IN THE ELECTORAL COURT OF SOUTH AFRICA
(HELD AT BLOEMFONTEIN)

Reportable

Case no: 0016/26EC

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

ACTIONSA **FIRST RESPONDENT**

ECONOMIC FREEDOM FIGHTERS **SECOND RESPONDENT**

UMKHONTO WESIZWE **THIRD RESPONDENT**

GOOD **FOURTH RESPONDENT**

ELECTORAL COMMISSION OF SOUTH AFRICA FIFTH RESPONDENT

MINISTER OF COOPERATIVE GOVERNANCE TRADITIONAL AFFAIRS **SIXTH RESPONDENT**

Neutral citation: *Democratic Alliance v ActionSA and Others* (0016/26EC) [2026] ZAEC 12 (30 October 2026)

Coram: **MODIBA J, MANGCU-LOCKWOOD AJ, AND PROFESSOR PHOOKO (ADDITIONAL MEMBER)**

Heard: 13 October 2026

Delivered: 30 October 2026

Summary: Electoral law – municipal elections – proportional representation submission of single-candidate party lists – whether party lists submitted in bad faith and in *fraudem legis* – whether such lists contravene the Constitution and electoral legislation – interpretation of items 17 and 20 of Schedule 1 to the Local Government: Municipal Structures Act 117 of 1998 – supplementation of insufficient party lists after elections permissible – bad faith and unlawfulness not established – declaratory, review and consequential relief dismissed – constitutional challenge postponed *sine die*.

ORDER

The following order is made:

1. The following applications are dismissed:

1.1 The application for an order declaring the party lists submitted by the first to fourth respondents (the four parties) to be –

a. In bad faith and *in fraudem legis*;
b. In violation of ss 157(2)*(a)*, 19(2) and 19(3)*(b)* of the Constitution;
c. In violation of ss 1, 13(1)*(a)*, 14(1) of the Local Government: Municipal Electoral Act 27 of 2000 (the Municipal Electoral Act); and
d. In violation of item 11 of Schedule 1, and item 5 of Schedule 2 of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act). (*paras 1 - 1.4, notice of motion*)

1.2 The application for review of the decision of the fifth respondent (Commission), taken on 16 September 2026, to publish the party lists. (*para 2.2, notice of motion*)

1.3 The consequential relief sought in paragraphs 3 to 5 of the notice of motion.

2. The following applications are postponed *sine die:*

2.1 The application to declare the decision of the Commission of 16 September 2026 unconstitutional, unlawful and invalid) (*para 2.1, notice of motion*);

2.2 The conditional constitutional challenge (*paras 6 – 6.5.2, notice of motion*)

3. There is no order as to costs.

JUDGMENT

Mangcu-Lockwood J (Modiba J, Prof Phooko concurring)

Introduction

[1] May a political party which expects to win more than one seat in municipal council elections nominate only one candidate in its proportional representation (PR) candidate party list? The applicant, the Democratic Alliance (DA), says it may not. And to the extent that the first to fourth respondents - ActionSA, Economic Freedom Fighters (EFF), GOOD Party (GOOD) and uMkhonto Wesizwe (MK Party) (the four parties) - have done so in their PR party lists for the upcoming municipal elections to be held on 4 November 2026, they acted in bad faith as a stratagem to avoid identifying their candidates, and to subvert and circumvent the law. Likewise, by accepting and certifying those lists, the fifth respondent (Commission) acted unlawfully.

[2] As a result, the DA seeks a range of relief, as follows:

'**Declaratory Relief**

1. It is declared that the party lists submitted by the First to Fourth Respondents for all municipalities in the 2026 local government elections, *alternatively* their party lists for those municipalities listed in Annexure A were submitted:

1.1. In bad faith and *in fraudem legis*;

1.2. In violation of ss 157(2)(a), 19(2) and 19(3)(b) of the Constitution;

1.3. In violation of ss 1, 13(1)(a), 14(1) of the Local Government: Municipal Electoral Act 27 of 2000 (Municipal Electoral Act); and

1.4. In violation of item 11 of Schedule 1, and item 5 of Schedule 2 of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act).

Review Relief

2. The decision of the Commission, taken on 16 September 2026, to publish the lists is:
    2.1. Declared unconstitutional, unlawful and invalid; and
    2.2. Reviewed and set aside.

Consequential Relief

3. The Commission's decision to certify the lists is substituted with a decision not to certify the lists.

4. *In the alternative to prayers 2 and 3* the Four Parties may not supplement the Lists in terms of items 17 of Schedule 1 or item 10 of Schedule 2 of the Structures Act, but may only supplement the Lists in terms of item 20 of Schedule 1, or item 13 of Schedule 2 of the Structures Act, after the first meeting of the relevant municipal council.

5. *In the further alternative*:

5.1. The Four Parties are afforded 48 hours from the date of this order to submit new party lists to the Commission for the 2026 local government elections; and

5.2. The Commission is directed to accept those party lists, determine whether they were submitted in good faith and, within seven days of the date of this order, to process them in terms of ss 14(3) to (6) and 15 of the Municipal Electoral Act.

Conditional Constitutional Challenge

6. To the extent necessary:

    6.1. The Municipal Electoral Act and the Structures Act – alternatively ss 1 13(1)(a) and 14(1) of the Municipal Electoral Act, and items 11, 17 and 20 of Schedule 1 and items 5, 10 and 23 of Schedule 2 of the Structures Act – are declared unconstitutional and invalid to the extent that they6.2. 6.3. 6.4. place no limit on the extent of, or reason for, supplementing party lists after an election.

    6.2. The declaration of invalidity in prayer 6.1:

    6.2.1. Will have no retrospective effect, save as set out in paragraphs 6.3 and 6.4; and

    6.2.2. Will be suspended for 24 months to allow Parliament to cure the defect.

    6.3 During the period of suspension:

    6.3.1. Item 17(1) of Schedule 1, and item 10(1) of Schedule 2 of the Structures Act, will read as follows:

    If a party list contains fewer candidates than the party is entitled to those seats must remain unfilled for the duration of the council's term, unless the vacancies render a quorum for the municipal council impossible, in which case the party concerned forfeits the unfilled seats, and the seats must be filled within 14 days in accordance with subitems (4) to (10).

6.3.2. Item 17(2)-(3) of Schedule 1, and item 10(2)-(3) of Schedule 2 will be severed.

6.4 For the upcoming 2026 local government election:

6.4.1. The Four Parties may not supplement the Lists in terms of items 17 of Schedule 1 or item 10 of Schedule 2 of the Structures Act, but may only supplement the Lists in terms of item 20 of Schedule1, or item 13 of Schedule 2 of the Structures Act, after the first meeting of the relevant municipal council.

6.5. *In the alternative*, the Four Parties are afforded 48 hours from the date of this order to submit new party lists to the Commission for the 2026 local government elections; and

6.5.1. The Commission is directed to accept those party lists, determine whether they were submitted in good faith and, within seven days of the date of this order, to process them in terms of ss 14(3) to (6) and 15 of the Municipal Electoral Act.

6.5.2. The Lists may not be supplemented in terms of item 17 of Schedule 1, or item 10 of Schedule 2 of the Structures Act.'

[3] By the time the matter was heard, the relief sought had been substantially narrowed down to exclude the review and consequential relief in paragraphs 3, 5.1 and 5.2, and to postpone the conditional constitutional challenge *sine die*, although it was also stated that they were not necessarily abandoned. In effect, the draft order proposed by the DA invited the Court to only deal with the declaratory relief and the consequential relief in paragraph 4 of the notice of motion at this stage.

[4] The MK Party did not oppose the proceedings and conveyed that it would not be filing an answering affidavit since the issues it intended raising were raised by the opposing respondents. The sixth respondent, the Minister of Cooperative Governance and Traditional Affairs (Minister) had not filed opposing papers by the date of the hearing. However, counsel appeared at the hearing and sought postponement of the conditional constitutional challenge. Since the DA had already

indicated that the relief in that regard was to be postponed *sine die*, the Minister's request for postponement was considered moot.

Preliminary points

[5] Two preliminary points have been raised, namely non-joinder and jurisdiction. The non-joinder is raised on account of the wide-ranging nature of the consequential relief sought, which may impact parties that are not before the Court, some of whom submitted PR lists. While GOOD points to every political party which submitted a PR list in this regard, Action SA specifies Speaker of the National Assembly (Speaker), the Chairperson of the National Council of Provinces (Chairperson), and the Minister responsible for Home Affairs.

[6] The test for joinder of necessity is whether the non-joined party has a direct and substantial interest - a legal interest in the subject matter of the litigation which may be prejudicially affected by the judgment.[1] In this case, the DA only seeks relief against the four parties, stating that those are the only parties whose lists are susceptible to its challenge. There is no evidence to the contrary, and no other political party has been shown to meet that test.

[7] While I accept that the impact of the relief sought is far-reaching and would have precedent-setting value, that on its own does not grant them a legal interest in this case. That is not the test for joinder. There is accordingly no basis to conclude that there are other parties which have a direct and substantial interest in these proceedings.

[1] *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) para 12; *Gordon v Department of Health, KwaZulu – Natal* 2008 (6) SA 522 (SCA) para 9.

[8] The non-joinder point is also raised in relation to the conditional constitutional challenge, where once again it is said the Speaker, Chairperson, Minister of Home Affairs, and other parties or institutions required by the applicable constitutional and procedural framework, may have a direct and substantial interest.

[9] It is correct that our courts have often preferred to receive the views and insights of the Speaker and the Chairperson when Acts of Parliament are under constitutional attack.[2] Their absence from the proceedings may well deprive the Court of submissions that could be of assistance. However, given the DA's inclination to postpone the constitutional challenge, the issue does not require determination at this point. I also take the view in any event, that it is not appropriate to determine the conditional constitutional challenge, as discussed in due course.

[10] Turning to the jurisdiction challenge, GOOD argues that this Court lacks jurisdiction to grant any of the relief sought in these proceedings except for the review relief. This is because the powers of this Court are confined to those mentioned in s 20 of the Electoral Commission Act 51 of 1996.[3] In view of the

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[2] See, for example *Ramodibe v S* (A80/2018) [2020] ZAGPPHC 271 (4 May 2020), para 2.

[3] Section 20 of the Electoral Commission Act provides:

> '(1) *(a)* The Electoral Court may review any decision of the Commission relating to an electoral matter.
> *(b)* Any such review shall be conducted on an urgent basis and be disposed of as expeditiously as possible.
> (2) *(a)* The Electoral Court may 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 is provided by law.
> *(b)* No such appeal may be heard save with the prior leave of the chairperson of the Electoral Court granted on application within the period and in the manner determined by that Court.
> *(c)* Such an appeal shall be heard, considered and summarily determined upon written submissions submitted within three days after leave to appeal was granted in terms of paragraph *(b)*.
> (2A) The Electoral Court may hear and determine any dispute relating to membership, leadership, constitution or founding instruments of a registered party.
> (3) The Electoral Court may determine its own practice and procedures and make its own rules.
> (4) The Electoral Court shall-

approach I have taken regarding the conditional constitutional challenge, I do not consider it necessary to decide the question of jurisdiction regarding that relief at this point.

[11] It suffices for present purposes that the trigger event for these proceedings, according to the DA, was the Commission's decision to certify the party lists. That is the subject-matter of the review challenge, which engages the jurisdiction of this Court in terms of s 20(1)*(a)* of the Electoral Commission Act.

[12] The remainder of the relief sought is related to the submission of, and certification of the lists, and is accordingly consequential upon the review of the impugned decision. The court is empowered to deal with those issues because s 18 of the Electoral Commission Act accords to this Court the status of a Supreme Court, which is the equivalent of the high court. That is consistent with ss 166 (e) and 172(2)*(a)* of the Constitution, which recognize the Electoral Court as a court of similar status to the high court. I am accordingly of the view that this Court is clothed with the necessary jurisdiction to determine the issues before it.

(a) make rules in terms of which electoral disputes and complaints about infringements of the Electoral Code of Conduct as defined in section 1 of the Electoral Act, 1993 (Act 202 of 1993), and appeals against decisions thereon may be brought before courts of law; and

(b) determine which courts of law shall have jurisdiction to hear particular disputes and complaints about infringements, and appeals against decisions arising from such hearings.

(5) The hearings and appeals referred to in subsection (4) shall enjoy precedence in the courts of law determined in accordance with that subsection.

(6) The Electoral Court may hear and determine any matter that relates to the interpretation of any law referred to it by the Commission.

(7) The Electoral Court may investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7 (3) *(a)* (ii).'

Brief Background

[13] The party lists in question were certified by the Commission on 16 September 2026, in accordance with s 15(1)*(b)* of the Municipal Electoral Act. That is when the DA states it became publicly known that each of the four parties had submitted a PR list bearing only a single name in virtually every municipality that they are contesting. This is despite the parties' prior electoral performance and current polling which indicates that they will almost certainly receive more than one seat from those party lists, says the DA. To summarize the common cause factual position of the four parties:

a. In 101 of the 102 municipalities contested by Action SA, it has submitted 1 PR candidate. It currently fields 2 211 ward candidates, and holds 44 PR seats in Johannesburg, 19 in Tshwane and 15 in Ekurhuleni.

b. The EFF is contesting all 257 municipalities in the country. It presently has 31 seats in Ekurhuleni, 29 seats in Johannesburg, 23 seats in Tshwane and 23 seats in eThekwini.

c. The MK Party contests elections in 229 municipalities. It has 1 PR candidate in all 229 municipalities, including in its stronghold the KZN. The DA estimates that, based on its performance in the 2024 National and Provincial Elections, it will likely win more than one seat in 72 municipalities. In eThekwini, it might win 28 PR seats; in Johannesburg 30 seats and in Ekurhuleni, 31 seats.

d. GOOD is contesting elections in 25 municipalities, mostly in the Western Cape. It has 9 PR seats in Cape Town, 4 each in Saldanha Bay and Drakenstein, 3 in Stellenbosch and Theewaterskloof and 2 in Breede Valley.

[14] The nub of the DA's complaint is that none of the four parties have stated under oath that their reason for listing only a single PR candidate was because they do not expect to win more than one seat, and it would be unreasonable for any of them to believe the contrary given their past performance.

[15] The opposing political parties have provided explanations for their stance. ActionSA relies on its 2026 Candidates Selection Policy, which was last amended in April 2026. Clause 3.1.2 thereof provides that the successful mayoral candidate is the sole name to be submitted on the PR list before the election. Clause 3.1.3 provides that, after the election results have been declared, the balance of the PR list is populated by ranking ward candidates according to the percentage of support each candidate obtained on the ward ballot in the relevant ward. No provisionally ranked PR list exists, and their final ranking will depend on the votes actually cast for the respective ward candidates. The principal pool of candidates from which the supplemented PR list will be populated comprises ActionSA's publicly nominated ward candidates.

[16] GOOD explains that it sought guidance from the Commission on whether it could submit single candidate lists and to later supplement them under item 17 of the Schedule 1 if necessary. The EFF admits to submitting only single-name lists, stating that it complied with the provisions of the applicable legislation and that no fraud can be inferred from that.

[17] It is common cause that the four parties' conduct was deliberate, and that they all intend to reveal the remainder of their PR candidates after the election. They have taken the view that item 17 of Schedule 1, Part 3 of the Structures Act entitles them to adopt that approach. The DA's case is that their lists were accordingly not submitted for the purpose required by the Constitution, the Municipal Electoral Act and the Structures Act. The relief it seeks in prayer 4 aims to effectively freeze their submitted single-name lists until after the first meeting of the municipal councils, which is where the main leadership positions are normally elected.

Issues for determination

[18] The issues arising for determination are accordingly the following:

a. Whether the single candidate lists of the four parties were submitted in bad faith and *in fraudem legis* (in fraud of the law)*;* in violation of ss 157(2), 19(2) and 19(3)*(b)* of the Constitution; and in violation of ss 1, 13 and 14 of the Municipal Electoral Act, and item 11 of Schedule 1 (and its equivalent item 5 of Schedule 2) to the Structures Act.

b. Whether item 17 of Schedule 1 (and its equivalent item 10 of Schedule 2), is available to a party that deliberately listed fewer candidates than the seats it expected to win, or whether such a party may supplement its list only under item 20 of schedule 1 (and its equivalent item 13 of Schedule 2), after the first meeting of the municipal council;

c. Whether a party's purpose in submitting a single-candidate list is legally relevant to the validity of the list and to the operation of item 17.

[19] All these issues are interrelated, and in considering them, this judgment considers the following in turn: (a) the overall statutory scheme; (b) statutory interpretation; (c) the relevant constitutional provisions; (d) Items 17 and 20 of Schedule 1; (e) bad faith and *in fraudem legis*; (f) the declaratory relief; (g) the review application; (h) the conditional constitutional challenge; and (i) costs.

The overall statutory scheme

[20] Section 157 of the Constitution provides as follows:

> **'157 Composition and election of Municipal Councils**
> (1) A Municipal Council consists of-
> *(a)* members elected in accordance with subsections (2) and (3); or
> *(b)* if provided for by national legislation-
> (i) members appointed by other Municipal Councils to represent those other Councils; or
> (ii) both members elected in accordance with paragraph *(a)* and members appointed in accordance with subparagraph (i) of this paragraph.
>
> (2) The election of members to a Municipal Council as anticipated in subsection (1) *(a)* must be in accordance with national legislation, which must prescribe a system-
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> *(a)* of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or
>
> *(b)* of proportional representation as described in paragraph *(a)* combined with a system of ward representation based on that municipality's segment of the national common voters roll.
>
> (3) An electoral system in terms of subsection (2) must result, in general, in proportional representation.
> …
>
> (6) The national legislation referred to in subsection (1) *(b)* must establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.'

[21] The national legislation contemplated in s 157(2) of the Constitution is the Municipal Electoral Act which regulates the conduct of elections, and the Structures Act, specifically its Schedules 1 and 2, which regulates the allocation of seats.

[22] Section 13(1)*(a)* of the Municipal Electoral Act provides that a registered party may contest an election by submitting a party list containing the names of candidates to stand as its representatives for the election of members of the council to proportionally represent parties in the council. A 'party list' is defined as a list of candidates proposed by a party for the purposes of the election of members of a municipal council to proportionally represent parties in the council either in relation to the municipality or in relation to a district management area.[4]

[23] Section 14(1)*(a)* of the Municipal Electoral Act provides as follows:

'A party may contest an election in terms of section 13 (1) *(a)* or *(c)* only if the party by not later than a date stated in the timetable for the election has submitted to the Commission-
(a) in the prescribed format and signed by the party's duly authorized representative-
(i) .....
(ii) a party list…'

[24] In terms of regulation 4 of the Regulations to the Municipal Electoral Act, a party list referred to in s 14(1)*(a)*(ii) must be in a form substantially similar to appendix 3. In turn, appendix 3 provides a form for nomination of a party list candidate, and a form for a party list of candidates. The latter is in a table format, with the headings 'order, identity number, full names and surname'.

[25] The contents of a party list are further regulated by item 11 of Schedule 1, which applies to metro and local councils and provides as follows:

'(1) The number of candidates on a list submitted by a party may not exceed double the number of seats in the metro or local council to be filled from party lists.

(2) The candidates' names must appear on the list in the order of the party's preference, commencing with the first in order of preference and ending with the last.

[4] Section 1, Municipal Electoral Act.

(3) Every party must seek to ensure that fifty per cent of the candidates on the party list are women and that women and men candidates are evenly distributed through the list.'[5]

[26] So, item 11 provides for a maximum number of names on a party list, though no minimum. It provides for the order of the party's preference to be indicated, which is accommodated in the *pro forma* tabulated annexure 3 of the regulations. It provides for gender parity to be ensured in the list.

[27] After submission of the lists, the Commission may seek further information, investigate candidates appearing on more than one list, and remove ineligible or unregistered candidates in terms of ss 14(3) to (5). Thereafter, it is required to compile, certify and keep the party lists, which it must furnish upon request upon payment of a prescribed amount.[6]

[28] The deadline for submission of party lists according to the election timetable was 17h00 on 28 August 2026. The Commission certified the party lists on 16 September 2026 and immediately published them on its website for public viewing.

Statutory Interpretation

[29] Because of the remedy sought in paragraphs 4 and 5 of the notice of motion, and as already foreshadowed, the focus of the proceedings became the interpretation

[5] Item 5 of Schedule 2, which applies to district councils, provides similar provisions, as follows:

'(1) The number of candidates on a party list submitted by a party may not exceed double the number of seats in the district council allocated, as the case may be, for the election of councillors referred to in section 23 (1) *(a)*.
(2) The candidates' names must appear on the list in the order of the party's preference, commencing with the first in order of preference and ending with the last.
(3) Every party must seek to ensure that fifty per cent of the candidates on the party list are women and that women and men candidates are evenly distributed through the list.'

[6] Subsections 15(1)*(a)* to *(c)*, Municipal Electoral Act.

of item 17 of Schedule 1 to the Structures Act. It is well to first recall the relevant statutory principles.

[30] The approach to statutory interpretation set out in *Endumeni*[7] involves a unitary exercise which considers the text, context and purpose, to determine a coherent and salient interpretation, thus avoiding any internal inconsistency. [8] The interpretive process is objective and not subjective.[9]

[31] As stated in *Cool Ideas*[10], the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. The interrelated riders to this general principle, are that statutory provisions should always be interpreted purposively, must be properly contextualised, and construed consistently with the Constitution to preserve their constitutional validity.[11]

[32] But that is not a licence for sophistry, or for a search for the chimerical or ephemeral.[12] The relevant context in which the provision rests is to be understood by identifying the mischief that the statute seeks to address.[13]

[33] Section 39(2) of the Constitution requires courts to promote the spirit, purport and objects of the Bill of Rights in the interpretive process. If a provision is open to

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[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18.

[8] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 25.

[9] *Moyo and Another v Minister of Police and Others (Moyo); Sonti and Another v Minister of Police and Others* (CCT174/18; CCT178/18) [2019] ZACC 40; 2020 (1) BCLR 91 (CC); 2020 (1) SACR 373 (CC) (22 October 2019) paras 52 – 58.

[10] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) *(Cool Ideas)* at para 28.

[11] Ibid.

[12] *Endumeni*, para 21.

[13] *Moyo, para 54.*

multiple plausible interpretations, the one that best conforms with the Constitution should be preferred.[14] The approach of interpreting legislation so as to avoid inconsistency with the Constitution is referred to as 'reading-down', and it is limited by what the text is reasonably capable of meaning.[15] It is distinguishable from the constitutional remedy of 'reading in' of missing words from a statutory provision, which may be granted after a court has declared that a statute is constitutionally invalid.[16] The conflation of the two may well result in an intrusive interpretation which offends requirements of the rule of law and the separation of powers.[17]

The constitutional provisions

[34] Turning to the constitutional provisions invoked in these proceedings, the text of s 157 already quoted provides, per its heading, that its purpose is to establish the composition and election of a municipal council. While s 157(1) regulates the composition thereof, s 157(2) regulates the election to the municipal council.

[35] Both the composition and election of municipal councils must be performed in accordance with national legislation, which I have already identified as the Municipal Electoral Act and the Structures Act. The national legislation must prescribe a PR system which provides for election of municipal council members from lists of party candidates. In simple terms, this means that the names of the members must be sourced from a party list.

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[14] *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd And Others v Smit No and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) *(National Coalition)*.

[15] *Hyundai* above fn 14 at para 24 and *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18.

[16] *National Coalition* at para 24.

[17] *Abahlali Basemjondolo Movement SA v Premier of the Province of KZN* [2009] ZACC 31; 2009 JDR 1027 (CC); 2010 (2) BCLR 99 (CC) (*Abahlali*) at para 123.

[36] The DA emphasizes that a person cannot be elected *from* a list if they are not on the list before the election, and that the inclusion of persons after the election is the opposite of what s 157(2)*(a)* of the Constitution demands.

[37] What the provision prescribes is that, by the time an individual is elected to a municipal council, their name must be on the PR list. It does not prescribe, nor does it seek to prescribe, when that name is added to the list. That is the province of the national legislation envisaged by the provision, which must *'prescribe a system'* encompassing the objectives stated in the constitutional provision.

[38] That system, according to *New Nation*[18] is an electoral system which provides for political parties, as opposed to individual candidates, to participate in elections at municipal level. It is a system of proportional representation comprising of a party list, and in terms of which a voter votes for a party. In such a system, said the high court in *Miller*[19] -

'the voter chooses a particular political party. The party, by submitting a list of candidates, regulates the choice of candidates and the order in which they are to be elected. There is, to my mind, no doubt whatsoever that every vote cast counts in the computation of the proportional representation election.'

[39] The Court in *New Nation* re-affirmed what had been stated in *Ramakatsa*[20] in relation to a PR party list system, as follows:

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[18] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others (New Nation)* (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) (11 June 2020) at para 185.

[19] *Democratic Party v Miller NO and Others (Miller)* 1997 (1) SA 758 (D) at 761 – 763.

[20] *Ramakatsa and Others v Magashule and Others (Ramakatsa)* (CCT 109/12) [2012] ZACC 31; 2013 (2) BCLR 202 (CC) (18 December 2012) para 68.

'*Ramakatsa* was concerned with and its reach was limited to cases where an adult South African has chosen a political party to be a vehicle through which she would exercise the right to vote. That case was concerned with the representation that involved political parties. Within that system, a voter is obliged to vote for a political party and it is the party which nominates candidates. Whether those candidates meet the approval of the voters or some of the voters is irrelevant. Once they have voted for the party, it falls upon the party to identify who will be their representative. And that representative is directly accountable to the party concerned.'[21] (my emphasis)

[40] The DA highlights the political rights enshrined s 19(2) and 19(3)*(b)*. In terms of s 19(2) every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution. In *New National Party*[22] the Court explained that the right to vote in free and fair elections is enjoyed within the context of an *'electoral system prescribed by national legislation which complies with the …requirements laid down by the Constitution. The details of the system are left to Parliament'*.[23]

[41] In *Kham*[24] it was confirmed that the adjudication of free and fair elections is a question of fact, which must be decided on the evidence, not on mere speculation. Since the elections have not yet taken place, including elections of the municipal council, any determination regarding transgression of s 19(2) at this stage fits within that description.

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[21] *New Nation* para 193.
[22] *New National Party of South Africa v Government of The Republic of South Africa and Others (New National Party)* 1999 (3) SA 191 (CC) para 14.

[23] *Independent Candidate Association SA NPC v President of the Republic of South Africa and Others* (CCT 144/23) [2023] ZACC 41; 2024 (3) BCLR 321 (CC); 2024 (2) SA 104 (CC) (4 December 2023) para 55.

[24] *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) (*Kham*) para 88.

[42] As for s 19(3)*(*b), it confers on every adult citizen the right: (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and (b) to stand for public office and, if elected, to hold office. In *New Nation* it was confirmed that the right held in terms of s 19(3)*(b)* is held by individuals, not political parties, to stand for public office and to contest elections.[25] And what entitles the citizen to hold office, in terms of the provision, is being elected.[26] Therefore, said the Court:

'an 'adult citizen who wishes to exercise the right conferred by section 19(3)(b) must first contest elections. In that context "elected" means being voted for. One does not get voted for if one's name does not appear on the ballot paper. Without contesting elections, it is impossible for any adult citizen to exercise the right to stand for and hold public office if elected.'[27]

[43] So, only individuals - not political parties - who are contesting elections may place reliance on s 19(3)*(b)*. Relying on *My Vote Counts II*[28] where the minority court highlighted a connection between the proper exercise of the right to vote and the right of access to information, the DA argues that the right to vote means voters must know who a party's candidates are for the election, and that without this information, a vote is cast blindly.

[44] The answer to that argument was given by the Constitutional Court in *UDM II*[29]. What an individual is entitled to know in the voting process is constrained by the PR political environment, as follows:

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[25] *New Nation* para 154.
[26] *New Nation* para 170.
[27] *New Nation* para 171.
[28] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) (*My Vote II*) paras 33 and 35.
[29] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening;Institute For Democracy In South Africa and Another As Amici Curiae) (No 2)* 2003 (1) SA 495 (CC) ("*UDM (No 2)*") para 37.

'Although voters might have been influenced by the names of candidates, and possibly their place on the list, they voted for parties and not for particular candidates. Seats were allocated to the various parties proportional to the votes cast. Those seats were filled by representatives on the party lists, seats being allocated in accordance with the order in which the party's candidates were named on the list.'

[45] This is means that the right to know when voting for candidates on PR party lists is informed and constrained by, firstly the PR system which highlights party representativity, and secondly, similar to s 19(2) by what the applicable national legislation requires. In this instance, the right to information is facilitated by s 15 of the Municipal Electoral Act which provides for the compilation, safe record keeping and granting of access to party lists upon request.

[46] Section 157(2) envisages that the names included in a party list be *'drawn up in a party's order of preference'*. It is the party which draws up a list, according to its preferences. The reality is that a voter may not even know the identity of a person that a party will later add if it wins more seats than nominated. So, the right to information in this context is tempered by considerations of PR party representativity.

[47] Ultimately, what becomes apparent when one has regard to the requirement of a party list is that the Constitution seeks to balance a variety of interests. This is borne out by the statutory scheme set out earlier, which shows that a party list serves multiple purposes, including: providing information to the voter, the Commission, and the public; acting as a source document for election of members who are to occupy seats in the municipal council; providing certainty in cases of vacancies or deficiencies, as discussed below; and regulating the orderly conduct of elections. All of these considerations involve diverse interests which characterize our multi-party

system of democratic government[30], which is itself a foundational constitutional value, and can only be balanced through policy which is articulated through the national legislation envisaged by the Constitution.

[48] As the case law discussed above indicates, any attempt to highlight any one of the constitutional rights, without applying the context of the national legislation envisaged by s 157(2), is not helpful. That is unfortunately what the DA has done in this case, especially in regard to the declaratory relief sought in paragraph 1.2, where it seeks a declarator that the party lists are in violation of ss 157(2), 19(2) and 19(3)*(*b). The approach is in any event, contrary to the principle of constitutional subsidiarity which provides that a litigant cannot directly invoke the Constitution to enforce a right without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right.[31] I now turn to examine the relevant provisions of the Schedules to the Structures Act, starting with item 17.

Items 17 and 20

[49] Item 17[32] provides as follows:

'**Insufficient party lists**

(1) If a party list contains fewer candidates than the party is entitled to, the Electoral Commission must in writing immediately notify the party of the exact shortfall and request the party to deliver within two days of the notice a list supplemented by the name or names of one or more eligible candidates.

[30] *Ramakatsa*, para 68.

[31] *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015) para 53.

[32] The corresponding provision for district councils is item 10 of Schedule 2.

(2) Immediately upon receipt of the list referred to in subitem (1), the Electoral Commission must allocate the number of representatives, in the order of preference on the list, to which the party is entitled.

(3) *(a)* Subject to paragraph *(b)*-

(i) if the party concerned has ceased to exist, the seat or seats must remain unfilled;

(ii) if the party concerned does not deliver a supplemented list, the seat or seats remain unfilled until it delivers a list; or

(iii) if the party concerned delivers a supplemented list containing fewer names than the number of seats to be filled from that list, the seat or seats remain unfilled to the extent of the shortfall until it delivers a further list.

(b) Where seats are unfilled in terms of paragraph *(a)*, and the vacancies render a quorum for the municipal council impossible, the party concerned forfeits the unfilled seats, and the seats must be filled within 14 days in accordance with subitems (4) to (10).

[50] The DA interprets item 17 by reference to item 20, which provides as follows:

'**Filling vacancies and changing the order**

(1) *(a)* A party may not supplement or change its list from the date of the closure of nomination of candidates for an election until a day after the date of the first council meeting.

(b)(i) Subject to paragraph *(a)*, a party may supplement or change its list, provided that if a councillor elected according to a party list ceases to hold office, the party concerned may supplement or change its list by not later than 21 days after the councillor has ceased to hold office.

(ii) The vacancy must be filled as soon as the party in question has supplemented, changed or increased its list, but not later than 14 days after the expiry of the 21-day period.

(2) If a party supplements, changes or increases its list in terms of subitem (1) it must provide the chief electoral officer with an amended list.'

[51] Its central interpretative argument is that item 20 provides for the general rule, namely that a party may not supplement or change its list from the date of closure of nomination of candidates for an election until after the date of the first council

meeting. Item 17 according to it contains a narrow safety valve which enables a party that wins more PR seats than it has candidates because it genuinely and only slightly underestimated the support it would obtain, to supplement its insufficient party list. Its primary purpose is not for the ordinary selection of PR councillors, which the four parties have converted it to mean.

[52] The text of item 17 is neutral, referring only to an 'insufficient' party list. The reasons for the 'insufficiency' are characterized by the fact that the *'party list contains fewer candidates than the party is entitled to'*. This requires a mechanical comparison between the list and the party's entitlement. And it must be made as soon as the entitlement is known by the Commission. The key question then is: when does it become known what the political party is entitled to? The answer is provided in item 13(1)*(a)*, which provides for the method for calculating and allocating seats as follows:

'The total number of valid votes cast for each party on the party vote and for the ward candidates representing the party must be divided by the quota of votes for a seat. The result is the total number of seats to which each party is entitled before any adjustment in terms of subitem (3).

…

(3) *(a)* In an election for a metro council or for a local council that has wards, the Electoral Commission must deduct from the total number of seats to which each party is entitled in terms of subitem (1) and (2), the number of ward candidates representing that party who were declared elected.

(b) The result is the number of seats which the party is entitled to fill from its list of party candidates.' (my emphasis)

[53] This provision makes clear that the insufficiency contemplated in item 17 can only arise after the calculation of votes. And it is determined by reference the number

of seats to which a party is entitled. That number is not, and cannot, be predetermined and must await finalization of the calculation and allocation set out in item 13 which, in turn, is informed by the valid number of party votes, ward candidates and the quota of votes provided in item 12.

[54] In effect, the DA's argument seeks to introduce a predetermined minimum number of candidate names that will suffice in a party list. Its approach requires a political party to project those numbers based on its previous performance and its polling. However, the legislation stays clear of such a requirement.

[55] One of the features of Schedule 1 is the avoidance of specifying numbers. It refers instead to calculations, formulae and a quota of votes.[33] Item 11, to which I have already referred, provides for the maximum number of candidates on a party list which may not exceed double the number of seats in the metro or local council to be filled from the party lists. There is no provision made for a minimum number of candidates on a list in the Schedule.

[56] Significantly, in terms of item 16, a political party may be disadvantaged by the election of too many ward candidates. If such an election results in it obtaining a number of seats that is equal to, or greater than the total number of seats in the council to which it is entitled under item 13, it will not be allocated seats from its party list.[34] In a way, this requires a balancing act by the political party regarding

[33] Items 12 and 16 provide the formulae for calculating the quota of votes for a seat. Item 13 provides for the application of the quota when calculating and allocating seat.

[34] The relevant part of item 16 provides:

'(1) If, through the election of ward candidates, a party listed on the part of the ballot paper for parties has obtained a number of seats that is equal to, or greater than the total number of seats in the council to which it is entitled under item 13, that party must not be allocated any seats from its list of party candidates.

(2) The seats of ward candidates are not affected.

(3) A new quota of votes for a seat must be determined…'

how many ward candidates to field *vis-a-vis* its party list candidates, and it must bear the political consequences.

[57] One must accept that the legislature cast its mind to the issue of a *number* of names on the list, hence the various enumerative provisions under headings such as 'number of votes'[35], 'quota'[36], 'allocating seats'[37], 'excessive seats'[38], 'insufficient party lists'[39], 'multiple seats'[40] and 'filling of vacancies'[41]. And hence the reference in item 11 to a maximum number.

[58] The legislature's reluctance to specify a minimum number of names may be explained by the uncertainty of political life and of the electoral environment, including the possibilities of redistribution of electoral support and the reality of coalition arrangements. In fact, item 19 acknowledges the reality that a candidate's name may be withdrawn from a party list and cause a vacancy to arise, for a variety of reasons.[42]

[59] There is also to consider the fact that, even on the DA's argument, a list containing a single name will in some instances comply with the constitutional requirement in s 157(2). The difference according to it is in the motive behind it –

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[35] Item 9.
[36] Item 12.
[37] Item 13.
[38] Item 16.
[39] Item 17.
[40] Item 17A.
[41] Items 18 and 20.
[42] Item 19 provides:
'A person who is a candidate on a party list ceases to be a candidate and a vacancy arises in the list when the party withdraws the person's name by written notice to the chief electoral officer, or when that person-
(a) assumes office as a councillor;
(b) resigns from the list by written notice to the chief electoral officer;
(c) becomes ineligible to be a candidate;
(d) is disqualified or removed from the list in terms of any legislation;
(e) ceases to be a member of the party for which that person was listed as a party candidate; or
(f) ceases to be ordinarily resident in the municipality to which the list relates.'

whether there was a ‘genuine’, ‘inadvertent’, or ‘unforeseeable’ underestimation by the political party; or whether there was a ‘genuine belief’ regarding its projected winnings. There are no such requirements in item 17 or in Schedule 1. Rather, the business of the schedule, as already shown, is the objective, mathematical calculation and allocation of seats for composition of municipal councils in compliance with the injunction issued in s 157 of the Constitution.

[60] An introduction of a requirement such as a ‘genuine belief’ or ‘genuine underestimation’ is not only at odds with the current tenor of the schedule, but it would also introduce more questions than answers. As the Commission correctly asks: Who must determine such genuineness, and at what stage? Based on what test must it be determined? How must the practicalities of such determination be facilitated? How would the genuineness be determined? The Commission highlights that it would also have to determine whether a party genuinely expected a particular number of seats; whether its expectation was sufficiently reasonable; and whether its shortfall was sufficiently unforeseen. Needless to say these are policy issues which are not appropriate to venture into for this Court. But what these questions also reveal is that the answers are not presently found in the text of the statute or the statutory scheme.

[61] There is also to consider the fact that, even if an underestimation is genuine, the concerns sought to be addressed by the DA would remain. The supplemented names would not have undergone scrutiny by the public or the opposition. This highlights that, in introducing the requirements suggested by the DA, policy choices including possible trade-offs would need to be made.

[62] It bears repeating that such an endeavour would be inappropriate for this Court to undertake. It amounts to treading into the terrain of the legislature, contrary to the

principle of separation of powers. To interpret the legislation as to incorporate those subjective elements would amount to a 'reading in' to the statute that which is not currently envisaged, not a 'reading down' to make it compliant with the Constitution. All of this brings to mind the SCA's injunction in *Endumeni* to not resort to the chimerical when interpreting statute.

[63] It also calls to mind the imperatives of a PR system, which places a high premium on the interests of a political party, as the representative of the voter, and as a member of a municipal council. At the stage of the composition and allocation of seats of a municipal council, the seats are populated from the party lists. A political party must therefore ensure that it has sufficient names on its list for allocation of seats. If a party does not have names due to the DA's suggested interpretation, it will not be able to populate the seats, to its prejudice and the prejudice of the voting public, not to mention the citizenry to be served by that municipality.

[64] Aligned with the DA's subjective elements is the suggestion that item 17 provides for a narrow safety valve which only applies where a party slightly and in good faith underestimates its electoral support. A perusal at the rest of Schedule 1 indicates that there are other instances in which item 17 may be used to supplement a list. One is where a vacancy is declared because a councillor who was elected from a party list ceases to hold office, and a party list has become exhausted. In such an instance, item 18(2) provides that the supplementation of the list must be effected in accordance with item 17, with the necessary adjustments. One can imagine a number of possible reasons why a municipal councillor may cease to hold office, including resignation, ineligibility, disqualification or ceasing to be an ordinary resident within a municipality. That is hardly a 'narrow safety valve'.

[65] Similarly, when a party has obtained seats equal to or greater than the total number of seats in the council to which it is entitled through the election of ward candidates, resulting in a new quota calculation and allocation, item 16(9), read with (4) envisages supplementation in terms of item 17(1).

[66] Turning to item 20, its subject-matter is the filling of vacancies and changing the order of lists. Sub-item 20(1)*(a)* provides for a moratorium period which prohibits supplementation or change of a list '*from the date of the closure of nomination of candidates for an election until a day after the date of the first council meeting*'. Outside the moratorium period, item 20(1)*(b)* permits supplementation or change, subject to a specific deadline if a councillor elected from a party list ceases to hold office.

[67] The provision applies in a variety of situations which are dealt with in the Schedule. One is the declaration of a vacancy of a councillor who ceases to hold office in terms of item 18(1). In turn, that provision is expressly made subject to item 20, which requires a party to supplement or change its list within 21 days of the councillor ceasing to hold office, and no later than 14 days thereafter; and to thereafter provide an amended list to the Chief Electoral Officer of the Electoral Commission (Chief Electoral Officer).

[68] Similarly, in terms of item 19 a vacancy may arise where a candidate on a party list ceases to be a candidate due to a variety of reasons. In such circumstances, item 20, which deals with the 'filling of vacancies' finds application, including the moratorium in sub-item (1)(a).

[69] This brings me to the relationship between item 17 and the moratorium found in sub-item 20(1)*(a)* which prohibits supplementation or change of a list 'from the date of the closure of nomination of candidates for an election until a day after the date of the first council meeting'. At first glance, item 20 may appear to impose a moratorium on the application of item 17 during the said period. However, when one considers the time periods involved in the application of the two provisions, such an interpretation becomes unworkable, and renders item 17 nugatory.

[70] As already discussed, item 17 is triggered once votes have been counted and seats have been allocated - when it is known what a party is entitled to. That is necessarily during the operation of the moratorium period in item 20. Yet, the specific need for applying item 17 after elections and voting is to make up in numbers that which could not have been known with certainty before. To exclude the application of item 17 in such circumstances would work against the very aim of bringing proportionality to the outcome of the votes. It would denude the voting public of the outcome of its votes, expressed through proportional representativity which is supposed to be the constitutionally enshrined result in terms of s 157(3) of the Constitution.

[71] That was the effect of the legal position[43] discussed in *Miller*, a case decided early into our constitutional democracy, where the DA challenged a statutory provision which provided that if the list does not contain sufficient candidate, the additional seats to which the party is entitled to are forfeited. The court agreed that disregarding the votes was undemocratic and unconstitutional, and commented as follows:

[43] The applicable provisions at the time were ss 75(4) and (5) of the Local Government Election Regulations 28 of 1996, published in the *Provincial Gazette of KwaZulu-Natal* 5109 on 27 February 1996.

'There is no reason at all why mechanisms cannot be designed to deal with situations where insufficient candidates are put up in party lists. To my mind, it is quite understandable that a political party may take a conservative view or entirely misread its prospects in the election - possibly by reference to opinion polls - and hence put up insufficient candidates. Why should it be penalised for this? After all, it is part and parcel of the democratic process that the result of an election may be unforeseen.'[44]

[72] In fact, the Commission confirms that item 17(1) was re-enacted in its present form in 2021 by the same statute that substituted item 20(1). It also points to the difference in electoral design between national and provincial elections on the one hand, and municipal elections on the other. Whereas the legislature opted for forfeiture of seats where a party list contains fewer names than the seats allocated to it in national and provincial elections,[45] there is no such forfeiture in the case of municipal councils. Instead, Parliament opted for supplementation through item 17(1). This is further indication that the intention was for the provision to apply after election and during the moratorium.

[73] The two provisions are distinguishable in that item 17 deals with a limited situation of an insufficient list arising from the objective consideration of what the party is entitled to. The supplementation is initiated by the Commission upon realizing a shortfall in the party's list. And the timeframes imposed are tight in that the Commission is required to act immediately, and the party is granted a turnaround of two days. On the other hand, item 20 seeks to deal with general circumstances where political parties may wish to change their lists for a variety of reasons. The supplementation in such an instance is initiated by the party. The deadlines are fairly flexible and the time periods longer.

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[44] *Miller* at 763C-E.
[45] Schedule 1A to the Electoral Act 73 of 1998.

[74] In order to bring parity between the two provisions and interpret them in a constitutionally compliant manner, I am persuaded that the moratorium in item 20(1)*(a)* should be read down to exclude circumstances where item 17 finds application. In other words, that it should be read to mean: '*Subject to item 17, a party may not supplement or change its list from the date of the closure of nomination of candidates for an election until a day after the date of the first council meeting'*. Such an interpretation saves either provision from constitutional invalidity and gives meaning to item 17. It also follows from the application of the common law principle of statutory interpretation of *generalis specialibus non derogant* (general words (rules) do not derogate from special ones), which proceeds from the following premise:

'When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.[46]

[75] Such an interpretation also takes account of the uncertainties of the electoral environment. One can think of a situation where a name appearing on a certified list may need to be removed before the first council meeting due to discovery of serious criminal conduct on the part of the candidate.

[76] Ultimately, the DA itself accepts that item 17 can find application during the moratorium period, including before the first meeting of the council. Its condition is

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[46] See *Sasol Synthetic Fuels (Pty) Ltd and Others v Lambert and Others* (7/2001, 8/2001) [2001] ZASCA 133; 2002 (2) SA 21 (SCA) (27 November 2001) para 17 and the authorities cited there.

that this should only be where a party has inadvertently or genuinely underestimated its support. I have already rejected that argument.

Bad faith and *in fraudem legis*

[77] Both the allegations of bad faith and acting *in fraudum legis* are founded on the allegation that the four parties do not honestly believe that they will win only one PR seat in all the municipalities in which they are competing, and have all sought to circumvent the purpose of the submission of candidate lists.

[78] An act is in *fraudem legis* when a party attempts to avoid the provisions of a statute or peremptory law by disguising or concealing the true nature of their conduct.[47] At least in the case of ActionSA and GOOD, the evidence directly contradicts the allegations of disguise or concealment.

[79] As already mentioned, ActionSA relies on its 2026 Candidates Selection Policy, which was last amended in April 2026. It is a publicly available document, which was made available long-before before the submission deadline for candidate lists. It unequivocally sets out the party's stance for its members, voters and the public alike. All of this undermines any inference of concealment or acting in disguise.

[80] Likewise, GOOD has attached emails which were addressed to officials of the Commission as proof that it sought guidance from the Commission on whether it could submit single candidate lists and later supplement them under item 17 if necessary. At the very least, the correspondence shows that GOOD made known its

[47] A & D Hutchison *'Simulated transactions and the fraus legis doctrine'*. *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA) at 69 -73; *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* [2014] ZASCA 40; [2014] 2 All SA 654 (SCA); 2014 (4) SA 319 (SCA) paras 9 -11 and 14 -15.

intentions to the Commission, including the Chief Electoral Officer, before submission of its lists. Again, this dispels any notion of concealment or disguise. I have noted the Commission's denial of the inference drawn by GOOD that it sanctioned the conduct. Regardless, the communication with GOOD is not disputed.

[81] The position adopted by the EFF is that no fraud can be inferred from the submission of a single name list, and that it complied with the provisions of the applicable legislation. From the statutory interpretation exercise conducted above, their stance was lawful. There is no basis to conclude that they acted in fraud of the law. In fact, the starting point of the *in fraudem* principle is that a party may lawfully arrange its affairs so as to remain outside a statutory provision even where that is the very purpose of the arrangement.[48] The MK Party is in a similar position as the EFF, since the allegations against it rely on their interpretation of the law. No case has been established against it.

[82] As for bad faith, no factual basis has been laid whatsoever, save for the same allegations based on the parties' interpretation of the law. It is trite that a party must establish the factual basis for its case. None has been established against any of the four parties. The first declarator sought in paragraph 1.1 of the notice of motion must accordingly be dismissed.

The remaining declaratory relief

[83] All of the relief sought in these proceedings, save for the conditional constitutional challenge, hinges on the outcome of the above interpretative analysis. The outcome supports the approach adopted by the four parties, that based on the current statutory scheme, they will be entitled to supplement their lists after elections

[48] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* at para 14.

in terms of item 17 if they comply with its requirements. Further, that this was part of a design of the statutory scheme; not an accident or due to *mala fide* opportunism.

[84] In paragraph 1.2 of the notice of motion the DA seeks a declarator that the lists were submitted in violation of ss 157(2)*(a)*, 19(2) and 19(3)*(b)* of the Constitution. As the respondents point out, apart from the conclusory argument that the rights are violated, there is no basis set out for reliance upon this relief apart from the interpretive argument, which I have rejected.

[85] I have already indicated, in any event, that the relief sought in paragraph 1.2 transgresses the principle of subsidiarity in that there is no attempt to rely upon any of the applicable statutory provisions. Instead, the case directly invokes the constitutional provisions. As traversed earlier, the legal parameters of those constitutional rights do not avail the DA. The case law indicates that the content of the constitutional rights is constrained by firstly, the design of PR electoral system and secondly, the national legislation. As the interpretative analysis indicates, the impugned lists were submitted in compliance with the legislation. There is accordingly no basis to conclude that ss 157(2), 19(2) and 19(3)(b) of the Constitution have been violated by the submission of the party lists.

[86] There is also no basis to conclude that the lists were submitted in violation of sections 1, 13 and 14 of the Municipal Electoral Act[49]; or item 11 of Schedule 1 or item 5 of schedule 2[50]. The case on this score is likewise based on the interpretation of items 17 and 20, which I have rejected. In any event, as the Commission states, its certification decision exists in fact and has legal consequences until set aside, in

[49] Paragraph 1.3 of the notice of motion.
[50] Paragraph 1.4 of the notice of motion.

line with *Oudekraal*[51]. Accordingly, the DA cannot obtain substantive invalidation of the certified lists without setting aside to the certification decision of the Commission, to which I now turn.

Review of the Commission's certification

[87] Given the DA's ambivalence regarding its persistence with this ground, it is best to deal with it. In prayer 2.2 of the notice of motion, the DA seeks to review the Commission's decision to publish the party lists. It is common ground that, although the Commission does publish submitted lists, there is no specific provision requiring publication. The operative decision in terms of s 15(1)*(b)* is certification of the lists, which the Commission is required to keep and make available upon request.

[88] The DA's case in this regard is that the Commission's decision to certify the four parties' lists was based on a material error of law or a material error of fact because the Commission assumed that the lists were compliant. In making these allegations, the DA relies once again on its interpretation of the provisions in question, which I have rejected.

[89] Apart from the generalized reference to an error of law or fact, there is no legal basis identified or factual grounds upon which the Commission's decision is sought to be reviewed. The DA also does not identify whether it invokes the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality, which it was required to do.[52] This is contrary to the well-established rules of pleading, which also apply in constitutional matters, that a party must make out

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[51] *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* (25/08) [2009] ZASCA 85; 2010 (1) SA 333 (SCA) (3 September 2009).

[52] *Minister of Home Affairs v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA).

its case in the pleadings so that the respondents may know the case they are required to meet.[53]

[90] There is otherwise no basis to conclude that the Commission failed in its duties in certifying the four parties' lists, or that it acted in error of the law or fact in doing so. No such case has been established. Accordingly, the review relief sought in paragraph 2.2 of the notice of motion must be refused.

[91] Insofar as the DA seeks a declarator that the decision of the Commission to publish or certify the lists is unconstitutional, unlawful and invalid in paragraph 2.1 of the notice of motion, I am of the view that that aspect of the case is in essence part of the relief sought in the conditional constitutional challenge. I am accordingly of the view that it should be postponed for determination with the constitutionality challenge. But to be clear, I have not found any basis to impugn the decision of the Commission or to set it aside.

Conditional Constitutional Challenge

[92] In the conditional constitutional challenge, the DA impugns the constitutional validity of items 11, 17 and 20 of schedule 1 and of the corresponding items of schedule 2, insofar as they place no limit on the extent of, or reason for, supplementing party lists after election.

[93] As already presaged, I do not consider it appropriate to deal with that challenge at this juncture. Not least because the Minister, a party with a direct and substantial interest in that relief, was not before this Court by the time of the hearing,

[53] *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) para 114.

and has indicated a desire to participate. Further, given that there are two Acts of Parliament under attack which are said to be invalid and in which a reading-in remedy is sought, it would also be desirable to join the Speaker and the Chairperson as parties.

[94] There are other reasons which render it undesirable and inappropriate to deal with such a substantive challenge with far-reaching consequences at this point. One is the fact that the matter has been brought and dealt with on an urgent basis, as is the nature of proceedings in this Court. Usually, challenges of this nature require a fair amount of time for preparation, consultation, research and explanation for the parties, especially for the policy and lawmakers and those who have to execute the policies. The effect of the relief sought under this heading would have a profound impact on the design of the electoral system for the municipal councils. A matter of such fundamental significance needs careful handling, not a rushed jolt.

[95] Also relevant is the timing of the application, which I consider to be an important consideration. The matter has been brought some weeks before voting day, after the date for nominations had closed and party lists were certified. The disruption to the elections if such an order were granted at this point is unthinkable. Given that, according to the Commission, the practice of submitting lists in the manner that the four parties have done has been conducted since as far back as 2011, there is no urgency which requires the matter to be dealt with under these circumstances.

[96] And given that the DA is a political party which is contesting the elections against the four parties, it cannot be ruled out that ‘changing the rules in the middle of the game’ may have unfair consequences. This is especially so when all the opposing parties point to the fact that the DA has itself previously indulged in the

same practice that it now complains about, including in the current elections. While I note the DA's denials, they illustrate the nature of the problem of relying, as it does, on subjective elements to determine whether single-name lists are lawful.

[97] It is no wonder that the DA acknowledges, though half-heartedly, that the conditional constitutional challenge is not appropriate for determination at this stage.

Costs

[98] The opposing political parties seek punitive costs for a variety of reasons, chief among which is the imputation of bad faith and fraud, which has been found to be without foundation. The other is the fact that the DA is guilty of the same conduct that it complains about, and that the proceedings have been brought frivolously and, in effect, as a political device.

[99] When taking into account the context in which the application is brought, which is election season, it is understandable that the debate amongst the parties is robust and charged. While the timing of the application may be unfortunate and appear opportunistic, this does not detract from the importance of the issues raised in the matter. They include the interpretation of items 17 and 20, which have not been clarified before, and which are important for our electoral system.

[100] There is accordingly no reason to deviate from the usual rule of this Court to not award any costs.

Order

[101] In the circumstances, the following order is made:

1. The following applications are dismissed:

1.1 The application for an order declaring the party lists submitted by the first to fourth respondents (the four parties) to be –

a. In bad faith and *in fraudem legis*;
b. In violation of ss 157(2)*(a)*, 19(2) and 19(3)*(*b) of the Constitution;
c. In violation of ss 1, 13(1)*(a)*, 14(1) of the Local Government: Municipal Electoral Act 27 of 2000 (the Municipal Electoral Act); and
d. In violation of item 11 of Schedule 1, and item 5 of Schedule 2 of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act). (*paras 1-1.4, notice of motion*)

1.2 The application for review of the decision of the fifth respondent (Commission), taken on 16 September 2026, to publish the party lists. (*para 2.2, notice of motion*)

1.3 The consequential relief sought in paragraphs 3 to 5 of the notice of motion.

2. The following applications are postponed *sine die:*

2.1 The application to declare the decision of the Commission of 16 September 2026 unconstitutional, unlawful and invalid) (*para 2.1, notice of motion*);

2.2 The conditional constitutional challenge (*paras 6 – 6.5.2, notice of motion*)

3. There is no order as to costs.

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MANGCU-LOCKWOOD, J

ACTING JUDGE OF THE ELECTORAL COURT

Appearances

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Counsel for First Respondent:	M Salukazana
Instructed by:	MVMT Attorneys, Sandton Webbers Attorneys, Bloemfontein
Counsel for Second Respondent:	MM Ka-Siboto F Sangoni M Zikalala
Instructed by:	England Slabbert Attorneys Inc, Cape Town Lovius Block Inc, Bloemfontein
Counsel for Fourth Respondent:	H J De Waal SC
Instructed by:	Lionel Murray Schwormstedt & Louw, Cape Town
Counsel for Fifth Respondent:	D Borgstrom SC M Tsele
Instructed by:	Barnard Inc, Bloemfontein
For Sixth Respondent:	
Instructed by:	The State Attorney, Pretoria