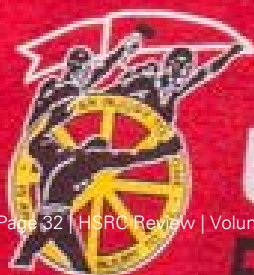


NO
CAPTURED



Thousands march under the banner of COSATU (Congress of South African Trade Unions) in Johannesburg calling for an end to state capture in September 2017.

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United Action
FOR CHANGE

The HSRC responds to a call to strengthen the Political Party Funding Act



The HSRC has responded to a call from the government's National Anti-Corruption Advisory Council for submissions on how to strengthen South Africa's Political Party Funding Act 6 of 2018. This comes at the back of the Zondo Commission's recommendation to strengthen legislation to criminalise the making of donations to political parties in exchange for public tender contracts. **Gary Pienaar** reports.

In September 2022, President Cyril Ramaphosa established the National Anti-Corruption Advisory Council (NACAC) to monitor the government's national anti-corruption strategy and to advise how to strengthen the country's anti-corruption architecture. The council's duties also include monitoring the implementation of the recommendations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, also known as the Zondo Commission or the State Capture Commission.

One of the Commission's recommendations was that South Africa's Political Party Funding Act 6 of 2018 (PPFA) be amended to criminalise the making of donations to political parties in exchange for public tender contracts. The NACAC invited comments on this recommendation, the adequacy of disclosure thresholds and donations caps, and gaps in the Act that need to be amended in order to prevent and combat corruption.

The HSRC responded to NACAC's call for submissions on strengthening the PPFA. The organisation based its submissions on its own research and the findings from two studies commissioned by the Department of Home Affairs and the Electoral Commission (IEC). The two studies focused on the initial implementation and impacts of the PPFA and were completed in 2022 and early 2023, respectively.

Criminalisation

The proposed criminalisation of donations to political parties to influence the award of a tender is superfluous, experts

from the HSRC's Developmental, Capable and Ethical State research division argue. It duplicates the effect of section 13 of the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA), which already prohibits the direct or indirect giving, and receiving, of any "gratification" to induce someone to award a tender to a particular person. This provision adequately includes donations to political parties. Nevertheless, it may be helpful to incorporate it by reference in the PPFA, to emphasise the prohibition and the offence in the context of political finance.

Thresholds and caps

The PPFA requires political parties and corporate donors to disclose to the IEC cumulative annual donations exceeding the threshold of R100,000 per year. The PPFA and Regulations impose annual limits or caps on donations from any single donor:

- (a) *Limit on donations*: R15 million per year
- (b) *Limit on donations from a foreign entity*: R5 million per year.

Impact of the PPFA on political parties

The IEC, political scientists, civil society organisations (CSOs) and political parties welcomed the implementation of the PPFA in April 2021. The PPFA is seen as supporting the Constitution's values of openness, transparency and accountability, the constitutional right to information, and strengthening multi-party democracy. One political party acknowledged that the PPFA's requirements had spurred it to implement comprehensive systems of tracking income and accounting for expenditure, which benefited the party's internal democratic accountability.

Despite broad consensus in favour of these constitutional values as a critical rationale for disclosure requirements and donation caps, some argue that they discourage private funding of political parties and that they constrain parties' ability to conduct legitimate political activities.

Larger political parties claim that the PPFA's disclosure requirements have dramatically decreased their private donation income. The veracity of these claims is difficult to assess, since parties didn't disclose the value of private funding prior to the Act's implementation.

Importantly, the PPFA's effect on parties' income isn't uniformly negative. Smaller represented parties' income from public funding has increased due to changes in the allocation formula. The PPFA replaced the Public Funding of Represented Political Parties Act 1997, in which the formula was 90% proportional and 10% equitable. The PPFA's formula is two-thirds proportional and one-third equitable, realising wider sharing of public funding to promote multiparty democracy as one of the Act's objectives.

There is tension between the democratic principles of openness and transparency, and the right to information, and the risks associated with the right to privacy of donors, should they wish to remain anonymous. In deeply divided contemporary South Africa, there is a well-founded apprehension of negative commercial, career or personal consequences as a result of disclosure. This is evident in the State Capture Commission's findings concerning the manipulation of public procurement processes.

Many stakeholders view the PPFA as a compromise, having urged Parliament to adopt more stringent criteria in the form of lower thresholds and caps. The PPFA's current standards were adopted by political parties in Parliament when they passed the legislation. It would be unacceptable for political parties to shift the balance in their favour so soon after its delayed implementation in 2021, given the highly unusual context in its first year. During the November 2021 local government elections, South Africa was enduring lockdowns and the socio-economic impacts of the COVID-19 pandemic. Donors are also generally less interested in supporting representatives in local government structures.

Several experts highlighted that complete information isn't yet available concerning the PPFA's first year of implementation. The IEC must first receive political parties' audited annual financial statements and satisfy itself as to their acceptability. Even if satisfied with political parties' co-operation and reporting, the Act is silent on how much of that information the IEC will publish. Furthermore, the PPFA has not yet been "field-tested" throughout a full

election cycle that includes a general election when higher levels of fundraising are achieved.

The PPFA and corruption

Stakeholders value the Act's aim of limiting undue influence by sectoral and private interests on a political party's electoral agenda and policy platform, and its representatives' choices and conduct when in power. Political parties have an interest in maximising their resources and electoral impact, although a direct correlation is difficult to establish – fundraising success and electoral impact are also affected by parties' reputation among donors and voters. Political parties also have a responsibility to uphold and promote constitutional values and principles.

Hasty amendments to new and largely untested legislation, in response to unsubstantiated claims by political parties concerning reduced income trends, would be unwise, especially if that entails weakening the PPFA's transparency standards that already represent a difficult compromise.

Some key gaps

Independents

An obvious gap in the PPFA concerns independent public representatives (IPRs) after the [Electoral Amendment Act 1 of 2023](#) provided for their participation in national and provincial elections. Once political parties secure a seat in a legislature, they become entitled to public funding from the IEC, but this is not yet available to elected IPRs. They should be subject to the PPFA's obligations and should share in its benefits.

Independent candidates' associations, political parties and others agreed that the PPFA should provide for equivalent and equitable regulation of independents. However, the way in which independents are ultimately included in the electoral system, with any changes ([currently the subject of litigation](#)), is an essential consideration prior to amending the PPFA.

Prohibited donations

Political parties may not accept donations from foreign governments or agencies but can accept donations from foreign persons and entities, capped at R5 million per year, for "training or skills development of a member of a political party" or "policy development by a political party".

The PPFA doesn't define these terms, which may be sufficiently vague as to permit foreign "study tours" that amount to foreign holidays.

The PPFA also doesn't define "foreign entity". Presumably, it includes a company, trust, foundation, etc., with its primary base or headquarters outside South Africa. If an

entity is headquartered elsewhere in the world, but has a presence in South Africa, is the local office a foreign entity? When may a party or IPR accept such a donation? How thoroughly should they interrogate a potential donation before accepting it? Is it reasonable to expect a small party or IPR with limited resources to do so?

Beneficial ownership

South Africa currently has no transparent, publicly accessible register of beneficial ownership (control) of juristic entities – especially private or unlisted companies. The Companies and Intellectual Property Commission (CIPC) holds only the details of directors in companies registered with the CIPC. This information can be used to identify multiple directorships, but it is insufficient to enable a party, IPR or the IEC to ascertain whether a director exercises effective control of other juristic entities, particularly through shareholdings. It is also unclear whether relevant shareholder information is readily and publicly available without charge through [Strate](#), South Africa’s principal central securities depository responsible for safekeeping the legal, digital record of securities ownership.

This information gap enables “related party” transactions, as it is almost impossible for a party, IPR or an under-resourced IEC to identify who its ultimate or beneficial owner is. Cross-shareholding is readily possible, and interests can be held in offshore shell companies, or in subsidiaries via complex holding company structures.

This enables a holding company, a subsidiary, and a shell company with the same owner to make supposedly separate donations, thereby evading thresholds and caps.

Investment vehicles

Are political parties’ investment vehicles separate entities, or are they part of a political party as envisaged in the definition of “political party” in the Electoral Act because their primary objective is to (contribute to) contesting elections? While a political party may not accept a donation from an organ of state or a state-owned enterprise, the PPFA doesn’t restrict the simple circumvention of this prohibition by a party’s investment vehicle doing business with the state and then making a donation to the party.

The value of evidence-based debate

The two studies highlight the need for evidence-based debates concerning the factors that influence private funding of political parties and how these factors may affect our democracy. As the multi-stakeholder body tasked with advising the government on how to improve South Africa’s efforts to prevent and combat corruption, and especially a repeat of the state capture, the NACAC deserves the support of all South Africans. When organs of state have commissioned studies that provide essential evidence that can assist efforts to make our society more equitable and inclusive, it is incumbent on research institutions, including the HSRC, to share those findings and associated insights.

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