".[111] In addition, "[n]o one may be compelled to belong to an association".[112] As an illustration, the International Labour Convention[113] (on the Freedom of Association and Protection of the Right to Organise) provides that with regard to freedom of association, "[w]orkers and employers [similarly citizens], without distinction whatsoever, shall have the right to ... subject only to the rules of the organisation [political party] concerned, to join organisations [political parties] of their own choosing without previous authorisation".[114]

The decision to associate with a political party may lead to an application for membership being submitted to the political party for consideration. In the *Mcoyi and Others Case*[115], the court noted that the relationship between a party and its members "is a contractual one, the terms of the contract being contained in the constitution of the party".[116] Also, provisions of a party's constitution are relied on to qualify or disqualify membership. Since "political parties are voluntary associations, they are not created by government and are thus generally not regulated by statute. Party members decide on the

110 *Mcoyi and Others v Inkatha Freedom Party, Magwaza-Msibi v Inkatha Freedom Party* 2011 (4) SA 298 (KZP) par 30. Also see *Yiba and Others v African Gospel Church* 1999 (2) SA 949 (C).

111 Appl. 6094/73, D&R 9 (1978) 5 (7). Van Dijk, P and Van Hoof, GJH, *Theory and Practice of the European Convention on Human Rights* (1990) Deventer, The Netherlands, Kluwer 592. I Fredericks "The Legal regulation of Political Parties and their Participation in Elections" in N Steytler, J Murphy, P De Vos & M Rwelamira (eds) *Free and fair Elections* Kenwyn Juta (1994) 75.

112 Article 20(2).

113 Hereinafter "IOL".

114 Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 87 of 1948, ratified by South in 1995.

115 *Mcoyi and Others v Inkatha Freedom Party, Magwaza-Msibi v Inkatha Freedom Party* 2011 (4) SA 298 (KZP).

116 *Mcoyi and Others v Inkatha Freedom Party, Magwaza-Msibi v Inkatha Freedom Party* 2011 (4) SA 298 (KZP). Also see *Matlholwa v Mahuma and Others* C [2009] 3 All SA 238 (SCA) par 8.

qualifications for membership and the structure of the party".[117] A political party may therefore decline an application for membership if the prospective member does not meet the qualifications for membership as listed in the party constitution.[118] Furthermore, if a member of a political party breaches the party constitution, the member may be subjected to disciplinary procedures which could lead to expulsion.[119] Thus, the question is whether the conduct of political parties, such as a decision to decline an application for membership or a decision to expel or suspend a member of the party, infringes section 18 and section 19(1) (b) of the Constitution.

"In so far as the constitutions of the various political parties constrain members of political parties or other individuals from participating, [section 18 and section 19(1) (b) of the Constitution] will be of limited assistance. It will not enable applicants to challenge admission criteria or members to dispute intra-party decision-making mechanisms or disciplinary procedures".[120] In the *Ismail Case*[121], it was held that in the "absence of express provisions in the domestic constitution [of the party] it is open to the party entitled to convene a private disciplinary enquiry to institute any procedure considered appropriate as long as it complies with the rules of natural justice".[122] The rules of natural justice are "common law rules which have to be observed before any administrative action may be taken...These rules have crystallised in practice into the principles of *audi alteram partem* (literally: hear the other side) and *nemo judex in sua causa* (literally: no-one may be a judge in his own cause)...".[123] The effect is that if "the rules of

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117 I Fredericks "The Legal regulation of Political Parties and their Participation in Elections" in N Steytler, J Murphy, P De Vos & M Rwelamira (eds) *Free and fair Elections* Kenwyn Juta (1994) 76.

118 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-32.

119 *Harding v Independent Democrats and Others* 2008 2 All SA 199 (C) 202; *UDM v President of the Republic of South Africa & Others* 2002 11 BCLR (CC); 2003 1 SA 495 (CC) par 71.

120 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-34.

121 *Ismail v New National Party in the Western Cape and Others* 2001 JOL 8206 (C).

122 *Ibid* 16.

123 Colen P, "Organs of State and the Rules of Natural Justice" retrievable from http://www.bclr.com/EntrepreneurArticles/BCLR%202009%2007.pdf.

'natural justice' have not been observed, an aggrieved person can approach an appropriate court that will enforce the rules as a matter of policy".[124]

It was further held in the *Ismail Case*[125] that, by "becoming a member of a private body such as [a political party, the member of the political party] agreed to be bound by [the party constitution] and to be amenable to the disciplinary processes permitted thereunder".[126] In May 2010 Julius "Malema[127] admitted to violating party rules by dividing the ANC ... He was forced to apologize, seek anger-management help and agreed to pay a 10,000 rand ... fine. He was also warned that he risked suspension from the party if he committed a similar infraction in the next two years".[128] Due to the recurrence of a similar violation by Malema which fell within the two year warning period, as will be discussed below, his ANC "membership has been suspended for a period of 2 (two) years".[129]

Recently the ANC charged[130] Malema and another five[131] members of the ANC youth league with various charges which include "bringing the party in disrepute"[132] and "sowing divisions in ANC ranks".[133] Ultimately the

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124 *Ibid.*

125 *Ismail v New National Party in the Western Cape and Others* 2001 JOL 8206 (C).

126 *Ibid* 18.

127 Leader of ANC youth league and ANC member.

128 M Cohen,"South Africa's Malema May Face Suspension From Ruling ANC" [retrievable from http://www.businessweek.com/news/2011-08-19/south-africa-s-malema-may-face-suspension-from-ruling-anc.html]. Also see M Bosch, "Malema facing suspension for 'sowing division' in ranks" *Weekend Post* 20 August 2011 at 2.

129 "Malema et al: Full Text of ANC Disciplinary Hearings" retrievable from http://www.publiceyenews.com/2011/11/14/malema-et-al-full-text-of-anc-disciplinary-hearings/.

130 *Ibid*.The ANC members were charged on the 16th November 2011.

131 "ANC disciplinary committee refuses Malema recusal application" retrievable from http://www.polity.org.za/article/anc-disciplinary-committee-refuses-malema-recusal-application-2011-09-01 wherein Sapa stated that "[c]harged with him are ANCYL spokesperson Floyd Shivambu, deputy president Ronald Lamola, treasurer general Pule Mabe, secretary general Sindiso Magaqa and deputy secretary general Kenetswe Masenogi". See also public statement, by the disciplinary committee that the "NDC is also cognisant that those charged are national leaders of the ANC Youth League and is of the view that their leadership positions impose on them a responsibility to conduct themselves, in all respects, in an exemplary manner, serving as role models to young people", contained in "Malema et al: Full Text of ANC Disciplinary Hearings" retrievable from http://www.publiceyenews.com/2011/11/14/malema-et-al-full-text-of-anc-disciplinary-hearings/.

132 M Bosch, "Malema facing suspension for 'sowing division' in ranks" retrievable from the *Weekend Post* 20 August 2011 at 2.

members of the party were charged "for violations of the ANC Constitution".[134] The ANC proceeded with a disciplinary hearing.[135] Malema's application for the recusal of three members of the ANC's National Disciplinary Committee (NDC)[136] members was refused on the basis "that insufficient facts had been presented to show bias or a perception of bias"[137] by the designated chairpersons'.[138]

The NDC is authorised in terms of the party constitution to impose various sanctions such as the temporary suspension[139] of members' found guilty of violating the party constitution. According to the NDC, a "person, who has been found guilty [of violating the party constitution] by an ANC disciplinary proceeding resulting in the imposition of the penalties of suspension, temporary/forfeiture of membership rights or expulsion, such penalties shall have the same application in all structures of the ANC Youth League".[140] The NDC held that Malema's membership be suspended for a period of five years in respect of his recent violation of the ANC Constitution.[141] This penalty imposed by the NDC runs concurrently with the two year membership

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133 "ANC disciplinary committee refuses Malema recusal application" retrievable from http://www.polity.org.za/article/anc-disciplinary-committee-refuses-malema-recusal-application-2011-09-01.

134 "Malema et al: Full Text of ANC Disciplinary Hearings" retrievable from http://www.publiceyenews.com/2011/11/14/malema-et-al-full-text-of-anc-disciplinary-hearings/. Rule 4.15 of the ANC Constitution retrievable from http://www.anc.org.za/show.php?id=207 wherein it is stated that the party constitution requires that members of the ANC "respect the Constitution and structures" of the party.

135 "ANC disciplinary committee refuses Malema recusal application" retrievable from http://www.polity.org.za/article/anc-disciplinary-committee-refuses-malema-recusal-application-2011-09-01. Rule 25.6 of the ANC Constitution retrievable from http://www.anc.org.za/show.php?id=207.

136 Rule 25.6(a) of the ANC Constitution retrievable from http://www.anc.org.za/show.php?id=207. "Malema et al: Full Text of ANC Disciplinary Hearings" retrievable from http://www.publiceyenews.com/2011/11/14/malema-et-al-full-text-of-anc-disciplinary-hearings/ wherein it is stated that the "NDC is a structure appointed by the NEC of the ANC tasked with the responsibility to consider any violation of the ANC constitution based on the evidence before it".

137 "ANC disciplinary committee refuses Malema recusal application" retrievable from http://www.polity.org.za/article/anc-disciplinary-committee-refuses-malema-recusal-application-2011-09-01.

138 *Ibid*.

139 Rule 25.12 of the ANC Constitution retrievable from http://www.anc.org.za/show.php?id=207.

140 "Malema et al: Full Text of ANC Disciplinary Hearings" retrievable from http://www.publiceyenews.com/2011/11/14/malema-et-al-full-text-of-anc-disciplinary-hearings/.

141 *Ibid.*

suspension mentioned above.[142] In addition, Malema was ordered "to vacate his position as President of the ANC Youth League".[143] The NDC informed Malema of his right to lodge an appeal to the National Disciplinary Committee of Appeal (NDCA) within the 14 day time period and an appeal was lodged.[144]

Also, ANC party members who supported the charged members of the ANC youth league were guilty of misconduct because on the first day of the disciplinary hearing, a "small number of supporters marched in the streets around the ANC's Luthuli House headquarters..."[145] and "threw rocks, bottles and bricks at journalists and police...".[146] As a result, "Julius Malema, Ronald Lamola, Pule Mabe, SindisoMagaqa and Kenetswe Mosenogi were held accountable and charged for contravening Rule 25.5 (o) and Rule 25.5 (q)[147] of the ANC Constitution as well as, for undermining the Secretary General of

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142 *Ibid.*

143 *Ibid.*

144 "ANCYL leaders submit appeals", http://www.news24.com/SouthAfrica/Politics/Malema-ANCYL-leaders-submit-appeals-20111125. "Malema et al: Full Text of ANC Disciplinary Hearings" retrievable from http://www.publiceyenews.com/2011/11/14/malema-et-al-full-text-of-anc-disciplinary-hearings/.

145 "ANC disciplinary committee refuses Malema recusal application" retrievable from http://www.polity.org.za/article/anc-disciplinary-committee-refuses-malema-recusal-application-2011-09-01.

146 *Ibid*. "Malema et al: Full Text of ANC Disciplinary Hearings" retrievable from http://www.publiceyenews.com/2011/11/14/malema-et-al-full-text-of-anc-disciplinary-hearings/.

147 Rule 25.5(o) and rule 25.5(q) of the ANC Constitution retrievable from http://www.anc.org.za/show.php?id=207 which provides that the:

> "following conduct by a member or public representative shall constitute misconduct in respect of which disciplinary proceedings may be invoked and instituted against him or her: ...
>
> (o) Prejudicing the integrity or repute of the organisation, its personnel or its operational capacity by:
>
> aa. Impeding the activities of the organisation;
> bb. Creating division within its ranks or membership;
> cc. Doing any other act, which undermines its effectiveness as an organisation; or
> dd. Acting on behalf of or in collaboration with:
>
> i. Counter-revolutionary forces;
> ii. A political organisation or party other than an organisation or party in alliance with the ANC in a manner contrary to the aims, policies and objectives of the ANC;
> iii. Intelligence or the security services of other countries; or
> iv. Any person or group who seriously interferes with the work of the organisation or prevents it from fulfilling its mission and objectives... [and]
>
> (q) Deliberately disrupting meetings and interfering with the orderly functioning of the organisation..."

the ANC".[148] The penalty was the suspension of their membership for two years; such suspension "suspended for a period of three years and will be implemented if the respondents are found guilty of any contravention of the ANC`s Code of Conduct within the said period".[149]

In summary, the powers that political parties are entitled to exercise in the sphere of disciplinary proceedings are those that are derived from their party constitution, bearing in mind the provisions of the Constitution.

The issue of the liability of political parties for the misconduct of their members, more specifically vicarious liability, arises "only when facts are proved which give rise to such liability at common law".[150] There is no legislation dealing with liability issues such as the aforementioned, in South Africa.

In addition, participation in political activities on voting day also has to be considered. According to section 108 of the Electoral Act, participation in political meetings or events is not permitted on voting day and the only activity permitted in the area of the voting station on voting day is the casting of one's vote.[151] Although this provision serves "to protect the right freely to make political choices"[152], whether this provision is constitutional is a question of interpretation. In my opinion, this provision is constitutional because it prevents unfair influence by political parties or their members on the voter's political choice on voting day.

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148 "Malema et al: Full Text of ANC Disciplinary Hearings" retrievable from http://www.publiceyenews.com/2011/11/14/malema-et-al-full-text-of-anc-disciplinary-hearings/.

149 *Ibid* where it was stated that the members were given fourteen days to appeal.

150 *National party v Jamie* NO *& Another* 1994 (3) SA 483, 494 (ECW); *Inkatha Freedom Party v African National congress* 1994 (3) SA 578, 588 (EN), *Hamman v South west African People's Organisation* 1991 (1) SA 127 (SWA). Brickhill, J and Babiuch R, "Political Rights" in S Woolman , T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta & Co Ltd, 45-35.

151 Section 108 of the Electoral Act.

152 *Ibid*. J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-35.

Another issue that has an impact on participation with political parties is the privacy rights of individuals. Political parties must ensure that they do not infringe upon the privacy rights of individuals. Also, political parties and their members must act in accordance with the provisions of the Electoral Code.[153] The Constitution provides that "everyone has the right to privacy...".[154] The Electoral Code provides that, on the one hand, "[n]o person may offer any inducement or reward to another person to attend or not to attend a public meeting, march, demonstration, rally or other public political event"[155] and, on the other hand, "[n]o person may offer any inducement or reward to another person to join or not to join a party".[156] A similar provision is contained in the Electoral Act which provides that "[n]o person may compel or unlawfully persuade any person to attend and participate in, or not to attend and participate in, any political meeting, march, demonstration or other political event".[157] Hence, political parties must take adequate measures to prevent their members from infringing these provisions of the Electoral Code and Electoral Act. This is because, in doing so, political parties must not only guard against the infringement of the privacy rights of individuals but also of their right to freedom of association.

Furthermore, in considering the applicability of section 19 of the Constitution to the provision of donation records by political parties, Griesel J stated that "the question is whether the applicants reasonably require the respondents' donation records for the period in question in order to exercise or protect their right to 'make political choices'... "[158] The applicants argued that "citizens have the right 'to make political choices', which the applicants interpret as being 'the right, in the first place, to choose between political parties'. They submitted further that, in exercising his or her choice, an individual is entitled to have to hand relevant information about a party, its policies and

153 Section 3 of the Electoral Code contained in Electoral Act 78 of 1998 (hereinafter referred to as the Electoral Code).
154 Section 14 of the Constitution.
155 Section 9(2)(a)(ii).
156 Section 9(2) (a) (i) of the Electoral Code.
157 Section 87(1)(a)(v) of the Electoral Act.
158 *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C) 10.

finances".[159] The Judge stated that "the question whether the respondents are obliged to make disclosure of their donations records must be decided on an interpretation of our own legislation and the application of that legislation to the facts of the matter under consideration".[160] With regard to the case of the Applicants, the court mentioned that the Applicants did not "explain how the respondents' donation records would assist them in exercising or protecting any of the rights on which they rely or why, in the absence of those donation records, they are unable to exercise those rights".[161] Accordingly, Griesel J supported the view of the parties that the manner in which to regulate the funding of political parties is to be determined by the legislature and not the court.[162] Thus learned judge found that "[d]onor secrecy does not impugn any of the rights contained in..." section 19 of the Constitution.[163] After due consideration of existing legislation and the facts of the case, the court found that "the respondents are not obliged to disclose..."[164] records of private donations received by the party and the application was therefore dismissed.[165] Further discussion in relation to political party funding will be discussed below.

2.4 THE RIGHT TO CAMPAIGN FOR A POLITICAL PARTY

Section 19(1) (c) of the Constitution provides that citizens have the right to campaign for their political party. The Electoral Code gives effect to the right of citizens to campaign by making provision for "free political campaigning ..."[166] in South Africa. Campaigning provides an opportunity for "[p]otential voters [to] have sufficient access to information about [political] parties, their platforms and their candidates. Parties and their candidates must [also] have

159 *Ibid.*
160 *Ibid* wherein it was stated that "the right to access to information is not a right that exists in the abstract... on the contrary, the inquiry is a factual one and the person seeking the information must make out a case therefore on the papers."
161 *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C) 10.
162 *Ibid* 11.
163 *Ibid.*
164 *Ibid* 12.
165 *Ibid.*
166 Section 1 (b).

sufficient access to the potential voters to canvass their support".[167] During the campaigning period political "parties can present candidates and leaders to the electorate and seek to mobilise the support of the electorate by [means of for example] propaganda, organised activities and by emphasising ideological differences with other parties in competitive party systems".[168] South Africa's "multi-party system..."[169]makes provision for competitiveness amongst political parties.

The media is an essential campaigning tool for political parties. The Constitution provides that "[n]ational legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society".[170] The legislation that gives effect to this constitutional provision is the Independent Communications Authority of South Africa Act[171]. This Act establishes "an independent Authority which ... [regulates] broadcasting in the public interest and ... [ensures] fairness and a diversity of views broadly representing South African society".[172]

In relation to the right to equality, the following is taken into consideration: (1) whether biased broadcasting or reporting with regard to a particular political party, by the press and media and (2) whether the exclusion of unrepresented political parties from the acquisition of state funding, amounts to an infringement of the right to equality.

The Constitution provides that "[e]veryone is equal before the law and has the right to equal... benefit of the law".[173] Indeed, "incorrect or biased reporting may distort the truth, give the public an unfair perception of a candidate or the

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167 P De Vos "Free and Fair campaigning" in N Steytler , J Murphy,P De Vos & M Rwelamira (eds) *Free and fair Elections* Kenwyn Juta 119. A.R

168 Ball *Modern Politics and Government* Fifth Edition (1993). The Macmillan Press Ltd, Houndmills Basingstoke Hampshire RG21 2XS London 80.

169 Section 1(d) of the Constitution.

170 Section 192 of the Constitution.

171 Independent Communication Authority of South Africa Act 2000 No. 13 of 2000, as amended by the Broadcasting Amendment Act 64 of 2002.

172 Section 2 (a) of Independent Communication Authority of South Africa Act 2000 No. 13 of 2000, as amended by the Broadcasting Amendment Act 64 of 2002.

173 Section (9) (1) of the Constitution.

process, and thereby undermine election integrity".[174] The media has the power to destroy the credibility of the party if "unsubstantiated allegations of illegal or unethical activities" about the party are reported.[175] This may occur if the media is biased. Also, biased reporting occurs when the media "give preferential treatment to large advertisers" such as political parties, who pay for party advertisements.[176] Not all parties have sufficient funds to cover advertising costs. Biased reporting may result in a contravention of the equality clause of the Constitution because it "can undermine the principle of equal treatment for all".[177] Statutory regulations guard against incorrect or biased reporting in South Africa.[178] The Electoral Act provides that "[n]o person may publish any false information with the intention of − *(a)* disrupting or preventing an election; *(b)* creating hostility or fear in order to influence the conduct or outcome of an election; or *(c)* influencing the conduct or outcome of an election".[179]

Moreover, political parties realise "that fighting an election in any society is an expensive business, and that no matter what enthusiasm there might be for a particular cause, elections in large are won or lost in general proportion to the funds available for fighting for them".[180] The Constitution provides that "[t]o enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis".[181] The right to campaign for a political party is therefore supported by the Public Funding of Represented Political Parties Act[182]. This Act makes provision for the allocation of funds to political parties in order to promote "active participation by individual citizens

174 "Media" retrieved from http://aceproject.org/ace-en/topics/ei/eic/eic07.
175 *Ibid*.
176 *Ibid.*
177 *Ibid.*
178 *Ibid.*
179 Section 89(2) of the Electoral Act.
180 L Fernandez "The Legal Regulation of campaign financing" in N Steytler, J Murphy, P De Vos & M Rwelamira (eds) *Free and fair Elections* Kenwyn Juta 99.
181 Section 236.
182 Public Funding of Represented Political Parties Act 103 of 1997. Also see "South Africa: Public Funding of Represented Political Parties Act" retrieved from http://www.eisa.org.za/WEP/soulaws6c.htmthe wherein it was stated that the "Promotion of Multi-Party Democracy Bill was introduced in 1997. This Bill was later passed as the Public Funding of Represented Political Parties Act 103 of 1997."

in political life".[183] "Public funding for political parties is justified as one means to advance the diversity of representation while advocating accountability, equity and the like...".[184] The Act provides that represented political parties receive benefit from the Fund "in accordance with a prescribed formula based in part, on the principle of proportionality ... and in part, on the principle of equity...".[185]

No "constitutional entitlement to state funding"[186] exists for unrepresented political parties in South Africa. According to the Constitution, "[u]nrepresented parties do not qualify for state funding".[187] The question is whether the constitutional exclusion of unrepresented political parties from the acquisition of state funding, contravenes the equality clause. The equality clause is applicable to all political parties because they are entitled to equal benefit of the law[188]:

> "[An] equality challenge is ... unlikely to succeed for two reasons. First, the Public Funding of Represented Political Parties Act satisfies the requirement in [section 236 of the Constitution] that national legislation be enacted to regulate public funding of political parties. The legislation contemplated by [section 236 of the Constitution] is expressly required to provide for the funding of parties 'participating in national and provincial legislatures'... Secondly, it could be argued that the differentiation between represented parties and unrepresented parties [creates difficulty in ascertaining] the support for unrepresented parties, and therefore the amount of state support that should be given to them".[189]

The regulation of private funding received by political parties has not yet been dealt with by South African legislation. "[P]rivate domestic and foreign

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183 Section 5(1)(b) (iv).

184 D Pottie "Party Finance and the Politics of Money in Southern Africa" (2003) Vol. 21 (1) *Journal of Contemporary African Studies* 6.

185 Section 2(a)(i) and (ii) of the Public Funding for Represented Political Parties Act 103 of 1997.

186 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-36.

187 *Ibid*.

188 Section 9(1) of the Constitution.

189 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 45-37.

donations are [therefore] largely unregulated...".[190] The options of political parties, regarding private funding, vary. Funds are retrievable from for example sectors of society, from international contributions or from membership fee payments received by the party.[191]

With reference to the regulation of the private funding received from political parties, the question is whether allowing these private donations to political parties without disclosure thereof to the public, is justified in our constitutional dispensation. It could be argued that political parties, who fail to provide transparency of the funds received by them, create "scope for corruption on the part of politicians".[192]

In the *Institute for Democracy in South Africa Case*[193], IDASA together with other applicants proceeded with an application to the High Court wherein they sought "to establish the principle that political parties, or at least those who hold seats in the national, provincial and local government legislatures, are obliged ... to disclose particulars of all the substantial donations they receive, on due and proper request for those particulars made by any adult South African citizen".[194] Various political parties namely the "African National Congress (ANC), the Democratic Alliance (DA), the Inkatha Freedom Party (IFP) and the [then] New National Party (NNP)", (hereinafter "the

190 D Pottie "Party Finance and the Politics of Money in Southern Africa" (2003) Vol. 21 (1) *Journal of Contemporary African Studies* 6.

191 L Fernandez "The Legal Regulation of campaign financing" in N Steytler , J Murphy, P De Vos & M Rwelamira (eds) *Free and fair Elections* Kenwyn Juta 100-10. In the following article, D Pottie "Party Finance and the Politics of Money in Southern Africa" (2003) Vol. 21 (1) *Journal of Contemporary African Studies* 10 , it is stated that "[a] basic typology of party finance includes the following categories: [p]ublic funding: the funding may be allocated on an annual basis or election campaign related only. The method of allocation to parties may be based on level of voter support (and may include additional threshold of voter support in order to qualify), or on the number of elected seats (may also include threshold). Indirect forms of support might include: free public media access, use of public buildings for political meetings, free security for party leadership and political rallies, subsidised or free postal rates, tax subsidies. Private Funding: political parties may be subject to rules on disclosure as well as campaign spending limits".

192 IDASA "Democracy & Party Political Funding" available at http://www.idasa.org/media/uploads/outputs/files/PARTY%20FUNDING%20COURT%20CASE%20BRIEFING%209%20may.pdf.

193 *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C).

194 *Ibid* 4. See also section 32(1) of the Constitution and section 11 or section 50 of the Promotion of Access to Information Act 2 of 2000 (*PAIA*) as these where the legislative provisions relied on by the applicants.

Respondents"), opposed the application.[195] The Respondents' favoured the legislative regulation of private funding of political parties as opposed to "*ad hoc* litigation in the courts".[196] In contrast to the Respondents' who sought a dismissal of the application, the ANC sought a stay of the proceeding in order to "allow the political and legislative process to follow the proper course necessary for the adoption of a national policy through legislation regulating the funding of political parties with the Republic of South Africa".[197] The heads of argument presented by counsel, on behalf of the ANC, contained an affirmation by the party that "the question of regulation and control of private donor funding of political parties should be addressed and implemented through a legislative process which will embody national policy perspectives and the balancing of the rights and interests of all persons, including the electorate, political parties and their donors".[198] The stance taken by the ANC and the other parties, during the court proceedings in the *Institute for Democracy in South Africa Case*[199], is of relevance when looking at the present legal regime and the lack of progress in this area of legal reform in South Africa. Furthermore, the Institute for Democracy in South Africa confirmed its decision to "[c]ontinue to work with all political parties, to support a process that ensures that an appropriate transparency and regulatory regime is designed for South Africa ...[and to monitor] the political and legislative process, [holding] political parties accountable to promises made to the Court...".[200] Despite this undertaking by the Institute for Democracy in South Africa, their goal has not been achieved to date.

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195 *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C) 4.

196 *Ibid* 5.

197 *Ibid.*

198 "Submission on Private Members Bill to Regulate Private Political Party Funding" available at http://www.pmg.org.za/files/docs/100806greyling_2.pdf.

199 *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C).

200 Briefing by IDASA "Democracy & Party Political Funding" available at http://www.idasa.org/media/uploads/outputs/files/PARTY%20FUNDING%20COURT%20CASE%20BRIEFING%209%20may.pdf.

Bearing in mind the findings of the *Institute for Democracy in South Africa Case*[201], a member of parliament namely Lance Greyling who represented the then Independent Democrats, gave a speech in support of the regulation of private funding of political parties.[202] The scope of his speech dealt with the need for a "Private Members Bill to Regulate Private Political Party Funding"[203] in South Africa.

In relation to campaigning, just as there is a need for fairness in funding, there is also a need for fairness in publicity. In order to regulate private funding, the right of access to information in the Constitution may need to be relied upon. Presently, the right of access to information and more particularly, the Promotion of Access to Information Act[204] is being relied on by the Independent Newspapers[205] in a matter pending in the Western Cape High Court.[206] With respect to the right of access to information, the Constitution provides that "(1) [e]veryone has the right of access to – (a) any information held by the state; [as well as] (b) any information that is held by another person and that is required for the exercise or protection of any rights".[207] In order to exercise the right of access to information, the aggrieved person or entity (including for example the media or political parties) may resort to review by the courts under PAIA. Similarly "the primary mechanism for asserting administrative justice rights is not direct reliance on..." the constitutional provision applicable to that right ie section 33 of the Constitution, "but through review under" the Promotion of Access to Justice Act.[208]

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201 *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C).

202 "Submission on Private Members Bill to Regulate Private Political Party Funding" available at http://www.pmg.org.za/files/docs/100806greyling_2.pdf.

203 *Ibid.*

204 Hereinafter "PAIA". Promotion of Access to Information Act 2 of 2000.

205 F Schroeder "ANC opposes 'brown envelope' court bid" retrievable from http://www.iol.co.za/capeargus/anc-opposes-brown-envelope-court-bid-1.1098360 wherein it was stated that the court application was lodged by the Cape Argus "under the umbrella of the Independent Newspapers".

206 F Schroeder "ANC opposes 'brown envelope' court bid" retrievable from http://www.iol.co.za/capeargus/anc-opposes-brown-envelope-court-bid-1.1098360.

207 Section 32(1) of the Constitution.

208 Hereinafter "PAJA". K Klaaren and G Penfold "Just Administrative Action" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta

In relation to unfair campaigning, the facts giving rise to the present court application that is being opposed by the ANC relates to allegations[209] pertaining to the alleged conduct of an ANC member, Ebrahim Rasool, whilst he was employed as the then former Premier of the Western Cape.[210] His alleged conduct involves the payment to two journalists of the Cape Argus for the publication of favourable reports about him in order to "promote the 'Rasool faction' in the party's regional branch".[211] Possibly, the favourable reports published, amounted to the "rubbishing [of] his opponents in the Western Cape ANC".[212] According to a court order, the ANC was given an opportunity "to file its opposing papers", the Independent Newspapers having approached the court for the order when no response was received by the ANC in respect of "an application made directly to" the party, in terms of PAIA.[213] The purpose of the court application is "to compel the party to hand over documents[214] in its possession that relate to [this so called] "brown envelope" journalism scandal".[215]

The applicability of PAIA to private bodies such as political parties arises because the Independent Newspapers with its first application for the request of documents from the ANC, "may have relied on the incorrect part of the PAIA because the ANC may have contended that it had acted as a private body and not a public one".[216] The Independent Newspapers then lodged another application in terms of PAIA, on the party, as an attempt to remedy

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& Co Ltd, 63-6. Also see *Bato Star Fishing (Pty) Ltd v minister of environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at par 22.

209 F Schroeder "ANC opposes 'brown envelope' court bid" retrievable from http://www.iol.co.za/capeargus/anc-opposes-brown-envelope-court-bid-1.1098360 wherein it was stated that the allegations as stipulated above within the context of this dissertation, was made "in an affidavit by former Cape Argus journalist Ashley Smith".

210 F Schroeder "ANC opposes 'brown envelope' court bid" retrievable from http://www.iol.co.za/capeargus/anc-opposes-brown-envelope-court-bid-1.1098360.

211 *Ibid.*

212 Sabelo Ndlangisa, "ANC ordered to hand over 'brown envelope' report" retrievable from http://www.citypress.co.za/SouthAfrica/News/ANC-ordered-to-hand-over-brown-envelope-report-20111129.

213 F Schroeder "ANC opposes 'brown envelope' court bid" retrievable from http://www.iol.co.za/capeargus/anc-opposes-brown-envelope-court-bid-1.1098360.

214 *Ibid* which refers to "a report on the ANC's internal inquiry into the "brown envelopes" saga".

215 F Schroeder "ANC opposes 'brown envelope' court bid" retrievable from http://www.iol.co.za/capeargus/anc-opposes-brown-envelope-court-bid-1.1098360.

216 *Ibid.*

reliance on possibly an incorrect provision of PAIA. As regards the outcome of the court application, Griesel J "ordered the ANC to hand over the report of its internal inquiry into the 'brown envelope' scandal".[217]

Also, of relevance to political parties and their campaign right is the constitutional provision that the "Bill of Rights ... binds the legislature, the executive, the judiciary and all organs of state".[218] The duties of the state with regard to party campaigning are twofold. It comprises firstly of the duty of the state "to protect the political rights of citizens" and this includes the political right of citizens to campaign.[219] Secondly, a further duty of the state is to protect "parties against [any] interference in their canvassing and campaigning activities".[220] Moreover, the Electoral Code provides that "[e]very registered party and candidate must publicly state that everyone has the right to lawfully erect banners, billboards, placards and posters as well as the right to canvass support for a party or candidate"[221] and that "[n]o person may unreasonably prevent any other person access to voters for the purpose of ... raising funds or canvassing support for a party or a candidate".[222]

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217 S Ndlangisa "ANC ordered to hand over 'brown envelope' report" retrievable from http://www.citypress.co.za/SouthAfrica/News/ANC-ordered-to-hand-over-brown-envelope-report-20111129. See also Leila Samodien, "Press to get access to Rasool bribes report" retrievable from htpp://www.iol.co.za/news/crime-courts/press-to-get-access-to-rasool-bribes-report-1.1189377.

218 Section 8(1) of the Constitution.

219 RM Rautenbach and EFJ Malherbe *Constitutional Law* (2009) Fifth Edition 131.

220 *Ibid.*

221 Section 4(1)(a)(iv-v).

222 Section 9(2)(a)(c).

CHAPTER 3
POLITICAL PARTIES AND ELECTORAL LAWS

3.1 INTRODUCTION

This chapter commences with a discussion on the role and nature of the Electoral Commission in terms of the Constitution. The applicability of national legislation is mentioned in light of constitutional requirements pertaining to the formation of the Electoral Commission in South Africa. The constitutional classification of the Electoral Commission as a state institution promoting democracy in our constitutional dispensation is then taken into account with regard to the objectives of the Electoral Commission Act[1]. The composition of the Commission as well as the criteria for appointment as a Commissioner is referred to, bearing in mind the manner in which the Commission performs his or her functions. The role of the Electoral Commission as described by the courts is discussed with particular reference to the managing role of the Commission. Other functions of the Electoral Commission that are applicable to political parties and the electoral process are identified in order to clarify the role of the Electoral Commission in our Constitutional dispensation. The adjudication of disputes by the Commission and recourse to civil proceedings is mentioned.

The discussion on the electoral court commences with the nature and composition of the court. The functions of the Electoral court are discussed with reference to case law. Cases dealing with political parties and the Electoral Commission that was brought before various courts, such as the Electoral Court and the Constitutional Court, are assessed in order to clarify the role of the Electoral Court. These cases demonstrate, for example, the importance of compliance with legislation by political parties. The cases further demonstrate the sensitivity of cases of a political nature in that

[1] Electoral Commission Act 51 of 1996, hereinafter "the Electoral Commission Act".

jurisdiction should always be determined with caution and certainty prior to litigation.

This chapter deals with the right to free, fair and regular elections in light of the constitutional provisions applicable to this right. An explanation of the vital role that the Electoral Commission plays in ensuring that the elections are free and fair forms a part of the discussion. The importance of electoral legislation to ensure free, fair and regular elections is also mentioned below. The relationship between the independent nature of the Commission and the right to free, fair and regular elections is then assessed. The issues that dealt with are whether the principles of co-operative governance are applicable to, for example, the Electoral Commission who may find themselves in a dispute with the government and determining whether political parties may approach the court for relief if the independence of the Electoral Commission is undermined.

The right to vote and the right to do so in secret, form an integral part of the electoral process. Concepts such as universal adult suffrage and a voter's roll that are linked to the individual's right to vote are mentioned with reference to the constitutional founding provisions, case law and legislation. A description of the right to vote as well as the regulation of this right in accordance with legislation is taken into account. A discussion on those entitled and those not entitled to register to vote, forms a part of this chapter. The requirements for registration as a voter are therefore mentioned. Furthermore, whether the limitation of the right to register to vote is justified is taken into consideration. Lastly, the option of approaching a court for relief if the right to vote is violated forms a part of this discussion.

3.2 THE ROLE OF THE ELECTORAL COMMISSION

The Constitution provides that the "Electoral Commission must be composed of at least three persons [and that the] number of members ... must be

prescribed by national legislation".[2] The Electoral Commission Act[3] provides that the "Commission shall consist of five members".[4] This Act stipulates inter alia the following criteria for appointment as commissioner namely that "[n]o person shall be appointed as a member of the Commission unless he or she- ... does not at that stage have a high party-political profile ... and ... has been nominated by a committee of the National Assembly, proportionally composed of members of all parties represented in that Assembly ...".[5] Appointed members are prohibited from being nominated or appointed to a political office, from supporting or opposing a political party during an election and from compromising their independence as a member of the Commission by means of their conduct or party membership or party association.[6] The appointed commissioner is obliged to "serve impartially and independently and perform his or her functions as such in good faith and without fear, favour or prejudice"[7]. At a meeting where the proposed discussion is one where a member of the Commission has a conflicting interest which might "preclude him or her from performing his or her functions in a fair, impartial and proper manner..."[8], then he or she should disclose the nature thereof.[9] Upon disclosing the conflicting interest, the member of the Commission may not "be present, cast a vote or in any other manner participate in the proceedings..."[10] of such a meeting. Furthermore, allegations "of misconduct, incapacity or incompetence of a member of the

2 Section 191 of the Constitution.
3 Act 51 of 1996.
4 Section 6 of the Electoral Commission Act.
5 Section 6(2) of the Electoral Commission Act.
6 Section 9(2)(a), (b) and (c) of the Electoral Commission Act provides that "[n]o member of the Commission- *(a)* shall during his or her term of office be eligible for appointment or nomination to any political office; *(b)* may, whether directly or indirectly, in any manner give support to, or oppose, any party or candidate participating in an election, or any of the issues in contention between parties or candidates; *(c)* may, by his or her membership, association, statement, conduct or in any other manner place in jeopardy his or her perceived independence, or in any other manner harm the credibility, impartiality, independence or integrity of the Commission...".
7 Section 9(1)(a) of the Electoral Commission Act. Section 181(2) of the Constitution.
8 Section 10 (1) of the Electoral Commission Act.
9 Section 10(2)(a) of the Electoral Commission Act.
10 Section 10(1)(a), (b) and (c).

Commission"[11] may be investigated by the Electoral Court. This court may then "make any recommendation to a committee of the National Assembly".[12]

With regard to the role of the Electoral Commission, the Constitution provides that the "Electoral Commission must – (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation; (b) ensure that those elections are free and fair, and (c) declare the results of those elections...".[13] The national legislation giving effect to the establishment of the Electoral Commission is the Electoral Commission Act[14]. Thus, the Electoral Commission Act provides that "[t]here is an Electoral Commission for the Republic...".[15] The Electoral Commission is regarded as one of the "state institutions [that] strengthen constitutional democracy in the Republic".[16] The objectives of the Electoral Commission Act[17] are therefore "to strengthen constitutional democracy and promote democratic electoral processes".[18] The Electoral Commission, as a state institution, is "independent, and subject only to the constitution and the law, and [it] must be impartial and must exercise [its] powers and perform [its] functions without fear, favour or prejudice".[19] This constitutional description of the independent and impartial nature of the Electoral Commission is confirmed in the Electoral Commission Act.[20]

In the *Mketsu Case*[21] the Electoral Commission was described as "a statutory body ... with wide powers in relation to elections, including their management".[22] One of the functions of the Electoral Commission is to

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11 Section 20(7) of the Electoral Commission Act.
12 *Ibid*.
13 Section 190 of the Constitution.
14 Electoral Commission Act 51 of 1996 hereinafter referred to as the Electoral Commission Act.
15 Section 3(1) of the Electoral Commission Act.
16 Section 181(1) of the Constitution. Section 3(2) of the Electoral Commission Act.
17 Act 51 of 1996.
18 Section 4 of the Electoral Commission Act.
19 Section 181(2) of the Constitution.
20 Section 3(1) and section 3(2) of the Electoral Commission Act.
21 *Mketsu v African National Congress [ANC]* 2003 (2) SA 1 (SCA), 2002 (4) ALL SA 205 (SCA).
22 *Ibid* par 5.

"manage any election".[23] The managing role of the Commission was described in the *New National Party Case*[24] as one that extends beyond a mere supervisory role, as the functions of the Commission "relate to an active, involved and detailed management obligation over a wide terrain".[25]

Other additional functions of the Electoral Commission that specifically relate to political parties are as follows namely, the function of the Electoral Commission to "compile and maintain a register of parties..."[26] and to "establish and maintain liaison and co-operation with parties...".[27] The function of the Commission to liaise and co-operate with political parties is supported by the Electoral Code of Conduct[28]. According to the this Code, "[e]very registered party and every candidate must- ... establish and maintain effective lines of communication with- (i) the Commission; and (ii) other registered parties contesting the election...".[29] Registered parties also have a duty to ensure that their party representative attends the party liaison committee meeting.[30] In this regard, the Electoral Code provides that "[e]very registered party and every candidate must- ... take all reasonable steps to ensure- ... that representatives of that party or candidate attend meetings of any party liaison committee or other forum convened by the Commission".[31]

If political parties fail to liaise and co-operate as mandated by the Electoral Act and the Electoral Code, the Electoral Commission may "adjudicate [such] disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature".[32] Moreover, "the chief electoral officer may institute civil proceedings before a court, including the

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23 Section 5(1)(a) of the Electoral Commission Act.

24 *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC).

25 *Ibid* par 76.

26 Section 5(1)(f) of the Electoral Commission Act.

27 Section 5(1)(g) of the Electoral Commission Act.

28 The Electoral Code of Conduct as contained in Schedule 2 of the Electoral Act 78 of 1998 (hereinafter referred to as the Electoral Code).

29 Section 7(d) of the Electoral Code.

30 Section 7(g) (iii) of the Electoral Code.

31 *Ibid.*

32 Section 5(1) (o) of the Electoral Commission Act.

Electoral Court, to enforce a provision of this Act[33] or the Electoral Code".[34] The chief electoral officer also has the right to intervene "in any civil proceedings if the Commission has a legal interest in the outcome of those proceedings".[35]

3.3 THE ROLE OF THE ELECTORAL COURT

The Electoral Commission Act[36] gives effect to the establishment of an Electoral Court, as this Act provides that "[t]here is an Electoral Court for the Republic, with the status of the Supreme Court".[37] In the *Mketsu Case*[38], it was stated that the Electoral Court "enjoys the status of a High Court".[39] However, the "Electoral Court may determine its own practice and procedures and make its own rules"[40] unlike matters proceeding in the High Court that are regulated by the Uniform Rules of Court[41]. In accordance with the Electoral Commission Act, five[42] persons are "appointed by the President upon the recommendation of the Judicial Service Commission"[43] to serve as members of the Electoral Court.

The functions of the Electoral Court include the power to "review any decision of the Commission relating to an electoral matter"[44], to "hear and determine an appeal against any decision of the Commission only in so far as such decision relates to the interpretation of any law or any other matter for which an appeal

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33 Electoral Act 78 of 1998.
34 Section 95(1) of the Electoral Act.
35 Section 95(2) of the Electoral Act.
36 Act 51 of 1996.
37 Section 18 of the Electoral Commission Act. Also see G Fick "Elections" in S Woolman, Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 2, Juta & Co Ltd, 29-30.
38 *Mketsu v African National Congress [ANC]* 2003 (2) SA 1 (SCA), 2002 (4) ALL SA 205 (SCA).
39 *Ibid* par 8. Also section 18 of the Electoral Commission Act states that "[t]here is an Electoral Court for the Republic, with the status of the [High] Court".
40 Section 20(3) of the Electoral Commission Act.
41 http://www.justice.gov.za/legislation/rules/UniformRulesCourt%5B26jun2009%5D.pdf
42 Section 19(1)(a) and section 19(1) (b) of the Electoral Commission Act which provides that the "Electoral Court shall consist of the following members ...: *(a)* A chairperson, who is a judge of the Appellate Division of the Supreme Court, and two other judges of the Supreme Court; and *(b)* two other members who are South African citizens".
43 Section 19(1) of the Electoral Commission Act.
44 Section 20(1)(a) of the Electoral Commission Act.

is provided by law"[45] and to "hear and determine any matter that relates to the interpretation of any law referred to it by the Commission ...".[46] An example where the Electoral Court exercised its power of review is the *United Democratic Movement Case*[47]. The provision of the Electoral Act applicable to this case is firstly the duty of a "registered party intending to contest an election [to] nominate candidates and submit a list or lists of those candidates for that election to the chief electoral officer in the prescribed manner".[48] The chief electoral officer "notified the applicant, the UDM, that it had not complied with section 27(2) (c) and (d) of the Electoral Act[49]...".[50] These sections of the Act provide that the party "list or lists must be accompanied by a prescribed − ...acceptance of nomination, signed by each candidate [and an] ... undertaking signed by each candidate, that that candidate will be bound by the Code...".[51] Consequently, the chief electoral officer lodged an objection with the Commission in terms of section 30(2)[52] of the Electoral Act.[53] The objection was to the candidates reflected on the UDM's party list "in respect of whom no acceptances [of the nomination] were submitted".[54] The Commission upheld the objection. However, the objection was lodged with the Commission and served on the applicant, the UDM, two days after the cut-off date in terms of the Election Time Table.[55] With regard to the cut-off date, the Electoral Act provides that the "objection must be made to the Commission ... by not later than the relevant date stated in the election timetable...".[56] The UDM argued then that the chief electoral officer's "failure to advise the Commission that the objection had been served late renders the Commission's decision subject to review".[57] The Electoral Court, upon review, held that the

45 Section 20(2) (a) of the Electoral Commission Act.
46 Section 20(6) of the Electoral Commission Act.
47 *United Democratic Movement v Electoral Commission* 2005 JOL 14188 (ECSA).
48 Section 27(1) of the Electoral Act.
49 Electoral Act 73 of 1998.
50 *United Democratic Movement v Electoral Commission* 2005 JOL 14188 (ECSA) 1.
51 Section 27(2)(c) and section 27(2)(d) of the Electoral Act.
52 Section 30(2) of the Electoral Act which provides that the "objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable, and must be served on the registered party that nominated the candidate".
53 *United Democratic Movement v Electoral Commission* 2005 JOL 14188 (ECSA) 2.
54 *Ibid*.
55 *Ibid* 3.
56 Section 30(2) of the Electoral Act.
57 *United Democratic Movement v Electoral Commission* 2005 JOL 14188 (ECSA) 4.

failure of the chief electoral officer "to bring it to the attention of the Commission that the objection had been served late had no influence on the Commission's decision, upholding the objection".[58] The application was therefore dismissed.[59]

In the *African Christian Democratic Party Case*[60], "the Electoral Court refused to interfere with a decision by the Electoral Commission [of] excluding the applicant, the African Christian Democratic Party, from contesting the imminent local government elections...".[61] The reason for the Electoral Commission's decision was based on the applicant's non-compliance with section 14(1) (b) and section 17(2) (d) of the Local Government: Municipal Electoral Act[62]. These provisions deal with the requirements political parties and ward candidates are to adhere to when contesting municipal elections, more specifically, the political party's obligation to pay the prescribed deposit in terms of these provisions of the Act.[63] This decision of the Electoral Court to refrain from interfering with the Electoral Commission's decision led to an urgent application for leave to appeal against the judgment of the Electoral Court.

The matter was then referred to the Constitutional Court. The Constitutional Court had to firstly consider whether it had the "jurisdiction to consider an application for leave to appeal against the Electoral Court".[64] Secondly, if the Constitutional Court had the necessary jurisdiction to consider "whether the

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58 *Ibid.*

59 *Ibid* 14.

60 *African Christian Democratic Party v Electoral Commission and Others* 2006 JOL 16810 (CC).

61 *Ibid* par 1.

62 Act 27 of 2000.

63 Section 14(1)(b) provides that a "party may contest an election… only if the party by not later than a date stated in the timetable for the election has submitted to the office of Commission's local representative … a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission". Furthermore, section 17(2)(d) provides that the "following must be attached to a nomination when the nomination is submitted to the Commission… a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission". Also see *African Christian Democratic Party v Electoral Commission and Others* 2006 JOL 16810 (CC) par 3.

64 *African Christian Democratic Party v Electoral Commission and Others* 2006 JOL 16810 (CC) par 14.

Electoral Commission's decision not to certify the applicant and its candidates, effectively disqualifying them from contesting the election… should be reviewed and set aside".[65] In considering whether it has jurisdiction to consider an application for leave to appeal against the Electoral Court, section 96 of the Electoral Act was taken into consideration by the Constitutional Court. This section provides that the "Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal…"[66] The court noted that the Municipal Electoral Act[67] does not contain a similar provision and that there is "no provision in the Municipal Electoral Act which renders section 96 of the Electoral Act applicable to disputes arising from municipal elections".[68] According to O' Regan J the "Municipal Electoral Act does not contain an express provision for an appeal against the decision of the Electoral Court… [at the same time] there is also no express provision in the Municipal Electoral Act stating that the decision of the Electoral Court is final".[69] O' Regan J further stated that "in the circumstances, it cannot be said that section 96 applies to disputes arising from municipal elections and accordingly [section 96] cannot on any terms be held to oust the jurisdiction of the Constitutional Court to entertain an appeal...".[70] The Constitutional Court concluded that it was in the interests of justice to grant leave to appeal but also mentioned that this is an exceptional case taking the closeness of the date of the election into consideration.[71] The municipal election was to be held on the 1st of March 2006.[72] The application was lodged on the 20th February 2006 and judgement was granted on the 24th of February 2006.[73] The application for leave to appeal was therefore upheld and the order of the Electoral Court was

65 *Ibid* par 3.
66 Section 96(1) of the Electoral Act. Also see *African Christian Democratic Party v The Electoral Commission and Others* 2006 (5) BCLR 579 (SCA) par 14.
67 Act 27 of 2000.
68 *African Christian Democratic Party v Electoral Commission and Others* 2006 JOL 16810 (CC) par 15.
69 *Ibid.*
70 *Ibid.*
71 *Ibid* par 18.
72 *Ibid* par 2.
73 *Ibid.*

set aside[74] as the court found that "the applicant had complied with the provisions of sections 14 and 17 in respect of the payment of the deposit".[75]

In the *Mketsu Case*[76], party members of the African National Congress alleged that the selection process for the party list and ward candidates for the municipal elections was flawed.[77] The matter was brought before the Eastern Cape Division of the High Court.[78] The respondent, the ANC, argued that the High Court lacked jurisdiction.[79] The High Court dismissed the application in favour of the ANC's defence.[80] The matter was then referred to the Supreme Court of Appeal. The Court assessed section 65 of the Municipal Electoral Act. This section provides that an "interested party may lodge an objection concerning any aspect of an election that is material to the declared result of the election with the Commission …, by not later than 17:00 on the second day after voting day, at its office in Pretoria ...".[81] The Electoral Act contains a similar provision.[82] Furthermore, according to the Electoral Act, the "Commission must decide the objection, and must notify the objector and the registered party that nominated the candidate of the decision... [and that the] objector, or the registered party who nominated the candidate, may appeal against the decision of the Commission to the Electoral Court...".[83] As regards the lodgement of the objection in accordance with section 65 of the Municipal Electoral Act, the Court confirmed that the objection raised by the party members of the ANC, is material to the declared result.[84] Hence, section 65 is

74 *Ibid* par37.
75 *Ibid* par 34.
76 *Mketsu v African National Congress [ANC]* 2003 (2) SA 1 (SCA), 2002 (4) ALL SA 205 (SCA).
77 G Fick "Elections" in S Woolman, Roux, M Bishop (eds) Constitutional Law of South Africa (2006), Second Edition, Vol 2, Juta & Co Ltd, 29-31.
78 *Ibid*.
79 *Mketsu v African National Congress [ANC]* 2003 (2) SA 1 (SCA), 2002 (4) ALL SA 205 (SCA) 7.
80 G Fick "Elections" in S Woolman, Roux, M Bishop (eds) Constitutional Law of South Africa (2006), Second Edition, Vol 2, Juta & Co Ltd, 29-31.
81 Section 65 of the Municipal Electoral Act.
82 Section 30(2) of the Electoral Act which provides that the "objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable, and must be served on the registered party that nominated the candidate".
83 Section 30(3) and section 30(4) of the Electoral Act.
84 *Mketsu v African National Congress [ANC]* 2003 (2) SA 1 (SCA), 2002 (4) ALL SA 205 (SCA) 9.

applicable to the circumstances surrounding this case. The court therefore considered whether the appellants, Mketsu and others, complied with section 65 of the Municipal Electoral Act. The Court held that "the procedure set out in section 65 of the Municipal Electoral Act is intended to be mandatory and that the High Court accordingly has no jurisdiction to entertain objections of the kind referred to therein"[85] The court found that the appellants, Mketsu and others had failed to follow the procedure laid down in section 65 of the Municipal Electoral Act.[86] Hence, the appeal was dismissed.[87] The High Court was therefore correct in dismissing the application based on its lack of jurisdiction.

3.4 THE RIGHT TO FREE, FAIR AND REGULAR ELECTIONS

The Constitution provides that all citizens have "the right to free, fair and regular[88] elections …".[89] This right was confirmed in the *New National Party Case.*[90] The Constitution further provides that the Electoral Commission plays a role in ensuring free and fair elections for all South African citizens.[91] In order to protect and enforce this constitutional right, the Electoral Commission Act[92] established the Electoral Commission to inter alia "ensure that any election is free and fair [and to] promote conditions conducive to free and fair elections...".[93]

The Electoral Commission creates "conditions conducive to free and fair elections..."[94] by managing both, the process of registration, and voting prior

85 *Ibid* 21.
86 *Ibid* 4.
87 *Ibid* 22.
88 Section 1(d) of the Constitution which provides that the "Republic of South Africa is one, sovereign, democratic state founded on the following values: …Universal adult suffrage, a national common voters roll, regular elections… to ensure accountability, responsiveness and openness".
89 Section 19(2).
90 *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC) par 12 where it was noted that all South African citizens have a right to free, fair and regular elections irrespective of their age.
91 Section 190(1)(b) of the Constitution.
92 Act 51 of 1996.
93 Section 5(1)(b) and section 5(1)(c) of the Electoral Commission Act.
94 *Ibid*.

to and during the election period.[95] The Electoral Commission "may request the person who called an election to postpone the voting day for that election, provided the Commission is satisfied that the postponement is necessary for ensuring a free and fair election".[96] Langa DP stated that the "Commission is under a duty to satisfy itself that the elections are free and fair, and to report to Parliament if they are not or are likely not to be".[97] According to the Constitutional Court, the creation of the Electoral Commission is an essential yet not a sufficient ingredient to ensure free and fair elections.[98] Therefore, Electoral legislation[99] also plays a vital role in regulating electoral matters.[100] Furthermore, various provisions[101] of the Constitution regulate the regularity of elections. These provisions stipulate the term of the national and provincial legislature as well as the term of the municipal council.[102] Elections in respect of the national and provincial legislatures as well as the municipal council occur every five years.[103]

Additionally, the "right to free, fair and regular elections …"[104] requires that the independence of the Electoral Commission be upheld, failing which an infringement of this constitutional right will arise. Indeed, the Commission is only in a position to "promote democratic electoral processes"[105] such as free, fair and regular elections through its "independence".[106] Political parties may

95 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC) par 16.
96 Section 21(1) of the Electoral Act.
97 *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC) par 60.
98 *Ibid* 16.
99 Electoral Act 73 of 1998.
100 *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC) par 16.
101 Section 49(1), 108(1) and 159 of the Constitution.
102 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta & Co Ltd, 45-41.
103 Section 49(1), 108(1) and 159 of the Constitution. Also P Maduna "Political Rights" in MH Cheadle, DM Davis, NRL Haysom (eds) *South African Constitutional Law The Bill of Rights* (2005), Second Edition, Lexisnexis Butterworths, 14-5. Also see Section 24 (1) of the Local Government: Municipal Structures Act 117 of 1998.
104 Section 19(2).
105 Section 4 of the Electoral Commission Act.
106 Section 181(2) of the Constitution. See also section 3(1) of the Electoral Commission Act.

approach a court for relief if either the "right to free, fair and regular elections …"[107] or the independence of the Electoral Commission is undermined.[108]

In the *New National Party Case*[109], a political party[110] alleged in a High Court application, that inter alia, the government interfered with the Electoral Commission's independence.[111] The application dealt with issues such as the undermining of the Electoral Commission, which (according to the party) "might have a bearing on the integrity and fairness of national and provincial elections for members of the National Assembly and provincial legislatures...".[112] The court dismissed the application[113] and this resulted in the party applying to the constitutional court for leave to appeal.[114] Upon considering the application for leave to appeal, the constitutional court took cognisance of the importance of "a free, credible and fair election" in South Africa.[115] According to the constitutional court, "the public importance and interest in the matter are of such magnitude that it is manifestly in the interests of justice that any [application for leave to appeal instituted by the party] be noted directly to this Court".[116]

In this case, the Commission advised the government that identity documentation other than bar-coded identity documents should be recognised as an acceptable form of documentation for the purpose of registration and voting.[117] The party, in its application to court contended that the government

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107 Section 19(2).

108 J Brickhill and R Babiuch "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta & Co Ltd 45-38.

109 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC).

110 The then existing New National Party.

111 *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC) par 1. J Brickhill and R Babiuch, "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta & Co Ltd, 45-39.

112 *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC) par 2.

113 *Ibid* par 58 where it was stated that the application failed on the basis that the party did not make out a case for the relief it sought.

114 *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC) par 1.

115 *Ibid* par 2.

116 *Ibid* par 6.

117 *Ibid* par 55.

infringed the independence of the Commission by not accepting the advice of the Commission.[118] The Constitutional Court noted that the Electoral Commission opted to enter into negotiation with the government instead of resorting to litigation.[119] This analysis of the court reveals that the Electoral Commission, by opting to enter into negotiation with the government, asserted its independence.[120] According to Langa DP, the "Commission is well able to protect its own interests and to determine the best way of doing so…".[121]

In light of the discussion above, an issue to consider is whether the principles of co-operative governance are applicable to, for example, the Electoral Commission who may find themselves in a dispute with the government and to determine whether political parties may approach the court for relief. Co-operative governance requires that legal proceedings should be resorted to only after all other possible remedies to resolve the dispute have failed.[122] In this regard, the Constitution provides that an "organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute".[123] The Constitution also provides that "all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and in good faith by … avoiding legal proceedings against one another".[124]

In the *First Certification Judgement Case*[125] it was held that these constitutional provisions[126] be read together.[127] Although the principles of co-

118 *Ibid*.
119 *Ibid* par 107.
120 *Ibid*.
121 *Ibid*.
122 Section 41(3) of the Constitution. Also see J Brickhill and R Babiuch, "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta & Co Ltd, 45-40. Stu Woolman and T Roux, "Co-Operative Government & Intergovernmental Relations" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 1, Juta & Co Ltd, 14-7.
123 Section 41(3) of the Constitution.
124 Section 41(h)(vi) of the Constitution.
125 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

operative governance applies to organs of state,[128] in the *Langeberg Case*[129] the court found that the Electoral Commission did not fall into the category of an organ of state in the national sphere of government.[130] The reason for the courts finding was based on: firstly, the Commission's exclusion from executive authority[131], secondly, the Commission as a chapter nine state institution[132] extends beyond what the concept of national government entails and lastly, the independence[133] of the Commission which is the opposite of the prerequisite of interdependence that applies in instances where the principles of co-operative government arises.[134] Therefore it is not a requirement for chapter nine institutions[135] such as the Electoral Commission to adhere to the principles of co-operative governance. Disputes involving the Electoral Commission and the government or political parties "is not an intergovernmental dispute for the purposes of [section] 41(3)"[136] of the Constitution. In conclusion of the co-operative governance aspect, only if the parties before the court can be classified as organs of state in the national sphere of government, then the dispute between the parties "should where possible be resolved at a political level rather than through adversarial litigation".[137] Political parties may therefore approach the court for relief if there is a dispute between the Electoral Commission and the government.

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126 Section 41(3) and section 41(h)(vi) of the Constitution.

127 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) par 291.

128 Section 41 (1) and section 41 (3) of the Constitution.

129 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC).

130 *Ibid* par 27.

131 Section 85(2) of the Constitution

132 Section 181(1)(f) of the Constitution.

133 Section181(2) of the Constitution.

134 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) par 27. See Stu Woolman and T Roux, "Co-Operative Government & Intergovernmental Relations" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 1, Juta & Co Ltd 14-13.

135 Section 181 (1) of the Constitution.

136 Stu Woolman and T Roux, "Co-Operative Government & Intergovernmental Relations" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 1, Juta & Co Ltd 14-13.

137 *Ibid* 14-18. Also see *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) par 291. Also see *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) par 30-31.

3.5 THE RIGHT TO VOTE

The Constitution provides that the "Republic of South Africa is one, sovereign, democratic state founded on the following values ... Universal adult suffrage [and] a national common voters roll ...".[138] Universal adult suffrage and a national common voters' roll are therefore listed among the constitutional founding provisions.[139] "In a country of great disparities of wealth and power [this franchise] declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive [multi-party] polity".[140] Various other provisions[141] of the Constitution support an electoral system based on a national common voters roll. Yacoob J confirmed that the "existence of, and the proper functioning of a voters roll, is … a constitutional requirement integral both to the elections mandated by the Constitution and to the right to vote in any of them".[142] In order to give effect to these constitutional provisions, the Electoral Act provides that the "chief electoral officer must compile and maintain a national common voters' roll".[143]

Furthermore, the Constitution provides that every "adult citizen has the right to vote in elections ..."[144]. The constitutional court confirmed that "[i]ndispensable to any democratic process is that political parties will ensure that their potential supporters are aware of the prerequisites of voting and comply with them"[145]. In the *August Case*[146] the Constitutional Court described the vote of citizens as a "badge of dignity and of personhood".[147]

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138 Section 1(d) of the Constitution.
139 *Ibid*.
140 *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC) at par 17.
141 Section 43(1), section 105(1) and section 157(5) of the Constitution.
142 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC) at par 13.
143 Section 5 of the Electoral Act.
144 Section 19(3) (a) of the Constitution.
145 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC) at par 42.
146 *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC).
147 *Ibid* par 17.

Cory J stated in the *Haig Case*[148] that the right to vote "is a proud badge of freedom".[149] In the *New National Party Case*[150] Yacoob J stated that "the right to vote is… indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former".[151] According to the Constitutional Court, "the right to free and fair elections underlines the importance of the exercise of the right to vote ... each citizen entitled to [vote] must not vote more than once in any election; any person not entitled to vote must not be permitted to do so. The extent to which these deviations occur will have an impact on the fairness of the election".[152] The Electoral Act provides that a "voter may only vote once in an election".[153]

The Constitution establishes the right to vote but it does not presently establish a duty to compel South African citizens (or members of political parties) to vote.[154] For those who exercise their right to vote, a "form of regulation to facilitate the right to vote"[155] is necessary. In relation to the regulation of the right to vote, in the *New National Party Case*[156] it was stated that in order "to exercise the right to vote, Parliament must enact legislation to facilitate its exercise".[157] The Electoral Act facilitates the exercise of the right to vote. Such facilitation comprises of the establishment of "the date of the election, the location of the polling booths, the hours of voting and the determination of which documents prospective voters will require in order to register and vote…"[158] In the *August Case*, the Constitutional Court mentioned that the duties of the executive and the legislature comprise of the promulgation of a

148 *Haig v Canada (Chief Electoral Officer)* 1993 105 DLR (4th) 577.
149 *Ibid* 613.
150 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC).
151 *Ibid* par 12.
152 *Ibid*.
153 Section 38(1).
154 Section 19(3) (a) of the Constitution. J Brickhill and R Babiuch, "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta & Co Ltd 45-46.
155 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC) at par 123.
156 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC).
157 *Ibid* par 123.
158 *Ibid*.

date for the elections, securing the secrecy of the ballot and establishing machinery such as the Electoral Commission[159] to manage the voting process.[160]

In addition, because the right to vote forms a part of our Constitution[161], there is an obligation on the legislature and the executive to ensure its protection.[162] In South Africa the legislature, executive, the Electoral Commission and political parties play a role in protecting and regulating the right of South African citizens to vote. Accordingly, the constitutional court provides that:

> "[t]here are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right [ie the right to vote]. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the [electoral] scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose".[163]

Indeed, the aforementioned safeguards are paramount because Parliament determines "the way in which the electoral scheme is to be structured."[164] With regard to the regulation of the right to vote, political parties and the Electoral Commission encourage South African citizens to register as voters because the right to vote is "qualified by the requirement that one must be a registered voter".[165] Voter, as defined by the Electoral Act comprises of a

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159 *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC) at par 16.

160 *Ibid.*

161 Section 19(3) (a) of the Constitution. J Brickhill and R Babiuch, "Political Rights" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 4, Juta & Co Ltd 45-46.

162 *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC) at par 16.

163 *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC) at par 20.

164 *Ibid*.

165 G Fick "Elections" in S Woolman, Roux, M Bishop (eds) Constitutional Law of South Africa (2006), Second Edition, Vol 2, Juta & Co Ltd, 29-2.

South African citizen not younger than 18 years old who is listed on the voters' roll.[166]

The Electoral Act provides the requirements for registration as a voter.[167] Upon registration, the name of the voter is recorded on the voters' roll for the "voting district in which that person is ordinarily resident".[168] South African citizens not younger than 18 years old should ensure that they are registered as a voter in order for their name to be listed on the voters' roll by the Commission, failing which such citizen's will not be permitted to vote at an election.[169] In terms of the Electoral Act, South African citizens prohibited from registering to vote are inter alia those who are of unsound mind or who have a mental disorder as declared by the High Court, those who apply for registration in a manner other than that prescribed by the Electoral Act and those who apply for registration at a voting district other than the district in which they are ordinarily resident.[170]

Furthermore, a citizen who fails to register to vote shall be prohibited from voting. In the *August Case*, Els J in the Transvaal High Court stated that there are instances where the conduct of citizens is such that it deprives them of the "opportunity to register as a voter or to vote…An example is a person who specifically decides not to register because he does not want to vote, also a person who is on vacation and decides not to return to his ordinary place of

166 Section 1 of the Electoral Act.

167 Section 8 of the Electoral Act.

168 Section 8(3) of the Electoral Act. Section 33(1) of the Electoral Act which provides that persons may apply to the Commission for a special vote on condition that they fall into the category mentioned in the Act such as for example disability or pregnancy. Hence, persons who are unable to vote at the voting station in the district where they are ordinarily resident and registered as a voter may apply for the special vote if they comply with the provisions of the Electoral Act. Failure to adhere to the provisions of the Act could result in a person forfeiting his or her right to vote. Also see P Maduna, "Political Rights" in MH Cheadle, DM Davis, NRL Haysom (eds) *South African Constitutional Law The Bill of Rights* (2005), Second Edition, Lexisnexis Butterworths, 14-10.

169 Section 8(1) of the Electoral Act. Section 38(2) of the Electoral Act which provides that "a voter may vote at a voting station… if that voter's name is in the certified segment of the voters' roll for the voting district concerned".

170 Section 8(2) of the Electoral Act. Also see J Brickhill and R Babiuch, "Political Rights" in S Woolman, T Roux, M Bishop (eds) Constitutional Law of South Africa (2006), Second Edition, Vol 4, Juta & Co Ltd, 45-49.

residence for the purpose of voting".[171] This prohibition of the right to vote is justified as it ensues from the conduct of the individual and hence the prohibition is self-imposed. The Constitutional Court held that rights may not be "limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement".[172] According to Maduna, limitations of the right to vote due to a person falling into the list of prohibited persons[173] as defined by the Electoral Act "are self-evidently justifiable and will easily pass muster under section 36 of the Constitution, particularly when they are considered in relation to constitutional democracies".[174] Any limitation of the right to register to vote must comply with the constitutional "limitation clause".[175]

Another situation where a citizen may be prohibited to vote is when they do not possess the correct documentation. In the *New National Party Case*[176], the "constitutionality of certain provisions of national legislation prescribing the documents which otherwise qualified voters must possess in order to register as voters and to vote" was challenged by a political party.[177] The party argued that the Electoral provisions[178] that prescribe bar-coded ID's for registration

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171 *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC) par 8.

172 *Ibid* par 17.

173 Section 8(2) of the Electoral Act.

174 P Maduna "Political Rights" in MH Cheadle, DM Davis, NRL Haysom (eds) *South African Constitutional Law The Bill of Rights* (2005), Second Edition, Lexisnexis Butterworths 14-8.

175 Section 36 of the Constitution.

176 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC).

177 *Ibid* par 1.

178 Section 1(xii) provides:

> "'identity document' means an identity document issued after 1 July 1986, in terms of section 8 of the Identification Act, 1986 (Act No. 72 of 1986), or a temporary identity certificate issued in terms of the Identification Act, 1997 (Act No. 68 of 1997); (vii)"

Section 6(2) provides:

> "For the purposes of the general registration of voters contemplated in section 14, an identity document includes a temporary certificate in a form which corresponds materially with a form prescribed by the Minister of Home Affairs by notice in the Government Gazette and issued by the Director-General of Home Affairs to a South African citizen from particulars contained in the population register and who has applied for an identity document."

Section 38(2) provides:

> "A voter is entitled to vote at a voting station –
> (a) on production of that voter's identity document to the presiding officer or a voting officer at the voting station; and
> (b) if that voter's name is in the certified segment of the voters' roll for the voting district concerned."

and voting "constitute a denial of the right to vote[179] to a substantial number of South African citizens" who do not have a bar-coded ID in their possession.[180] The party claimed, in its amended court order, that:

> "1. The definition of 'identity document' in Section 1 (xii) of the Electoral Act, No 73 of 1998, is declared unconstitutional and invalid to the extent that it excludes those documents recognised as identity documents under Section 8(3) of the Identification Act, No 72 of 1986. 2. Section 6(2) of the Electoral Act, No 73 of 1998 is declared unconstitutional and invalid to the extent that it limits the issue of temporary registration certificates to those South African citizens whose particulars are contained in the population register and by failing to provide for the issue of temporary registration certificates to South African citizens whose particulars are not contained in the population register and who have applied for an identity document [and] 3. The invalidity of the provisions referred to are suspended pending appropriate amendments which have to be effected before ..."[181].

The court found that the decision to retain the statutory provisions, which determine "the means by which voters must identify themselves", is in the hands of Parliament and not the Commission or court.[182] According to Yacoob J, statutory provisions will be reviewed by courts "only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose".[183] The test to determine whether the Electoral Act infringe the right of citizens (including members of political parties) to vote, as concluded by the constitutional court, is as follows: "the Act would infringe the right to vote if it is shown that, as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right".[184]

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179 Section 19(3)(a).

180 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC) at par 19 and 21.

181 *Ibid* par 10.

182 *Ibid* par 20, 25 and 60.

183 *Ibid* par 25.

184 *Ibid* par 24.

The evidence before court failed to demonstrate that "the machinery, mechanism or process provided for by the Electoral Act is not reasonably capable of ensuring that those who want to vote and who take reasonable steps in pursuit of the right, are able to exercise it".[185] The constitutional court found that firstly, "there is a rational connection between the measure and the legitimate governmental purpose of facilitating the effective exercise of the important right to vote"[186] and secondly persons who wanted to vote were not deprived of the right if they reasonably pursed the right.[187] As a result, the appeal was dismissed.[188]

Additionally, political parties, their members or any person who undermine the right of a person to vote is guilty of an offence.[189] In the *New National Party Case*, the nature of the right to vote and the option of approaching a court for relief upon violation of the right to vote were taken into consideration by the court. O' Regan J confirmed that once an "election has been held, it will often be too late for a citizen to seek effective constitutional relief to be afforded the right to vote, as a court will ordinarily be extremely reluctant to overturn an election".[190]

Furthermore, the right of prisoners to vote was considered by the Constitutional Court in the *August Case*[191]. Sachs J confirmed that "prisoners… [were] effectively being denied their constitutionally protected right to register and vote".[192] The court held that the Electoral Act does not exclude prisoners from voting.[193] Prisoners are therefore entitled to vote. In the *Sauve Case* it was stated that "incarceration conditions should be made, as far

185 *Ibid* par 38.
186 *Ibid* par 49.
187 *Ibid* par 24.
188 *Ibid* par 50.
189 Section 97 and 98 of the Electoral Act.
190 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC) at par 125.
191 *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC).
192 *Ibid* par 36.
193 G Fick "Elections" in S Woolman, Roux, M Bishop (eds) Constitutional Law of South Africa (2006), Second Edition, Vol 2, Juta & Co Ltd 29-3.

as possible, compatible with the fullest possible exercise of the right to vote rather than advanced as a reason to deny that right altogether".[194]

Lastly, according to the ICCPR, the right to vote is to be exercised by secret ballot.[195] Moreover, the Universal Declaration of Human Rights provides that elections "shall be held by secret vote or by equivalent free voting procedures".[196] This is in line with the Constitution.[197] In South Africa, the voting procedure is regulated by the Electoral Act.[198] Such procedure promotes the preservation of the secrecy of the vote. Persons who are for instance blind, may acquire assistance without having the secrecy of their vote compromised.[199] Also, the Electoral Act provides that "no person may interfere with a voter's right to secrecy while casting a vote".[200] Political parties should therefore ensure that their members are aware of the voting procedure and that their party abstain from interfering with those exercising their right to vote.

3.6 THE RIGHT TO STAND FOR PUBLIC OFFICE

The applicability of the right to stand for public office is clearly defined in the Constitution. The persons who are not entitled to this constitutional right comprise of a closed list.[201] The Constitution provides that every "adult citizen has the right to... stand for public office and, if elected, to hold office".[202] Therefore persons younger than eighteen may not be nominated and elected as a member of the National Assembly, the provincial legislature, as well as the municipal council.[203] The Constitution further provides that certain persons

194 *Sauve v Canada (Attorney General)* 7 or (3rd) 481 (CAO) per Arbour JA at 488. Also see *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 (CC) fn 18.
195 Article 25.
196 Article 21.
197 Section 19(3)(a) of the Constitution.
198 Section 38 of the Electoral Act.
199 Section 39 of the Electoral Act.
200 Section 90 of the Electoral Act. Section 70 of the Electoral Act which protects the right to voter secrecy by requiring that voting compartments be designed in a manner that provides for screening of the voter from observers whilst the voter marks the ballot.
201 Section 19 (3) (b) of the Constitution. Section 47(1)(a) – (e) of the Constitution.
202 Section 19(3) (b) of the Constitution.
203 Sections 47 (1), 106 (1), 158 (1) of the Constitution.

may not stand for public office. These persons include inter alia unrehabilitated insolvents, those who are of unsound mind as declared by a court order, those who have been convicted of an offence and sentenced to more than twelve months imprisonment without the option of a fine, and persons who receive remuneration from the state consequent to their appointment or service to the state.[204] The right to stand for public office may also be regulated by legislation. The Electoral Commission Act provides that no "member of the Commission shall during his or her term of office be eligible for appointment or nomination to any political office".[205]

With the Constitution in mind, there is a link between party membership and the right to stand for public office because "[a]n individual may become a member of the legislature not through any direct choice by the public in respect of the individual, but exclusively by virtue of the proportional support obtained by the party to which the individual belongs, together with his or her position on the 'party list'".[206] The "composition of the 'party list' is an entirely domestic affair for any registered party contesting an election".[207] With reference to party lists, De Vos mentioned that "[a]s we vote for parties and not for individual candidates at national and provincial level, the manner in which political parties select candidates are crucial for our democracy… [and that] a law may help to limit the potential corruption associated with … the selection of candidates that will appear on party electoral lists".[208]

Party list disputes arise usually prior to local or national elections. In the Eastern Cape, for example, members of the ANC lodged a court application because, according to them, there was no fairness and transparency with regard to the formulation of the "party's candidates list for local government

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204 Section 47(1)(a), section 47(1)(c), section 47 (1) d), section 47 (1)(e); section 106 (1)(a), section 106 (1)(c), section 106 (1)(d), section 106 (1)(e); section 158 (1)(a), section 158 (1)(a), section 158 (1)(c), section 158 (1)(d), section 158 (1)(e) of the Constitution.

205 Section 9(2) (a) of the Electoral Commission Act.

206 *Ismail v New National Party in the Western Cape and Others* 2001 JOL 8206 (C) 25.

207 *Ibid* 26.

208 De Vos P, "Political parties must be more open and democratic" retrievable from http://constitutionallyspeaking.co.za/2011/07/14/.

elections".[209] The Court application was dismissed.[210] ANC spokesman, Brian Sokutu, stated that "ANC cadres should have exhausted all the means within the party structures to raise their dissatisfaction...".[211] He further stated that the ANC is "run by its own constitution" and not by the courts.[212] With regard to party list disputes, the party leadership has "warned ... that those who [resort] to court action would face internal disciplinary action".[213] To avoid these party list disputes in South Africa, the adoption of legislation dealing with the candidate selection process and the compiling of party lists may be formulated by the legislature, provided that the legislation at no time conflicts with the Constitution and the constitution of South African parties.

Moreover, as noted above, political parties contest elections.[214] According to the Democratic Alliance[215] constitution, "[o]nly Party members can serve on the representative and other structures of the Party and be public representatives of the Party".[216] In the *Ismail Case*[217], Binns-Ward AJ referred to a political party[218] constitution which stated that one of the objectives of the party was "to put up candidates for the National Assembly, National Council of Provinces and Provincial Parliament and for the election of local authorities".[219] In this case, Ismail[220], in his capacity "as a representative of the party … [occupied] a seat in the Provincial Parliament of the Western Cape".[221] As a party member, he was "elected to this position on the basis of

209 Gava C, "ANC wins case over local poll candidates list in Eastern Cape" retrievable from http://news.za.msn.com/article.aspx?cp-documentid=156660183.
210 *Ibid.*
211 *Ibid.*
212 *Ibid.*
213 "Court dismisses ANC ECape list case" retrievable from http://www.timeslive.co.za/Politics/article984198.ece/Court-dismisses-ANC-ECape-list-case.
214 Rule 3.3 of the ANC Constitution retrievable from http://www.anc.org.za/show.php?id=207.
215 Hereinafter "the DA".
216 Clause 3.1 of the Democratic Alliance Constitution retrievable from http://www.da.org.za/docs/542/DEMOCRATIC%20ALLIANCE%20FEDERAL%20CONSTITUTION%202010.pdf.
217 *Ismail v New National Party in the Western Cape and Others* 2001 JOL 8206 (C).
218 The then New National Party, now known as the Democratic Alliance consequent to the merger between the New National Party and the Democratic party. See *Ismail v New National Party in the Western Cape and Others* 2001 JOL 8206 (C) 2.
219 *Ismail v New National Party in the Western Cape and Others* 2001 JOL 8206 (C) 1.
220 Hereinafter "the Applicant".
221 *Ismail v New National Party in the Western Cape and Others* 2001 JOL 8206 (C) 2.

public trust … [and he] represented a constituency, a body, community that placed its faith in his credibility…".[222]

More particularly, the facts of the Ismail Case as applicable to political parties and the constitutional right to stand for public office, is as follows. The party charged the applicant with "breach of party discipline and not on the basis of his being in breach of parliamentary standing rules or any other code of conduct of a public nature".[223] The issue before the court was whether the applicant, as a Provincial Parliament representative, was entitled to a public disciplinary hearing by the party.[224]

In respect of section 34 of the Constitution, the court indicated that the applicant's reliance on this constitutional provision was "plainly misdirected".[225] This provision provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".[226] Accordingly, Binns-Ward AJ stated that "[i]n the absence of express provisions in the domestic constitution it is open to the party entitled to convene a private disciplinary enquiry to institute any procedure considered appropriate as long as it complies with the rules of natural justice. This would include a decision to hold any hearing in private".[227] He further contended that "[b]y becoming a member of a private body such as … [a political party], the applicant agreed to be bound by its [the parties] provisions and to be amenable to the disciplinary processes permitted thereunder".[228] As a result, it was held that "[i]t does not matter whether the affected member is a parliamentarian or not. The disciplinary proceedings are a party matter...".[229] In conclusion, the court dismissed the application.[230]

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222 *Ibid* 6.
223 *Ibid* 2.
224 *Ibid* 8.
225 *Ibid* 18.
226 Section 34 of the Constitution.
227 *Ismail v New National Party in the Western Cape and Others* 2001 JOL 8206 (C) 16.
228 *Ibid* 18.
229 *Ibid* 29.
230 *Ibid* 34.

In summary, party members hold public office as a representative of the party. Therefore the party members are not immune to the internal disciplinary procedures of the party, which may result in them losing their position. In addition, with regard to our electoral system, citizens can be elected to stand for public office without being a member of a political party. Indeed, our electoral system also permits "independents" to "obtain election to parliament".[231]

[231] *Ibid* 25.

CHAPTER 4
POLITICAL PARTIES AND THE RIGHT TO FREEDOM OF EXPRESSION

4.1 INTRODUCTION

This chapter commences with a description of freedom of expression in democratic South Africa. The importance of freedom of expression in South Africa is such that without it "the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled".[1] The relation of the right to freedom of expression with other fundamental rights and other constitutional values are taken into consideration by analysing various judgments of the Constitutional Court dealing with, for example, the status of the right to freedom of expression.

The term "everyone" which forms a part of the freedom of expression provision in our Constitution is compared to the term "every person" which was the term utilized in the Interim Constitution. The broad interpretation of the term "everyone" by the Constitutional Court is taken into consideration when determining the applicability of the right to freedom of expression to the state or organs of the state as well as to natural and juristic persons. Whether the right to freedom of expression is applicable to associations such as political parties is determined by assessing the "right to freedom of expression clause"[2] as well as the "application clause"[3] embodied in the Constitution[4], having reference to both the vertical and the horizontal application of the right to freedom of expression in terms of case law. Furthermore, case law dealing with the horizontal application of the right of freedom of expression simultaneously acknowledging the link between defamation law and the right to freedom of expression is mentioned within the context of this chapter. The impact of defamation law on the right to freedom of expression is discussed

1 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 21.
2 Section 16 of the Constituttion.
3 Section 8 of the Constitution.
4 Constitution of the Republic of South Africa, 1996.

below, more specifically in the section of this chapter that deals with the limitations of the right to freedom of expression.

A discussion on "freedom of the press and other media"[5] follows. This discussion commences with a description of the media and the obligation it has to society in ensuring the protection of the public interest. The link between the media and citizens including political parties is discussed with reference to the role that the media plays with regard to the engagement of political communication in democratic South Africa. An explanation of the nature of the independent regulator, ICASA[6], and its mandate "to regulate broadcasting in the public interest"[7] free from, for example, political control is then dealt with. Illustrations of ICASA as a protector and advancer of the right to freedom of expression is mentioned with reference to executive control by the Minister of Communications and political control by political parties.

Furthermore, the establishment of the Media Appeals Tribunal as a new regulatory mechanism for the printed media, as proposed by a political party namely the African National Congress, forms a part of the discussion encompassing this chapter. A description of media self-regulation is provided in order to clarify the concept for the purpose of this discussion. The role of the press Ombudsman in guarding against instances where the printed media may be subjected to political interference is discussed with the support of non-interference by political parties expressed in terms of both English as well as South African case law. The effectiveness of the Press Council of South Africa is then assessed by taking a finding of a British Parliamentary Committee into consideration. Adherence to a Code of Conduct and compliance with the objectives of the Press Council of South Africa is highlighted as key requirements to ensure fairness in the sphere of media self-regulation by a South African regulatory body. The debate on the establishment of the Media Appeals Tribunal is ongoing in South Africa and no final decision has to date

5 Section 16(1) of the Constitution.
6 The Independent Communications Authority of South Africa.
7 Section 192 of the Constitution.

been taken as regards the implementation of a new regulatory mechanism for the printed media.

A discussion on the freedom to receive or communicate information or ideas, as a part of the right to freedom of expression, forms a part of this chapter. This discussion highlights the importance of the freedom to receive or communicate information or ideas as expressed by the Constitutional Court and the European Court of Human Rights. The protection afforded to associations such as political parties by the right to freedom of expression and its supporting rights, with reference to the communication of information, is then taken into consideration. The constitutional mandate of the media which supports the freedom to receive information or ideas is referred to within the context of this chapter in order to demonstrate that the role of political parties and that of the media are intertwined. Furthermore, the freedom to receive information and whether it entails a broad enough interpretation which will permit the electronic broadcasting of court proceedings is mentioned with reference to a particular judgment conferred by the Constitutional Court. The constitutional right of access to the courts, the locus standi of political parties and public interest actions is then discussed with reference to a report by the South African Law Commission and case law.

The categories of expression that form a part of the right to freedom of expression and those that are excluded from the ambit of the freedom of expression right is dealt with within the context of this chapter. From this explanation stems the identification of the forms of expression that are constitutionally protected and those that are not. On this point, the Constitutional Court stated that "any expression that is not specifically excluded under [section 16(2)] enjoys the protection of the right".[8] This chapter furthermore incorporates a discussion on section 16(1) of the Constitution, section 16(2) as well as a discussion on the limitations clause

[8] *De Reucke v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at par 47. Also see *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 33. Also see D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 42-6.

with reference to political parties. Defamation as a limitation to the right to freedom of expression forms a part of this chapter. The question whether political parties may claim damages for defamation is considered with reference to case law. Thereafter a discussion on the regulation of hate speech in South Africa and the effect of the limitations clause on the right to freedom of expression follows. This chapter concludes with a practical perspective of hate speech bearing reference to case law.

4.2 THE RIGHT TO FREEDOM OF EXPRESSION IN SOUTH AFRICA

The Constitution provides that "[e]veryone has the right to freedom of expression which includes ... freedom of the press and other media [and] freedom to receive or impart information or ideas …".[9] What follows now is a brief description of the concept freedom of expression in democratic South Africa. The Constitutional Court described the right to freedom of expression as "the lifeblood of an open and democratic society …".[10] Furthermore, the Constitutional Court confirmed that freedom of expression "lies at the heart of a democracy".[11] The South African Human Rights Commission concurs with the aforementioned descriptions of the Constitutional Court, because the Commission in the *Freedom Front Case*[12] states that freedom of expression "constitutes one of the essential foundations of any democratic society".[13] Various international instruments such as the Universal Declaration of Human Rights[14] and the International Covenant on Civil and Political Rights[15] are in line with the view as expressed by the Constitutional Court.

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9 Section 16(1) of the Constitution.

10 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) at par 92.

11 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at par 7. Also see *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC), 2007 (1) SACR 408 (CC), 2007 (2) BCLR 167 (CC) at par 23.

12 *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC).

13 *Ibid* 1287. Also see *Handyside v United Kingdom* A.24 (1976) 1 EHRR 737 at par 49.

14 Article 19.

15 *Ibid.*

However, in the *Khumalo case*[16], the Constitutional Court stated that "although freedom of expression is fundamental to our democratic society, it is not a paramount value".[17] According to the Constitutional Court there is a relation between the right to freedom of expression and other fundamental rights such as, for example, "the right to dignity, as well as the right to freedom of association, the right to vote and to stand for public office, and the right to assembly".[18] O'Regan J therefore held that freedom of expression lies "in one of a 'web of mutually supporting rights' in the Constitution"[19]. Hence, freedom of expression "must be construed in the context of the other values enshrined in our Constitution".[20] More specifically, these other values enshrined in our Constitution inclusive of the aforementioned rights are, for example, the "basic values – such as fairness, equality, and respect for individual dignity…".[21] Our constitutional dispensation is such that "the values of human dignity, equality and freedom attract equal respect and none is, at the level of principle, superior to any of the others".[22] The Constitutional Court therefore emphasised that the right to freedom of expression "is not a pre-eminent freedom ranking above all others… [and that] the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression…".[23] In conclusion of this point, Kriegler J confirmed the aforementioned statement of the Constitutional Court when he stated that freedom of expression "does not enjoy superior status in our law".[24]

16 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

17 *Ibid* par 25.

18 *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at par 8.

19 *Ibid.*

20 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 25.

21 E Neisser "Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence" (1994) 10 *The South African Journal on Human Rights* 341.

22 *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC) 1288.

23 *Ibid.*

24 *S v Mamabolo (R TV Business Day and the Freedom of Expression Institutue Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at par 41.

The term "everyone" in section 16(1) of the Constitution denotes that a wide range of persons are entitled to rely on the right to freedom of expression.[25] In contrast thereto, the term "every person" was the narrower term referred to in the Interim Constitution[26]. In the *De Reucke Case*[27] Langa J emphasized that "section 16(1) expressly protects the right to freedom of expression in a manner that does not warrant a narrow reading".[28] This broad interpretation by the Constitutional Court of the term "everyone" confirms that the right to freedom of expression is applicable to "the state or organs of state"[29] as well as to natural and juristic persons.[30] Consequent to the vertical application of the right to freedom of expression, natural or juristic persons may assert the right to freedom of expression in their relationship with the state or organs of state who must guard against any violation of the aforementioned right.[31] As regards the horizontal application of the right to freedom of expression, for example, whether the right to freedom of expression is applicable to associations such as political parties, the Interim Constitution ruled out any possibility of direct horizontal application of the right to freedom of expression.[32] However, in the *Khumalo case*[33] the direct horizontal application of the right to freedom of expression was not ruled out by the Constitutional Court as will be discussed below.

The facts of the *Khumalo case*[34] are as follows. Political party leader Bantubonke Harrington Holomisa, the respondent in an application for leave to appeal against the dismissal of an exception, sued the applicants', New

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25 D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) Constitutional Law of South Africa (2006), Second Edition, Vol 3, Juta & Co Ltd 42-30.

26 Section 15(1) of the Constitution of the Republic of South Africa, 1993.

27 *De Reucke v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC).

28 *Ibid* par 48.

29 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 33.

30 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at par 57. D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) Constitutional Law of South Africa (2006), Second Edition, Vol 3, Juta & Co Ltd 42-30.

31 Section 8(1) of the Constitution. *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 31.

32 Du Plessis v De Klerk 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC). Also see the Constitution of the Republic of South Africa, 1993.

33 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

34 *Ibid.*

Africa Publications Limited and Others for defamation "arising out of the publication of an article with their newspaper".[35] According to the applicants', one of the grounds upon which it based its exception to the respondent's particulars of claim was the following:

> "[i]t is inconsistent with [section] 16 of the Constitution to permit a politician, alternatively a public official, to recover damages for the publication of a statement relating to matters of public interest, alternatively to matters of political importance, alternatively to his fitness for public office, in circumstances where he does not allege and prove the falsity of the statement in question".[36]

From the aforementioned facts it is clear that the "applicants' exception relies directly on section 16 of the Constitution, despite the fact that none of the parties to the defamation action is the state, or any organ of state".[37] O'Regan J acknowledged the intensity of the right to freedom of expression and having regard thereto stated that such intensity "coupled with the potential invasion of the right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application [in certain disputes involving only private parties][38] as contemplated by section 8(2) of the Constitution".[39] This aforementioned constitutional provision provides that various persons other than the state or organs of state may rely on the right to freedom of expression including associations such as political parties and the media.[40] For this reason, in the *Khumalo Case*[41], the Constitutional Court considered firstly the fact that "the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression [and secondly that there] can be no doubt that the law of defamation does affect the right to freedom of expression".[42] It therefore follows that presently the direct horizontal

35 *Ibid* par 1.
36 *Ibid* par 2.
37 *Ibid* par 29.
38 D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) Constitutional Law of South Africa (2006), Second Edition, Vol 3, Juta & Co Ltd 42-30.
39 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 33.
40 Section 8(2) of the Constitution states that a "provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".
41 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).
42 *Ibid* par 33.

application of the right to freedom of expression "will be determined on a case by case basis applying the open-ended criteria set out in section 8(2) of the Constitution".[43] As regards the effect of defamation law on the right to freedom of expression, it is discussed as a part of the limitations of the right to freedom of expression forming a part of this chapter.

Freedom of the press and other media which forms a part of the right to freedom of expression will now be discussed. The Constitution provides that everyone "has the right to freedom of expression which includes freedom of the press and other media".[44] The media has been described as "bearers of rights and bearers of constitutional obligations in relation to freedom of expression".[45] As stated in the *Khumalo case*[46], "the media… rely on freedom of expression and must foster it".[47] Furthermore, the media plays a role in protecting the public interest as is apparent from the following statement by Dean J of the High Court of Australia "the freedom of the citizen [including members of political parties] to engage in significant political communication and discussion is largely dependent upon the freedom of the media".[48] Therefore the media should, for example, facilitate ongoing political communication between political parties and its members or political parties and the public.

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43 D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) Constitutional Law of South Africa (2006), Second Edition, Vol 3, Juta & Co Ltd 42-31. Also see section section 8(2) of the Constitution which implies that the right to freedom of expression will bind a natural or juristic person if the aforementioned right is applicable to for instance, the case at hand, "taking into account the nature of the right and the nature of any duty imposed by the right".

44 Section 16(1)(a) of the Constitution.

45 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 22. Also see *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC), 2007 (1) SACR 408 (CC), 2007 (2) BCLR 167 (CC) at par 24.

46 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

47 *Ibid* par 22. Also see *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC), 2007 (1) SACR 408 (CC), 2007 (2) BCLR 167 (CC) at par 24.

48 Theophanous v Herald & Weekly Times Ltd and Another (1994) 124 ALR 1 at 61. Also see *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 22.

During the apartheid era, the broadcaster was subject to state control and this entailed "tight political control".[49] In our constitutional dispensation the role of the independent regulator or broadcaster, ICASA, comprises of the regulation of broadcasting and such regulation does not encompass the regulation of all electronic communications, for example, printed media is excluded.[50] This role of the independent regulator entails both the protection and the advancement of the right to freedom of expression as will be illustrated below. ICASA ensures that the public interest is upheld in the sphere of broadcasting.[51] Although it is mandatory for ICASA to consider policy directions issued by the Minister of Communications regarding the regulation of broadcasting, ICASA is not bound by such directions.[52] Furthermore, before "a policy direction is made the Minister must consult ICASA, engage in a notice and comment procedure in the Government Gazette and refer the proposed direction to the Parliamentary Portfolio Committee for comment".[53] In light of the above, the regulation role of ICASA firstly serves as a protection of the right to freedom of expression i.e. protection from, for example, interference from executive control. Secondly, the regulation role of ICASA supports the advancement of the right to freedom of expression in the form of broadcasting as the Constitution makes provision for the "broadcasting of views broadly representing South African Society"[54] . More specifically, the Constitution provides that "legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African

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49 J White "Independent Communications Authority of South Africa (ICASA)" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 2, Juta & Co Ltd, 24E-1.

50 Section 192 of the Constitution states that the role of the independent regulator is to "regulate broadcasting in the public interest" and therefore electronic communications that are not broadcasted will be excluded from the mandate of the independent regulator. J White "Independent Communications Authority of South Africa (ICASA)" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 2, Juta & Co Ltd 24E-11.

51 Section 192 of the Constitution. J White "Independent Communications Authority of South Africa (ICASA)" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 2, Juta & Co Ltd 24E-10.

52 Section 13A(5)(b) of the Independent Broadcasting Authority Act 153 of 1993. J White "Independent Communications Authority of South Africa (ICASA)" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 2, Juta & Co Ltd 24E-10.

53 Section 13A(6) of the Independent Broadcasting Authority Act 153 of 1993.

54 Section 192 of the Constitution.

society".[55] As stated in chapter 1, the legislation that gives effect to the aforementioned constitutional provision is the ICASA Act[56]. The importance of having an independent regulator such as ICASA is confirmed by the African Commission on Human and Peoples' Rights. The Commission passed a resolution stating that:

> "broadcasting … must be regulated by a public authority which is independent and protected against interference, particularly of a political… nature [and] the appointment process in respect of such a body shall be open and transparent with participation by civil society and it shall not be controlled by any such political party…".[57]

Political parties should not be in a position to exploit the broadcaster to, for example, "improve their showing at the polls".[58] Recently in South Africa political parties, the government and the media have engaged in debates regarding the establishment of a Media Appeals Tribunal. The debate stems from a political party namely the African National Congress which proposed that a new regulatory mechanism for the printed media be established on the basis that "the Press's own system of self-regulation has failed".[59] Media self-regulation has been described as "a joint endeavour by media professionals to set up voluntary guidelines and abide by them …. [and by so doing] the independent media accept their share of responsibility for the quality of public discourse in the nation, while fully preserving their editorial autonomy in shaping it".[60] Moreover, the proposal for the establishment of a new regulatory

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55 *Ibid.*

56 The Independent Communication Authority of South Africa Act 13 of 2000 ('ICASA Act') and its predecessor the Independent Broadcasting Authority Act 153 of 1993 ('IBA Act').

57 J White "Independent Communications Authority of South Africa (ICASA)" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 2, Juta & Co Ltd 24E-6. African Commission on Human and Peoples' Rights "Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa" available at http://www.achpr.org/english/_doc_target/documentation.html?/resolutions/resolutions67_en.html(accessed on 31 October 2010). Also see *Windhoek Charter on Broadcasting in Africa* (2001) Clause 2, available at https://www.alc.amarc.org/legislaciones/africa.pdf (accessed on 31 October 2010).

58 J White "Independent Communications Authority of South Africa (ICASA)" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 2, Juta & Co Ltd 24E-3.

59 "Whats Behind the Media Tribunal Proposal" available at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=19509&sn=Detail (accessed on 29 October 2010).

60 Organization for Security and Co-operation in Europe "The Media Self-Regulation Guidebook" available at http://www.osce.org/publications/rfm/2008/04/30697_1117_en.pdf

mechanism for the printed media was mentioned in the policy document of the African National Congress, such policy document being tabled at the parties National Policy Conference[61]. This policy document stated that "an investigation should be conducted into: the adequacy or otherwise of the prevailing self regulatory dispensation within the media … [and] the need or otherwise for a media tribunal to address these matters".[62]

The Declaration of Principles on Freedom of Expression in Africa states that any "regulatory body established to hear complaints about media content, including media councils, shall be protected against political… or any other undue interference".[63] In 1996, the press Ombudsman and an Appeal Panel was established to provide "accessible, cheap, impartial and independent complaints mechanism… as offering solutions through settlement or adjudication of complaints in accordance with a Code of Conduct".[64] The press Ombudsman also plays a role in, for example, guarding against instances where the printed media may be subjected to political influence or intimidation from, for example, political parties, political office bearers or government officials.[65] The English courts have emphasized that "those who hold public

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(accessed on 31 October 2010). Also see "Whats Behind the Media Tribunal Proposal" available at: http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=19509&sn=Detail (accessed on 29 October 2010). G Berger stated that "self regulation is a recognition of the relative independence of journalists and the media"; See G Berger, "Press self- regulation in South Africa: the pudding proved itself"; "The struggle for press self-regulation in contemporary South Africa: charting a course between an industry charade and a government doormat" (2009) available at http://nml.ru.ac.za/blog/guy-berger/2009/09/17/press-self-regulation-south-africa-pudding-proved-itself.html.

61 ANC National Policy Conference 27-30 June 2007, Gallagher Estate.

62 ANC. 2007a. Commission Reports and Draft Resolutions. 06 / Communications and the Battle of Ideas. ANC National Policy Conference 27-30 June 2007, Gallagher Estate. http:// www.anc.org.za/ancdocs/policy/2007/conference/communications.html. G Berger "Press self- regulation in South Africa: the pudding proved itself" "The struggle for press self-regulation in contemporary South Africa: charting a course between an industry charade and a government doormat" (2009) available at http://nml.ru.ac.za/blog/guy-berger/2009/09/17/press-self-regulation-south-africa-pudding-proved itself.html.

63 African Commission on Human and Peoples' Rights, "Declaration of Principles on Freedom of Expression in Africa", Article IX (2) available at http://www.article19.org/pdfs/publications/africa-declaration-of-principles-on-foe.pdf.

64 G Berger "Press self- regulation in South Africa: the pudding proved itself"; "The struggle for press self-regulation in contemporary South Africa: charting a course between an industry charade and a government doormat" (2009) available at http://nml.ru.ac.za/blog/guy-berger/2009/09/17/press-self-regulation-south-africa-pudding-proved-itself.html.

65 This role of the press Ombudsman is essential because it has been stated that "[s]elf-regulation for political reasons risks becoming a synonym for self-censorship". See G Berger, "Press self- regulation in South Africa: the pudding proved itself"; "The struggle for press self-

office in government and who are responsible for public administration must always be open to criticism [and] any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind".[66] Our courts support the aforementioned view of the English courts as is evident from the *Holomisa Case*[67]. In this aforementioned case it was held that "strong and independent newspapers [and] journals …are needed… if criticisms [including those of political parties] are to be effectively voiced…".[68]

In 2007, the "Ombudsman's position was relocated in [the] re-invented"[69] Press Council of South Africa and Appeals Board.[70] The role of the aforementioned regulatory body will be considered with reference to the role of the British Press Complaints Commission (hereinafter referred to as "the PCC"). A British Parliamentary Committee found that the PCC, which is a body responsible for media self-regulation, "did not command absolute confidence that it was fair…" and there were criticisms with regard to the manner in which the PCC applied its own press code.[71] The role of the South African regulatory body also complies with a Code of Conduct which is presently "the basis of the system"[72] utilized in South Africa. Furthermore, the Constitution of the Press Council of South Africa lists the following as one of

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regulation in contemporary South Africa: charting a course between an industry charade and a government doormat" (2009) available at http://nml.ru.ac.za/blog/guy-berger/2009/09/17/press-self-regulation-south-africa-pudding-proved-itself.html.

66 D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd 42-66, 42-23. Also refer to *Derbyshire County Council v Times Newspaper* [1992] 3 AA ER 65, 80 (CA), quoting *Hector v Attorney General of Antigua and Barbuda* [1990] 2 ALL ER 13, 106.

67 *Holimisa v Argus newspapers Ltd* 1996 (2) SA 588, 608-9 (W).

68 *Ibid*. Also see D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd 42-66, 42-23.

69 G Berger "Press self- regulation in South Africa: the pudding proved itself"; "The struggle for press self-regulation in contemporary South Africa: charting a course between an industry charade and a government doormat" (2009) available at http://nml.ru.ac.za/blog/guy-berger/2009/09/17/press-self-regulation-south-africa-pudding-proved-itself.html.

70 *Ibid*.

71 "Whats Behind the Media Tribunal Proposal" available at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=19509&sn=Detail (accessed on 29 October 2010).

72 G Berger "Press self- regulation in South Africa: the pudding proved itself"; "The struggle for press self-regulation in contemporary South Africa: charting a course between an industry charade and a government doormat" (2009) available at http://nml.ru.ac.za/blog/guy-berger/2009/09/17/press-self-regulation-south-africa-pudding-proved-itself.html.

its objectives namely the promotion and preservation of "the right of freedom of expression including freedom of the press as guaranteed in section 16 of the Constitution of the Republic of South Africa…"[73]. Therefore the Press Council of South Africa is obliged to conduct itself in a manner that achieves the aforementioned objective. By doing so the regulatory body shall display fairness when addressing complaints from, for example, political parties.

What follows is a discussion on the freedom to receive or communicate information which forms a part of the right to freedom of expression. The Constitution provides that everyone "has the right to freedom of expression which includes … freedom to receive or impart information or ideas…".[74] In the *South African National Defence Union Case*[75] the Constitutional Court confirmed that the Constitution[76] "recognizes that individuals [including political parties] in our society need to be able to hear, form and express opinions and views freely on a wide range of issues…".[77] The European Court of Human Rights[78] adopted a broad approach to the freedom to receive or communicate information or ideas.[79] It held that the right to freedom of expression is applicable "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb...".[80]

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73 "Constitution of the Press Council" available at www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/South%20%African%20press%20Council%20Constitution.pdf.

74 Section 16(1)(b) of the Constitution.

75 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC).

76 Constitution of the Republic of South Africa, 1996.

77 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at par 7. Also see *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC), 2007 (1) SACR 408 (CC), 2007 (2) BCLR 167 (CC) at par 23.

78 Article 10 of the European Convention of Human Rights. Also see *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754. Also see *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 28.

79 *De Reucke v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at par 49.

80 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 28. Also see *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754.

In South Africa, the right to freedom of expression together with the other fundamental rights it supports (as discussed above) protects "the right of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions".[81] For example, this occurs when individuals form a political party and the media is called upon by the political party to propagate the manifesto of the party. As stated in the *Khumalo Case*[82], "[a]s primary agents of the dissemination of information and ideas, [the media] are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility….".[83] Furthermore, this protection afforded by the right to freedom of expression and its supporting rights "enables citizens [and political parties], and particularly the media, to communicate information and ideas to the community and thus contributes to the creation and maintenance of an informed electorate, so that they can better participate in the democratic process".[84]

The media has an obligation, more importantly a constitutional mandate "to provide citizens [including political parties] both with information and with a platform for the exchange of ideas".[85] For example, political parties during campaigns express their right to freedom of expression when they communicate information to the public and when they receive information from the public. This retrieved information is then broadcast by the media in accordance with their constitutional mandate which supports the freedom to receive information or ideas.[86] In this regard the role of the media and that of political parties are intertwined. Mokgoro J stated as regards the importance of the right to receive information: "my freedom of expression is impoverished

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81 *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 SAHRC 1287.

82 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

83 *Ibid* par 24.

84 D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd 42-24.

85 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 24.

86 *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others*2007 (1) SA 523 (CC), 2007 (1) SACR 408 (CC), 2007 (2) BCLR 167 (CC) at par 24 where it is stated that the "media are key agents in ensuring that … the right to freedom of information are respected".

indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others… a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and the would-be recipients".[87]

Unlike the Interim Constitution[88] which did not include as a part of the right to freedom of expression, the freedom to receive information, the Constitution guarantees both the right to communicate and receive information.[89] Hence the content of the provision of freedom of expression as contained in the Interim Constitution was not as wide as that of our Constitution. Regarding the right to communicate and receive information, in the *South African Broadcasting Corporation Case*[90] one of the questions before the Constitutional Court was "whether the ambit of section 16 of our Constitution does extend to confer a right on the applicant [the South African Broadcasting Corporation] to televise court proceedings".[91] The court opted not to deal with the question, as the nature of the matter was urgent, yet the court did not fail to "assume in favour of the applicant that there is such a right".[92] However, in the aforementioned case, the importance of access to the courts[93] was considered by the Constitutional Court to be of greater importance than the right of the media to communicate and receive information via electronic broadcasting.[94]

In light of the above and in order to clarify the constitutional right of access to the courts with regard to the locus standi of political parties in respect of, for

87 *Case and Another v Minister of Safety and Security and Others; Curtis v Miinister of Safety & Security and Others* 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 at par 92. Also see D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd 42-32.

88 Section 15.

89 Section 16(1) of the Constitution. Also see *De Reucke v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at par 49. Also see D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd 42-66, 42-32.

90 *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC), 2007 (1) SACR 408 (CC), 2007 (2) BCLR 167 (CC).

91 *Ibid* par 25.

92 *Ibid.*

93 Section 34 of the Constitution.

94 D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd 42-33.

example, public interest actions, a discussion on such constitutional "enforcement of rights"[95] follows. According to the Constitution:

> "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are - ... (d) anyone [including political parties] acting in the public interest; and (e) an association [including political parties] acting in the interest of its members".[96]

The South African Law Commission, in terms of its *Report on the Recognition of Class Actions and Public Interest Actions in South African Law*, emphasised the need for legislation regulating public interest actions and class actions in South African law.[97] The draft bill namely "Public Interest and Class Actions Act"[98] has been published by the South African Law Commission although Parliament has to date not promulgated the draft bill.[99] There are presently no procedural rules governing class or group actions in South Africa and in the absence of the aforementioned procedural rules, the applicability of the High Court Rules of South Africa[100] reign in the sphere of class or group actions coupled with the discretion of the judiciary on a case by case basis.[101]

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95 Section 38 of the Constitution.

96 *Ibid.* Section 7(4) of the interim Constitution.

97 South African Law Commission, "The Recognition of Class Actions and Public Interest Actions in South African Law" at 34 available at http://salawreform.justice.gov.za/reports/r_prj88_classact_1998aug.pdf. Also see "Constitutional Practice Class Actions And Public Interest Actions" available at www.judicialeducation.org.za/files/MagCourts/CIV%20MAG%2017%20Class%20Actions%20and%20Public%20Interest%20Actions.pdf.

98 South African Law Commission, "The Recognition of Class Actions and Public Interest Actions in South African Law" available at http://salawreform.justice.gov.za/reports/r_prj88_classact_1998aug.pdf.

99 The daft bill was published in 1998. See South African Law Commission, "The Recognition of Class Actions and Public Interest Actions in South African Law" at 87 available at http://salawreform.justice.gov.za/reports/r_prj88_classact_1998aug.pdf. See also P Conradie "The International Comparative Legal Guide to: Class and Group Actions 2010" available at www.cliffedekkerhofmeyer.com/news/files/CDH-Class-and-Group-Actions-South-Africs.pdf.

100 Uniform Rule of Court 16A which provides that: "[s]ubject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), and these rules, any interested party in a constitutional issue raised in proceedings before a court may, with written consent of all the parties to the proceedings... be admitted therein as amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties."

101 *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) at para 22. In this aforementioned case, the interests of justice was considered sufficient ground for the court "to relax the statutory requirements of Rule 16A". Also see P Conradie "The International Comparative Legal Guide to: Class and Group Actions 2010" retrieved from

The *Glenister Case*[102], a High Court matter which was found to be within the "Constitutional Courts jurisdiction"[103] as will be mentioned below, demonstrates an example of the constitutional right of access to the courts, more specifically the locus standi of political parties in terms of section 38 of the Constitution. In this aforementioned case, the following political parties namely the "African Christian Democratic Party, the Democratic Alliance, the Independent Democrats, the United Democratic Movement and the Inkatha Freedom Party ... applied in terms of rule 16A of the Uniform Rules of Court for ... [l]eave to be admitted in the proceedings as *amicii curiae*...".[104] Van Der Merwe J stated that "the political parties had shown that they indeed have an interest in the outcome of [the High Court] application [and] that their submissions would be relevant ..."[105]. The facts and the outcome of the *Glenister*[106] High Court case and the Constitutional Court case, as applicable to political parties who were admitted in the aforementioned court proceedings as *amicii curiae* acting in the public interest, is discussed below.

The *Glenister High Court Case*[107] dealt with "the question of the disestablishment of the Directorate of Special Operations established in terms of section 7(1) (a) of the National Prosecuting Authority Act 32 of 1998"[108]

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www.cliffedekkerhofmeyer.com/news/files/CDH-Class-and-Group-Actions-South - Africs.pdf. Also see "Constitutional Practice Class Actions And Public Interest Actions" available at www.judicialeducation.org.za/files/MagCourts/CIV%20MAG%2017%20Class%20Actions%20and%20Public%20Interest%20Actions.pdf.

102 *Glenister v President of the Republic of South Africa and Others* 2008 (Unreportable), available at http://www.saflii.org/za/cases/ZAGPHC/2008/143.pdf. See also *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008).

103 *Glenister v President of the Republic of South Africa and Others* 2008 (Unreportable), available at http://www.saflii.org/za/cases/ZAGPHC/2008/143.pdf at 41.

104 *Ibid* 4. See also *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) 5.

105 *Glenister v President of the Republic of South Africa and Others*2008 (Unreportable), available at http://www.saflii.org/za/cases/ZAGPHC/2008/143.pdf at 4.

106 *Glenister v President of the Republic of South Africa and Others*2008 (Unreportable), available at http://www.saflii.org/za/cases/ZAGPHC/2008/143.pdf. Also see *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008).

107 *Ibid*.

108 *Glenister v President of the Republic of South Africa and Others* 2008 (Unreportable), available at http://www.saflii.org/za/cases/ZAGPHC/2008/143.pdf at 37. Also see *Glenister v*

and the initiation of legislation by the First, Second and Third Respondents'[109] to give effect to the aforesaid disestablishment of the Directorate of Special Operations.[110] The Applicant, Glenister, in the said application sought to interdict or restrict the initiation of such legislation.[111] According to Van Der Merwe J "this matter involves crucial and important political matters in which a High Court has no jurisdiction but only the Constitutional Court".[112] He furthermore stated that the High Court "has no jurisdiction to interfere with the executive powers of the President and Cabinet or with the process in Parliament".[113]

The above decision of the High Court led to the Applicant approaching the Constitutional Court firstly for leave to appeal and secondly for direct access thereby seeking the following order namely:

> "an order: (1) declaring that the decision taken by Cabinet on or about 30 April 2008 to initiate legislation disestablishing the DSO …is unconstitutional and invalid; and (2) directing the relevant ministers to withdraw the National Prosecuting Authority Amendment Bill of 2008 (NPAA Bill) and the South African Police Service Amendment Bill of 2008 (SAPSA Bill) … from the National Assembly".[114]

The United Democratic Movement, a political party admitted to the court proceedings as *amicii curiae* acting in the public interest, argued that "because the decision to initiate the legislation arose as a result of the Polokwane

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President of the Republic of South Africa and Others (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) 3.

109 *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) wherein the First Respondent is the President of the Republic of South Africa, the Second Respondent is the Minister of Safety and Security and the Third Respondent is the Minister for Justice and Constitutional Development.

110 *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) 3.

111 *Glenister v President of the Republic of South Africa and Others* 2008 (Unreportable), available at http://www.saflii.org/za/cases/ZAGPHC/2008/143.pdf at 2. See also *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) 3.

112 *Glenister v President of the Republic of South Africa and Others* 2008 (Unreportable), available at http://www.saflii.org/za/cases/ZAGPHC/2008/143.pdf at 41. See also *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) 3.

113 *Glenister v President of the Republic of South Africa and Others*2008 (Unreportable), available at http://www.saflii.org/za/cases/ZAGPHC/2008/143.pdf at 40.

114 *Ibid* 3 and 4.

Resolution, Cabinet acted under dictation in making the decision to initiate the legislation to disestablish the DSO. [The party suggested] further that the executive followed the dictates of the ruling party rather than its responsibilities in terms of the Constitution"[115]. Langa J expressed the view that "there is nothing wrong, in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party. Quite clearly, in so doing, Cabinet must observe its constitutional obligations and may not breach the Constitution"[116]. In conclusion, the Constitutional Court refused both the Applicants application for leave to appeal and for direct access, the court expressing the view that it was not in the interest of justice to grant such an application.[117] According to Langa J, "the applicant has not established that it is appropriate for the [Constitutional] Court to intervene in the affairs of Parliament in this case [and the applicant] has not shown that material and irreversible harm will result if the Court does not intervene".[118]

4.3 FREEDOM OF EXPRESSION AND ITS LIMITATIONS

The right to freedom of expression consists of categories of expression that form a part of the right to freedom of expression and categories of expression that are excluded from the ambit of the freedom of expression right.[119] This distinction is relevant firstly because the section 16(1)[120] categories of expression have the benefit of constitutional protection whereas the section 16(2)[121] categories of expression do not.[122] Secondly, the section 36[123] limitations clause is applicable only to categories of expression that are constitutionally protected.[124] Hence the importance of determining the

115 *Ibid* 31.
116 *Ibid.*
117 *Ibid* 32.
118 *Ibid.*
119 Section 16(1) and 16(2) of the Constitution.
120 Constitution of the Republic of South Africa, 1996.
121 *Ibid*.
122 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 33. L Johannessen "A Critical View of the Constitutional Hate Speech Provision" (1997) Vol 13 *The South African Journal on Human Rights* 138.
123 Constitution of the Republic of South Africa, 1996.
124 L Johannessen "A Critical View of the Constitutional Hate Speech Provision" (1997) Vol 13 *The South African Journal on Human Rights* 139-140.

parameters of the right to freedom of expression cannot be overlooked.[125] The discussion that follows will therefore deal with the aforementioned constitutional provisions bearing reference to the parameters of the right to freedom of expression and political parties.

Section 16(1) of the Constitution comprises of an open list because the Constitutional Court places emphasis on a broad interpretation of the right.[126] As stated above, in the *De Reuck Case*[127] Langa J stated that "section 16(1) expressly protects the freedom of expression in a manner that does not warrant a narrow reading".[128] Therefore all forms of expression fall within the constitutional protection ambit provided by section 16(1) of the Constitution except those forms of expression specifically mentioned and excluded by the provisions of section 16(2) of the Constitution.[129]

The freedom of expression provision as it stood in the Interim Constitution[130] did not include section 16(2) of the Constitution.[131] The political party, the African National Congress, in support of the inclusion of section 16(2) in the Constitution[132] submitted the following recommendation to the Committee who was responsible for the drafting of the freedom of expression provision namely "it is advisable that the right [to freedom of expression] should be reformulated to provide constitutional protection from racist, sexist or hate speech calculated to cause hostility and acrimony, and, racial, ethnic or even religious antagonism and division".[133] Therefore, the Constitution[134] identifies

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125 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 30.

126 *De Reucke v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at par 48.

127 *De Reucke v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC).

128 *Ibid* par 48. Section 16(1) of the Constitution.

129 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 32. See D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd, 42-7.

130 Constitution of the Republic of South Africa, 1993.

131 Section 15 of the Constitution of the Republic of South Africa, 1993. L Johannessen "A Critical View of the Constitutional Hate Speech Provision" (1997) Vol 13 *The South African Journal on Human Rights* 135.

132 Constitution of the Republic of South Africa, 1996.

133 L Johannessen "A Critical View of the Constitutional Hate Speech Provision" (1997) Vol 13 *The South African Journal on Human Rights* 137.

"advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" as forms of expression that fall beyond the constitutionally protected categories of expression.[135] For this reason, Langa J describes section 16(2) as definitional because it "defines the boundaries beyond which the right to freedom of expression does not extend".[136]

Moreover, section 16(2) of the Constitution has been described as an "internal limitation to the general right to freedom of expression [contained] in section 16(1) of the Constitution".[137] The United Nations Special Rapporteurs on freedom of opinion and expression stated that "[r]estrictions of the right to freedom of expression may be so broad in scope or drafted in such terms as to put the right itself in jeopardy…"[138]. Furthermore, it has been stated that an internal limitation of the right to freedom of expression is not recommendable, the reason being that the "internal limitation removes an entire area of speech beyond the ambit of the right to freedom of expression and consequently from the ambit of constitutional protection".[139] According to Langa J, the provisions of section 16(2) of the Constitution acknowledges that "certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm…".[140] In light of the aforementioned contrasting views, it therefore

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134 Constitution of the Republic of South Africa, 1996.

135 Section 16(2)(c) of the Constitution. Also see *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 31. Also see D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd 42-6 and 42-7 where it was stated that (a) the text of section 16(2) "imply that the categories of expression as enumerated in [section 16(2) of the Constitution] are not to be regarded as constitutionally protected speech" and (b) that these "… categorical exclusions in the constitutional text [comprise of] a closed list".

136 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 32.

137 L Johannessen "A Critical View of the Constitutional Hate Speech Provision" (1997) Vol 13 *The South African Journal on Human Rights* 138.

138 *The Right to Freedom of Opinion and Expression – Final Report by Mr Danilo Turk and Mr Louis Joinet, Special Rapporteurs,* E/CN.4/Sub.2/1992/9,14 July 1992. Also see L Johannessen "A Critical View of the Constitutional Hate Speech Provision" (1997) Vol 13 *The South African Journal on Human Rights* 144.

139 L Johannessen "A Critical View of the Constitutional Hate Speech Provision" (1997) Vol 13 *The South African Journal on Human Rights* 136.

140 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC) 2002 (5) BCLR 433 (CC) at par 32.

follows that whether or not section 16(2) is a necessary provision in the Constitution is a matter that may be further debated, taking factors such as, for example, "the right to human dignity"[141] and defamation law into consideration. According to Kriegler J "the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression…".[142] Furthermore, in the Khumalo Case O' Regan J stated that "the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name".[143] Hence, there is a profound link between the right to dignity, defamation law and the right to freedom of expression.

A discussion on defamation as a limitation of the right to freedom of expression as applicable to political parties now follows. According to Corbett J:

> "it is trite that [freedom of expression] is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press [and political parties], must yield to the individual's right, which is just as important, not to be unlawfully defamed".[144]

Defamation law seeks to achieve namely the protection of "the reputations of individuals – or of entities with the right to sue and be sued – against injury…"[145]. As stated in the *Argus Case*[146], the "traditional standard for determining whether utterances are defamatory is whether the imputation

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141 Section 10 of the Constitution.

142 *S v Mamabolo* 2001 (5) BCLR 449 (CC) -Ed, 2001 (3) SA 409 (CC) at 429.

143 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 26. Also see *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 15, a case that required "the balancing of two different and competing values which our law seeks to protect - on the one hand, freedom of speech, and, on the other, the safeguarding of reputations against unjustified attack".

144 *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 25 B-E. See also *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at par 26.

145 Defining Defamation, "Principles on Freedom of Expression and Reputation, Article 19 Principle 2(a), July (2000) available at http://www.article19.org/pdfs/standards/definingdefamation.pdf.

146 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A).

conveyed ... lowers the plaintiff in the estimation of right - thinking persons generally".[147]

Whether public bodies such as political parties or government may rely on defamation law was considered by the *Global Campaign for Free Expression* i.e. *Article 19*[148]. This Campaign stated that "[p]ublic bodies of all kinds [including political parties]...should be prohibited altogether from bringing defamation actions".[149] The reason being that such exclusion is attributed to "the vital importance in a democracy of open criticism of government and public authorities, the limited and public nature of any reputation these bodies have, and the ample means available to public authorities to defend themselves from criticism".[150] Presently, the position in South Africa differs from the position adopted by the aforementioned Campaign as will be explained with reference to case law. The *Argus Case*[151] commenced with the issuing of summons in the then called "Witwatersrand Local Division" by the Inkatha Freedom Party, a political party claiming "damages in respect of defamatory statements alleged to have been published in two articles in the Sowetan, a newspaper of which [Argus Printing and Publishing Company Limited] was the proprietor, publisher and printer".[152] The parties to the action agreed that the issue for adjudication was the following namely:

> "in as much as Inkatha is a non-trading corporation[153] (a universitas capable of suing and being sued in its own name) ... which depends on financial support from the public, ... whether Inkatha, as such a body, has the right to claim damages for defamation in respect of the articles complained

147 *Ibid* 22.

148 Defining Defamation, "Principles on Freedom of Expression and Reputation, Article 19, July (2000) available at http://www.article19.org/pdfs/standards/definingdefamation.pdf.

149 Defining Defamation, "Principles on Freedom of Expression and Reputation, Article 19 Principle 3, July (2000) available at http://www.article19.org/pdfs/standards/definingdefamation.pdf.

150 *Ibid*. Also see *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 21 wherein one of the "reasons advanced for denying a political body the right to sue for defamation" was the fact that "people should not be restrained in their political utterances by the fear of being subjected to claims for defamation".

151 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A).

152 *Ibid* 3.

153 *GA. Fichardt Ltd. v. The Friend Newspapers Ltd* 1916 AD 1 953 I-954 E where it was held that "a non-trading corporation can sue for defamation if a defamatory statement concerning the way it conducts its affairs is calculated to cause it financial prejudice". See also *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 10.

of, assuming those articles, for the purposes of argument, to be defamatory in the manner alleged by the plaintiff, and assuming further that the articles were calculated to cause financial prejudice in the nature of loss of membership dues and donations".[154]

The court a quo Judge, namely Stegmann J held that Argus Printing and Publishing Company Limited was liable to make payment to Inkatha Freedom Party in respect of damages for defamation.[155] According to the court a quo there "are no considerations of legal or public policy which deprive juristic persons which are or which resemble political parties of the ordinary remedy for defamation".[156] Argus Printing and Publish Co Ltd then "applied to the trial judge for leave to appeal, which was duly granted".[157] Therefore, in the *Argus Case*[158] the then called "Appellate Division" was tasked with determining "whether it would be in the public interest to permit attacks on political bodies, whose policies and actions are normally matters for debate on public and political platforms, to be made the basis of claims for damages in courts of law"[159], more specifically "whether this Court should, on the grounds of public or legal policy, hold that a political body is not entitled to sue for defamation calculated to cause it financial loss".[160] In the aforementioned case the "ground of public policy mainly relied

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154 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 4.

155 *Ibid* 6.

156 *Ibid*. See also *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 12 which mentions as an exception to the general rule that a non-trading corporation may sue for defamation, Rabie ACJ's finding that "certain corporations may be denied the right to sue for defamation on the ground of considerations of public or legal policy" as stated in *Dhlomo NO v. Natal Newspapers (Pty) Ltd and Another* 1989 (1) SA 945 (A) .

157 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 6.

158 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A).

159 *Ibid* 2. See *Dhlomo NO v. Natal Newspapers (Pty) Ltd and Another* 1989 (1) SA 945 (A) 954 G which gave rise to the abovementioned legal question being dealt with in the *Argus printing Case*.

160 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 13. *Also see Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 25 where it was stated that "[e]ven if utterances during political debate can be regarded as prima facie defamatory, the defendant would have available to him a number of defences. The most important ones for present purposes are those of fair comment, justification (truth and public benefit) and privilege. The effect of these defences is to exclude unlawfulness - in other words, to render lawful the conduct of the defendant in publishing matter which is prima facie defamatory". *Also see Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 26 wherein it was mentioned that the boundaries of these aformentioned defences is "determined by the application of the general criterion of reasonableness" and these criterion rely on "considerations of public and legal policy". Also see section 58 of the Constitution which deals with the nature of the privilege ie the freedom of speech afforded to members of the National Assembly. For further information on the

upon by the appellant, [Argus Printing and Publish Co Ltd, was] the need to foster and protect freedom of expression."[161] According to Grosskopf J:

> "the promotion and defence of this facet of public policy [relied upon by the appellent, does] not ... require that any class of person should be prevented from bringing proceedings for defamation [because where] a right to sue exists, the law of defamation itself recognizes the importance of freedom of political expression, and makes provision for it".[162]

It was held that "no good reason has been shown for excluding political bodies[163] from the class of non-trading corporations, which according to the *Natal Newspapers* case[164], are entitled to sue for damages for defamation".[165] Grosskopf J confirmed that "there can ... be no suggestion that a political body's reputation is necessarily so robust and universal as to be invulnerable to defamatory attacks".[166]

The arguments raised in the aforementioned case should be re-visited in order to more fully assess the present position of political parties in South Africa with regard to defamation law and more particularly in light of the following unanswered question namely, "whether the association between the ruling party and the Government should lead to the denial of the right of the party to sue for damages for defamation, either generally or in particular cases where its position can be assimilated to that of the Government."[167] Although Argus

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aspect of privelege refer to http://www.publiclaw.uct.ac.za/usr/public_law/Building/Chapter%203.pdf as scu discussion is not specifically applicable to political parties and hence extends beyond the scope of this dissertation.

161 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 13 & 63.

162 *Ibid* 63.

163 In *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 21, Grosskopf J stated that it would be "completely unrealistic to distinguish in the present context between political bodies which propose candidates for election and those which do not. It is a matter of common knowledge that some major political organizations in this country have never proposed candidates for election, and in fact do not regard themselves as political parties at all, but rather as liberation movements or something similar. Public policy does not, to my mind, require that they should enjoy greater freedom from attack than bodies which fight elections. There is consequently no basis in logic upon which we could lay down a rule which would apply only to political parties".

164 *Dhlomo NO v. Natal Newspapers (Pty) Ltd and Another* 1989 (1) SA 945 (A).

165 *Argus Printing and Publishing Company Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (AD); 1992 2 ALL SA 185 (A) 64.

166 *Ibid* 55.

167 *Ibid* 62.

Printing and Publish Co Ltd (the appellant) put to the court that "even where the defamation applies only to the party and not to the State, the right to criticise and attack the ruling party is of great importance and should be allowed unfettered by any fear of defamation actions"[168], the court opted not to deal with this point because it fell out of the fold of the legal question that was to be determined by the court.[169]

A discussion on the regulation of hate speech coupled with section 36 (1) of the Constitution follows. In South Africa "where racial violence has been prevalent and racial insult will… often be seen as physically threatening, the societal interests in … destabilizing [the] impact of violence are plainly applicable in considering whether to regulate hate speech".[170] According to Langa J, "[t]here is no doubt that the state has a particular interest in regulating [hate speech] because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality. There is accordingly no bar to the enactment of legislation that prohibits such expression".[171] Presently no such legislation has been formulated for the regulation of hate speech in South Africa. The South African Human Rights commission confirmed that only:

> "expression falling within the categories listed in section 16(2) cease to be protected. The implication of it not being protected is that once expression is deemed to be, for instance, hate speech, it may be regulated or totally proscribed by the State, provided that it is rational to do so. The State, in this instance, does not have to justify the limitation in terms of the limitation clause, as such regulation or proscription would not amount to an infringement of a constitutionally protected right. Thus, the finding that any particular expression amounts to hate speech would in most instances be determinative of the constitutional enquiry..."[172].

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168 *Ibid* 59.

169 *Ibid* 60.

170 E Neisser "Hate Speech in the new South Africa: Constitutional considerations for a land recovering from decades of racial repression and violence" (1994) Vol 10 *The South African Journal on Human Rights* 343.

171 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 33.

172 *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC) 1289.

Therefore "once expression is deemed to be hate speech, no further justification is required from the State for its regulation or prohibition".[173]

With regard to the limitation clause, the Constitution provides that the "rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors…"[174]. Langa J confirmed that the right to freedom of expression is "not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution".[175] In the *Islamic Unity Case*[176] the Constitutional Court emphasised that the limitation of any of the section 16(1) constitutionally protected categories of expression "must satisfy the requirements of the limitations clause to be constitutionally valid".[177] Therefore where "the state extends the scope of regulation [as mentioned above] beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution".[178]

A more practical perspective of hate speech follows. Hate speech comes into play when, for example, members of political parties' utter comments viewed by for instance opposing political parties or the public at large as being racist especially if such utterance amounts to a dignity violation.[179] In the *Freedom*

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173 *Ibid* 1294.

174 Section 36(1).

175 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at par 30. See also L Johannessen "A Critical View of the Constitutional Hate Speech Provision" (1997) Vol 13 *The South African Journal on Human Rights* 140. See Milo D Milo, G Penfold and A Stein "Freedom of Expression" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* (2006), Second Edition, Vol 3, Juta & Co Ltd 42- 9 where it is stated that "[t]he effect of the limitations clause is that the same document [the Constitution] that entrenches freedom of expression as a fundamental right itself acknowledges that this right is neither absolute nor pre-eminent".

176 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC).

177 *Ibid* par 31.

178 *Ibid* par 34.

179 E Neisser "Hate Speech in the new South Africa: Constitutional considerations for a land recovering from decades of racial repression and violence" (1994) Vol 10 *The South African Journal on Human Rights* 355.

Front Case[180] a complaint was lodged with the South African Human Rights Commission by a political party, the Freedom Front.[181] The complaint was based on the slogan '[k]ill the Farmer, kill the Boer' chanted by members of a political party namely the African National Congress at a meeting of the ANC Youth League and thereafter at the funeral of an ANC leader, Mr Peter Mokaba.[182] The Freedom Front argued that "the slogan amounted to hate speech and was therefore proscribed by the ... [Constitution]".[183] The South African Human Rights Commission rejected the argument proposed by the Freedom Front on the basis that "although the slogans may be distasteful and hurtful"[184], they were not categorised as hate speech as envisaged by section 16(2) of the Constitution.[185] The Freedom Front appealed the aforementioned determination.[186] Upon appeal, the South African Human Rights Commission headed by the chairperson Govender K, having regard to the publication of the aforementioned slogan and political events, stated that there "can be no doubt that the slogan, given its content, its history and the context in which it was chanted, would harm the sense of well being, contribute directly to a feeling of marginalisation, and adversely affect the dignity of Afrikaners".[187] Hence, the South African Human Rights Commission then found that the aforementioned chanted slogan amounts to "hate speech as defined in section 16(2) (c) of the Constitution".[188]

Regarding the liability of the political party for unauthorised hate speech utterances by members of the party, for example, occurring at rallies held by the party, the South African Human Rights Commission confirmed that "organisers of rallies [political parties] may be held responsible for hate speech uttered at such rallies".[189] The determining factor as stated in the

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180 *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC).
181 *Ibid* 1286.
182 *Ibid.*
183 *Ibid.*
184 *Ibid.*
185 *Ibid.*
186 *Ibid.*
187 *Ibid* 1299.
188 *Ibid* 1300.
189 *Ibid* 1299.

Freedom Front Case[190] depends on "whether tacit or direct encouragement was given to the hate speech, the extent to which the organisers disassociated themselves from the views expressed and the efforts that were made to stop the utterances".[191] In the aforementioned case, the Chairperson found no evidence "which suggests that the ANC encouraged either directly or indirectly the chanting of the slogan at either event and [the ANC did] clearly [disassociate] itself from the slogan"[192], failing which an apology would have been necessary.[193]

In the *Afriforum Case*[194], Afriforum (hereinafter referred to as "the first applicant") and Transvaal Agricultural Union of South Africa (hereinafter referred to as "the second applicant") approached the High Court on an urgent basis seeking the following relief namely:

> "[p]ending the final adjudication of a complaint laid by the first applicant at the Equality Court in Johannesburg on 12 March 2010, the respondent is interdicted and restrained from publicly uttering words or singing any songs or communicate lyrics using words which can reasonably be understood or construed as being capable of instigating violence, distrust and/or hatred between black and white citizens in the Republic of South Africa ..."[195].

The aforementioned relief was sought by the applicants against Julius Malema (hereinafter referred to as "the first Respondent"), the applicants being aggrieved by the song "Avudubele Ibulu", translated as "shoot the boer or farmer".[196] The political party, the African National Congress and the African National Congress Youth League was joined as the second and third respondent respectively.[197] The legal representative of the first respondent stated on behalf of the first respondent that should the court grant the order sought by the applicants, such order "would infringe first respondent's

190 *Ibid.*
191 *Ibid.*
192 *Ibid*.
193 *Ibid*.
194 *Afriforum and Another v Malema* 2010 ZAGPPHC 39 (1 April 2010) available at http://www.saflii.org/za/cases/ZAGPPHC/2010/39.html.
195 *Ibid* 3.
196 *Ibid.*
197 *Ibid.*

constitutional rights to freedom of expression".[198] The applicants, however, pursued the granting of the interim interdict and referred to the findings of the chairperson in the *Freedom Front Case*[199] in support of their argument that "[t]he words 'shoot the farmer' can hardly be distinguished from the words 'kill the boer, kill the farmer' "[200], the slogan according to the applicants, having already been declared hate speech in the aforementioned case.[201] Furthermore, the applicants referred to section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act[202] as a yardstick for determining whether the words in the song "Avudubele Ibulu" amounts to hate speech.[203] The definition of hate speech in accordance with the aforementioned Act[204] is "words based upon one or more of the prohibited grounds (Unfair discrimination generally or unfair discrimination on the ground of race, gender or disability) ... that could reasonably be construed to demonstrate a clear intention to - a) Be hurtful; b) Be harmful or to incite harm; c) Promote or propagate hatred."[205] The court found that the words in the song "Avudubele Ibulu" amounts to hate speech[206] and confirmed that "there is neither justification, nor protection in the Constitution" for hate speech. The reason being that it:

> "cannot be contested that applicants' members and others are offended and alarmed, if not threatened by the song …. [and the court stated that participants] in the political and socio-political discourse must remain sensitive to the feelings and perceptions of other South Africans when words were used that were common during the struggle days, but may be experienced as harmful by fellow inhabitants of South Africa today".[207]

198 *Ibid* 5.

199 *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC).

200 *Afriforum and Another v Malema* 2010 ZAGPPHC 39 (1 April 2010) available at http://www.saflii.org/za/cases/ZAGPPHC/2010/39.html 7.

201 *Ibid* 5. See also *Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC) 1300.

202 Act 4 of 2000.

203 *Afriforum and Another v Malema* 2010 ZAGPPHC 39 (1 April 2010) available at http://www.saflii.org/za/cases/ZAGPPHC/2010/39.html 8.

204 Act 4 of 2000.

205 Section 10 of Act 4 of 2000.

206 *Afriforum and Another v Malema* 2010 ZAGPPHC 39 (1 April 2010) available at http://www.saflii.org/za/cases/ZAGPPHC/2010/39.html 9.

207 *Ibid.*

As with the nature of urgent matters, the finding of the court was provisional.[208] With regard to the facts of the case and the role of mediation in ensuring the protection of the dignity of persons in circumstances such as those before the aforementioned court, Bertelsmann J further ordered that this matter be referred to the equality court.[209]

208 *Ibid.*
209 *Ibid* 10.

CHAPTER 5
CONCLUSION

The starting point of the discussion determines how political parties are governed by the Constitution. The discussion confirms that the enactment of the Interim Constitution guaranteed and that presently, the existence of our supreme Constitution, guarantees the enforcement of political rights for all South African citizens. It has been mentioned, within the context of this dissertation, that although the Constitution guarantees citizens "political rights", the Constitution does not define "political parties" despite the evident link between political parties and political rights in our multi-party democracy. The definition of political parties therefore stems from case law.

The constitutional provisions applicable to political parties and political rights are section 21 of the Interim Constitution and section 19 of the Constitution. These provisions, more particularly section 19 of the Constitution, set the scene for the development of this study. An analysis of section 19 reveals that its incorporation in the Bill of Rights gives higher status to rights of a political nature. Although South African law supports the unrestricted formation of political parties, an essential part of the formation process entails the registration of political parties with the Electoral Commission. This registration requirement is a prerequisite for political parties to participate in any election. Also, the electoral officer is governed by statute and therefore cannot register a party if the party does not meet the requirements, as discussed in Chapter two of this dissertation.

Moreover, legislation that regulates party financial matters presently is the Public Funding of Represented Political Parties Act. There is to date no other legislation that has been formulated to regulate the functioning of political parties in democratic South Africa. For example, the internal organisation of political parties and vicarious liability matters are not dealt with in any South African statute. The regulation of parties by statute is a recommendation to ensure a just political order whereby the functioning of political parties is in line with the Constitution.

As stated in the introduction, electoral matters are relevant to political parties. Of interest is case law dealing with various aspects such as party list disputes and the Electoral Commission's refusal to register a party. The court found that the parties failed to comply with the procedural requirements imposed by electoral legislation. Consequently, according to case law, compliance with legislation is paramount and non-compliance by parties with the procedural requirements imposed by electoral legislation will not result in leniency by the courts.

Also, the right to free, fair and regular elections is a topic which is of importance to political parties. As noted above, the Electoral Commission and electoral legislation facilitate democratic electoral processes"[1] in order to uphold free, fair and regular elections in South Africa. It therefore follows that in order for the Electoral Commission to fulfil this facilitation role, its independence must at all times be upheld. It has been determined that any violation of the Electoral Commission's independence may result in an infringement of the right to free, fair and regular elections. Case law was discussed in this regard and the co-operative governance principle was explained. As discussed in chapter three, co-operative governance requires that the case before court "should where possible be resolved at a political level rather than through adversarial litigation".[2] Importantly, the court found that the Electoral Commission need not comply with the principal of co-operative governance because the Commission did not possess the characteristics of an "organ of state". Political parties were therefore permitted to approach the court for relief as the case involved a dispute between the Electoral Commission and the government.

Furthermore, the constitutional court confirmed that "[i]ndispensable to any democratic process is that political parties will ensure that their potential

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1 Section 4 of the Electoral Commission Act.

2 *Ibid* 14-18. Also see *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) par 291. Also see *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) par 30-31.

supporters are aware of the prerequisites of voting and comply with them".[3] The right to vote forms a part of the Bill of Rights and it is regulated by legislation. Legislation provides a list of persons who are not entitled to vote. Party members or South African citizens, must register to vote otherwise they will be prohibited from voting. Also, having the incorrect documentation prohibits persons from exercising their right to vote. In this regard, case law was discussed above.

In light of the constitutional right to stand for public office, a link between party membership and this right ensues because "[a]n individual may become a member of the legislature ... by virtue of the proportional support obtained by the party to which the individual belongs, together with his or her position on the 'party list'".[4] This link may give rise to party list disputes. As mentioned above, the following recommendation is proposed: that the legislature formulates legislation that addresses issues such as the candidate selection process and the compiling of party lists, provided that the legislation at no time conflicts with the Constitution and the constitution of South African parties.

According to case law discussed in chapter four, the right to freedom of expression may apply horizontally and bind political parties. Furthermore, as noted above, all forms of expression are protected by the Constitution except those forms of expression that are expressly excluded by the Constitution. The chapter dealing with the right to freedom of expression comprises of a detailed discussion that derive from the applicability of this right to political parties. Hate speech is also taken into consideration with reference to case law. There is no legislation that regulates hate speech in South Africa. In conclusion, the formation of legislation to regulate this area of law, as applicable to political parties and their members is recommended.

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3 *New National Party of South Africa v Government of the RSA and Others* 1999(5) BCLR 489 (CC) at par 42.

4 *Ismail v New National Party in the Western Cape and Others* 2001 JOL 8206 (C) 25.

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