IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 11635/10

In the matter between:

MARIO GASPARE ORIANI-AMBROSINI, MP Applicant

And

MAXWELL VUYISILE SISULU, MP Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

AMICUS CURIAE'S AFFIDAVIT

I, the undersigned,

JACOBUS HERCULES VAN DER MERWE, MP

do hereby make oath and say that:

1. I am a Member of Parliament of the Republic of South Africa and serve in the National Assembly.
2. Unless otherwise indicated, the matters stated herein are within my direct and personal knowledge, and are, to the best of my knowledge and belief, true and correct. Where I make legal submissions, I do so on advice I have

received from counsel and the former long-serving Secretary of the National Assembly whom I consulted on the contents of this affidavit, which advice I believe to be correct.

3. I am a practicing attorney and I have been
    a. a Member of Parliament for 34 years, which makes me the most senior serving member of the National Assembly;
    b. the Chief Whip of the IFP for 17 years;
    c. a member of the Rules Committee of the National Assembly for 17 years;
    d. a member of the Programming Committee and the Chief Whips Forum of the National Assembly since their inception; and
    e. a member of the Judicial Service Commission for 14 years.

MY ADMISSION AS *AMICUS CURIAE*

4. On 29 April 2011, I caused a letter to be directed to Respondent's attorney of record in which, in terms of Rule 16A(2), Respondent's consent was sought to my admission as *amicus curiae* in the present dispute, indicating the exact contents on my intended submissions and the reasons for my intervention as they are set out below. On May 3 Respondent's attorney declined giving such consent without giving any reason for such a denial, as set out in "**Annexure JHVDM1**".
5. As a Member of Parliament I have an immediate and direct interest in any decision affecting the Rules of the National Assembly and my own power to introduce legislation in the National Assembly. I have intervened in this case as a matter of principle and not for self or political interest..

6. I have been informed of the contents of the hearing held in this case on March 9, 2011 and that during such hearing a number of issues relating to the parliamentary procedures arose. Parliamentary procedures are a mixture of factual and legal aspects, often the product of consolidated praxes and customs and, therefore, require, in order to be fully understood, the experience I have gained over three decades.
7. I am making this affidavit to provide answers to questions raised by this Honourable Court during the hearing of March 9, 2011. In so doing I am not suggesting that what is set out herein is necessary in order to this Honourable Court granting the relief sought in the Applicant's notice of motion. It would seem as if Applicant's case stands even without what is averred herein. However, because this is a matter of public importance which defines our democracy, this Honourable Court should be supplied with all information it wishes, even if it is *ad abundantiam*.

8. I submit that

   8.1 no prejudice is caused to Respondent who, by virtue of the duty of his office, is intimately familiar with anything averred here;

   8.2 this affidavit serves the ends of justice in a matter of public importance,

   8.3 this affidavit is mainly aimed at answering questions of parliamentary procedure raised by this Court,

   8.4 parliamentary procedures is a mixture of law and factual praxis requiring factual averments,

8.5 copy of this affidavit in draft form has been with Respondent's office since April 6 for consultation with Respondent on it; and

8.6 Respondent has had ample time to consider the contents of this affidavit and has sufficient time to answer it.

AMICUS CURIAE'S **SUBMISSIONS**

9. The Honourable Court questioned whether the introduction of MPs' Bills in the National Assembly would disrupt the Assembly's work. This question may suffer from the misconception that Bills are dealt with by, or debated in, the Assembly when introduced or tabled. Both in terms of Rule 247 and established worldwide parliamentary procedures, the introduction or tabling[1] of a Bill is limited to the Bill's publication in the Announcement, Tabling and Committee reports ("ATC") and in the official Gazette. Nothing is done in or by the Assembly. Once a Bill is so introduced or tabled, the Bill is automatically referred by the Speaker, in fact the Speakers' office, to the portfolio committee with competence over the Bill's subject matter. Once seized with the Bill, such committee can make a number of decisions in respect thereof. It can choose

    a. to bring the Bill up on its agenda; or

    b. to leave the Bill off the agenda, effectively for as long as it wants to, and even until it lapses in terms of Rule 298 once the National Assembly 's terms of office expires; or

    c. to deal with the Bill by

[1] Even though the definition of "tabling" in the Rules refers to "placing a document of the Table of the National Assembly" such practice no longer exists and no document has been so placed since 1994 and earlier.

i. rejecting it in a matter of minutes by voting against its desirability, and accordingly recommending its rejection by the Assembly, or

ii. processing the Bill with or without public inputs, including any hearing, at which point it can still reject it summarily, and recommend its rejection to the Assembly, or

iii. deliberating on the Bill, at which point it can

1. reject it, and recommend its rejection to the Assembly, or

2. pass it and recommend that the National Assembly approves it at second reading.

10. Only if by a majority vote the portfolio committee decides to pass the Bill, will that Bill be referred to, and dealt with, by the National Assembly in what are known as a second reading. The Bill itself is not really "read", but the Secretary of the Assembly reads only its title twice, and thereafter it is passed. Usually, there is a debate on the occasion of the second reading before the passing, but this is not always the case. The Programming Committee can choose that a Bill be read in, and passed by, the Assembly without any debate in cases of minor or non-controversial Bills. Therefore, the Assembly is not seized with an MP's Bill until and unless the portfolio committee, by majority, approves and refers that Bill to it for approval, or rejects it by majority and recommends its rejection by the Assembly.

11. It is possible, and it happens in other countries, that certain but not all MPs' Bills be given the opportunity of being presented in the Assembly before they

are referred to the relevant portfolio committee. Such presentation by the Bill's proponent does not involve a debate and may consist of as little as one or two minutes of the Assembly's time, and in any case may not exceed 15 minutes in terms of Rule 247(3)(a)(i). Such presentation is not a requirement. The Programming Committee and the Chief Whips Forum are competent to decide on these matters.

12. Therefore, by acceding to my prayers for the relief set out in the Notice of Motion, this Honourable Court will cause no disruption in the work of the National Assembly.

13. The Honourable Court questioned how MPs' Bills would be dealt with. We need to look at the broader context of the other activities conducted by MPs. In terms of Rules 94 to 99 and 105, an MP is entitled to move motions with or without notice and make Member's Statements. In terms of the Rules, this power is unlimited and unfettered by any majority rule. However, in practice the matter is different. Both the Programming Committee and the Chief Whips Forum control the agenda usually by consensus but, if needed, by majority rule and decide during what days MPs may be afforded an opportunity to put forward motions and member statements. This results in MPs not being able to conduct such activities on those days on which such opportunities have not been afforded on the agenda. In addition, an agreement is reached within such parliamentary structures on how many members' motions and members' statements by members of any given party can be accommodated on any given day on which they are given the opportunity to do so. Often each political party gets allocated three or four

motions and two members' statements, which the Chief Whip of a party distributes among his or her party's MPs. Yet, these agreed upon limitations and controls have nothing to do with the contents or merits of the intended motions or statements. Under the present Rules, which in this respect reflect universal democratic parliamentary practices, one's political opponents do not even know the contents of one's member's statements or notices of motion before one presents them, and no majority could prevent an MP from saying what he or she intends to say because such majority disagrees with the contents thereof. If this Honourable Court were to grant the relief sought in the Notice of Motion, in all likelihood the same practice will apply in respect of MPs' Bills, if parties agree to give MPs one or two minutes to present Bills in the National Assembly prior to them being referred to a portfolio committee. Again, there is no requirement that such presentation on introduction must occur.

14. The Honourable Court questioned whether allowing the introduction of MPs' Bills without any prior "permission" could open the flood gates and hinder the work of Parliament. This matter is to be placed in context.

    a. In 2009 the National Assembly met for only 40 days, in 2010 for only 46 days and 2011 for only 18 days thus far. Each meeting of the National Assembly starts at 2 p.m. or 3 p.m. and usually ends by 5pm. It is not unusual for the Assembly to meet for only 45 minutes or an hour.

    b. Each portfolio committee meets ordinarily once a week when the National Assembly is in session. It is not unusual for portfolio

committees to meet only once every two weeks, averaged out over the period allocated for committee meetings. This enables me and others colleagues of mine to serve on as many as nine portfolio committees simultaneously.

c. Parliament as a whole has thus far conducted its business for less then one sixth of the time available to it if its members were to work an ordinary 42-hour working week during merely 42 of the 52 weeks in a year.

d. The National Council of Provinces has a less demanding workload, as it works as much as the National Assembly when dealing with Bills contemplated in section 76 of the Constitution, but much less than it in respect of Bills which do not deal with provincial matters as contemplated in section 75 of the Constitution.

15. These statistics reveal that Parliament is hardly overworked and has plenty of time and opportunity available to consider MPs' Bills.

16. The Honourable Court wondered whether this application, launched by the Applicant in his individual, but not personal, capacity as an MP, is supported by our Party. It is fully so, as set out in paragraph 22 of Applicant's Reply Affidavit [page 326 of the record]. More explicitly, I can reassure this Honourable Court that this application has the full political backing of our party, of which I am the Chief Whip, and its leader the Hon. Prince Mangosuthu Buthelezi, MP as well as other parties whose representatives have conveyed to me as much.

17. The Honourable Court questioned whether allowing MPs to introduce Bills without any prior permission or scrutiny of their Bills' merits may lead such MPs to act irresponsibly or introduce what this Honourable Court referred to as outrageous Bills. This is not so.

    a. There are different layers of party discipline which MPs are subjected to in South Africa more than in other democratic countries.

        i. MPs are subjected to the disciplinary oversight of their respective Whips and Chief Whips.

        ii. MPs' actions are customarily approved and mandated by their party caucus meeting every Thursday when Parliament is in session, as the introduction of Applicant's Bill and this application were.

        iii. In terms of section 47(3)(c) of the Constitution, the office of an MP is *ipso facto* vacated if, for any reason, the membership of that MP in the political party which elected him or her is terminated. In terms of the constitutions of many political parties deposited with the Independent Electoral Commission, including those of the ANC, the DA and the IFP, the governing body of such parties may terminate the membership of an MP for any reason and at any time. The legitimacy of this power has been recently upheld by the Pietermaritzburg High Court in the unreported case 8622/10 in the matter between Veronica Zanele Magwaza-Msibi and Inkatha Freedom Party. This means that

MPs cannot possibly act in a manner which displeases their party's governing body, under pain of a summary expulsion from that party as well as Parliament.

iv. What is outrageous for one, or at one time in history, may be conventional wisdom for others or at different time. For instance, for decades Alfred Widman MP tabled a Bill to ban smoking in offices: an outrageous idea at the time. Often Private Members Bills are the incubators of great ideas the time for which has not yet come.

v. All MPs are, or ought to be, ultimately accountable to the electorate for the wisdom of their action, or lack thereof.

18. The Honourable Court questioned the value of the comparative references. A great deal of time was spent on comparative experience which shows that no other democratic parliament requires MPs to secure their opponents' prior permission before they may introduce a Bill. However, not sufficient emphasis was placed on why this Court should take such experience into account. The Constitution requires this Honourable Court to do so. In section 57, the Constitution gives the National Assembly the power to adopt Rules for its proceedings. This power is not unlimited, and the discretion thereunder must be informed but the requirement to provide for the participation of minority parties "in a manner consistent with democracy" as per section 57(2)(b). The meaning of the word "democracy" is different from the expression "this constitution" used elsewhere. For instance, section 39(3) limits the recognition to common law to its consistency with the bill of rights,

while section 211(1) limits the recognition of customarily law to its consistency with the Constitution. The word “democracy” refers to something beyond the Constitution itself. It is not a reference to the democracy established by our Constitution only, as otherwise the words “this constitution” would have been employed, but refers to the abstract notion made out of the “values” referred to in section 1 of the Constitution. The features of this notion are to be found in that which is common to democracies around the world. The limitation on the power of MPs to introduce legislation is anything but common in democracies.

19. The Honourable Court questioned what really happens in the Private Members’ Bills Committee tasked by the Rules to give or withhold permission. Unfortunately, section 10 of the Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 (Act No. 4 of 2004) bars me from giving evidence to this Court as per the contents of the minutes of this Committee or anything that Parliament does. Any other qualified witness may, but as an MP I may not. However, the scope of application of section 10 of said Act is limited to MPs and members of staff of Parliament. This Honourable Court may rely on the averment set out in the **affidavit of Anthony Christopher Mitchell** filed evenly herewith.

20. The Honourable Court suggested that the purpose of the Applicant’s prayer for relief is that of escaping the application of the rule of the majority. Obviously the rule of the majority is quintessential to democracy. The majority must decide and must have a monopoly on the output; but not on the inputs.

Under the Constitution majority power has two limits, a substantive and a procedural one, viz.:

a. no majority, no matter how large, can infringe upon inalienable human rights; and

b. any majority must exercise its power and decide through the democratic method, which includes transparency, accountability, public input and the role of parliamentary minorities ex section 57(2)(b), the most important feature of which is the power to introduce legislation, hold the majority accountable and provoke public debate.

In paraphrasing Voltaire's famous aphorism reflective of the call for majoritarianism "*the silence of reason gives birth to monsters*", Bertrand Russell put it better than I could ever do: "*in the silence of dialogue, reason gives birth to monsters*", which reflects the essence of democracy as a dialectic method based on a plurality of views and inputs.

21. The Honourable Court questioned whether the relief sought in the Notice of Motion would be self-implementing. It is. It has been carefully crafted. By declaring the unconstitutionality of, and surgically removing, the portion of the Rules identified in the relief sought, the entire cancer is taken out. The remainder of the Rules read consistently, coherently and aptly so as to regulate the introduction of Bills by MPs. As a consequence of the declaration of unconstitutionality sought as a relief, the Assembly can redraft some of the aspects of the Rules, but does not need to do so. In this case the Court is not asked to redraft rules or direct the Assembly on what to do. This Honourable

Court is merely asked to cut off that which is rotten with unconstitutionality, thereby abiding by the peremptory injunction of section 171(1)(a) of the Constitution, with the awareness that the remainder of the Rules forge a new and healthy body of provisions capable of immediate, efficient and coherent application.

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DEPONENT

I certify that the Deponent has acknowledged that he knows and understands the contents of this declaration, which was signed and sworn to before me at Cape Town on this 3rd day of May 2011, the regulations contained in Government Gazette notice number R1258 of 21 July 1972, as amended by Government Notice number R1648 of 19 August 1977, by Government Notice R1428 of July 11 1980, and by Government Notice number R774 of 23 April 1982, having been complied with.

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COMMISSIONER OF OATHS

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 11635/10

In the matter between:

MARIO GASPARE ORIANI-AMBROSINI, MP	Applicant
And	
MAXWELL VUYISILE SISULU, MP	Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	

AFFIDAVIT
OF
ANTHONY CHISTOPHER MITCHELL

I, the undersigned,

ANTHONY CHISTOPHER MITCHELL

do hereby make oath and say that:

1. Unless otherwise indicated, the matters stated herein are within my direct and personal knowledge, and are, to the best of my knowledge and belief, true and correct

2. I am employed as a senior parliamentary researcher by the Chief Whip of the Inkatha Freedom Party. I hold a B.COM and a LL.B degree, have completed my legal articles and passed the Board's exam under the auspices of the Cape Law Society. The analysis of parliamentary documents is part of my job.

3. I have reviewed the minutes of the Private Members' Bills Committee tasked by the Rules to give or withhold permission to the introduction of Bills by MPs.

4. The only minutes which appear to be available are minutes of meetings since 2008. Minutes before that time have either been lost or are reportedly not available as more fully shown in the correspondence from our offices attached hereto as annexure "**ACM 1".**. I received from the committee secretary some hand-written notes relating to the period 2007 to 2008 which supposedly formed the basis on which the now unavailable minutes for that period were drafted.

5. The table, attached hereto as annexure "**ACM 2**", shows how since 2007 the Private Members' Bills Committee has declined to give permission to the introduction of a variety of proposed Bills for reasons which when analyzed appear as political or policy reasons. For the aforesaid reason, the outcome of certain deliberations in 2007 and 2008 remains unrecorded and it is possible that more proposals for a Bill were dealt with in that period.

6. The proposal for a Bill submitted by the Hon. Mentor MP of the ANC was not given permission because it was deemed unconstitutional even though such Bill was drafted and requested by the Human Rights Commission.

7. The latest and most exemplary proof of the aforesaid path of seemingly political vetting of MPs' Bills is to be found in the Committee's decision to withhold permission for the introduction of the intended Bill proposed by the Hon. Lance Greyling, MP, attached hereto as annexure "**ACM 3**".

    a. When dealing with this proposed Bill, on its own accord, the Committee decided to apply and use as the sole criterion of its discretion the new draft rules passed by the Rules Committee but not yet adopted by the National Assembly. In applying these draft Rules the Committee ruled that the Hon. Greyling's Bill could not be given permission because it found his Bill to be "contrary to the spirit of the Constitution".

    b. This Bill intends merely and exclusively to require political parties to disclose the source of their private funding as a condition for their receiving public funding. This is standard practice in most established democracies.

    c. The patent absurdity of this decision suggests that any vetting entrusted to politicians will result in a political vetting, irrespective of the underpinning criterion.

8. Notwithstanding my being an experienced and skilled researcher, and my having full access to Parliament's information and the possibility to call on the assistance of Parliament's human resources, it has been difficult for me to access information about the contents of proposals for Bills since 2008 and it has been impossible in respect of the period before 2008. I doubt that a member of the public could have accessed the information I managed to

retrieve, little as it is. Had such proposal been tabled in Parliament as Bill, they would have been in the public record for ever, and both I and any member of the public would have been able to easily access and evaluate them, both in respect of what I found and what still eludes me.

_____

DEPONENT

I certify that the Deponent has acknowledged that he knows and understands the contents of this declaration, which was signed and sworn to before me at Cape Town on this 3rd day of May 2011, the regulations contained in Government Gazette notice number R1258 of 21 July 1972, as amended by Government Notice number R1648 of 19 August 1977, by Government Notice R1428 of July 11 1980, and by Government Notice number R774 of 23 April 1982, having been complied with.

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COMMISSIONER OF OATHS

ANNEXURE ACM 1

From: Ashlinn Barendilla [mailto:abarendilla@ifp.co.za]
Sent: 05 April 2011 12:48 PM
To: amamabolo@parliament.gov.za
Cc: Mario GR Oriani-Ambrosini
Subject: FW: Re: Minutes for Private members Committee
Importance: High

Dear Mr A Mamabolo

The email below refers, I have been requested to place on record the many and extended attempts and requests made to acquire copies of the minutes of the Private Members Legislative Proposals Committee from the Committee Secretary and yourself. Accordingly I hereby memorialise such circumstances as follows:

1. I contacted Barbara Loots on March 17, 2011 and requested that she email me all the minutes of the Private Members Legislative Proposals Committee meetings. She informed me that she only had minutes for the meeting held in 2010 and 2011 and subsequently emailed me those minutes. She also gave me the contact number for the Cluster Manager Mr Albert Mamabolo.
2. On March 17, 2011 I contacted Mr Mamabolo and asked him if he would be able to assist me in getting the minutes of the Private Members Committee that were held before January 2010. Mr Mamabolo told me that the Secretary who use to work in Barabara's place has left the employ of Parliament and that he is not sure if they would be able to trace the minutes. He said that he will speak to some other staff members and then contact me with any information regarding the minutes.
3. Two week s went by without any call from Mr Mamabolo. I then tried contacting him at his office a few times without any success as his office phone would remain unanswered.
4. On April 4, 2011 I once again contacted Mr Mamabolo's office. Mr Mamabolo answered the phone and informed me that he was unable to trace any of the Private Members Committee minutes of meetings that were held before January 2010. I then sent Mr Mamabolo an email request for the minutes to which he agreed to reply. I have not received an answer to the email.
5. On April 5, 2011 I tried to contact Mr Mamabolo at his office without any success.

Kind Regards,
Ashlinn Barendilla
Secretary to the IFP Caucus Chairperson
Tel: +27 21 403 2277
Fax: +27 86 658 9462
Email: abarendilla@ifp.co.za

From: Ashlinn Barendilla [mailto:abarendilla@ifp.co.za]
Sent: 04 April 2011 03:38 PM
To: 'amamabolo@parliament.gov.za'
Subject: Re: Minutes for Private members Committee
Importance: High

Dear Mr Albert Mamabolo

Re: Minutes for the Committee on Private Members' Legislative Proposals and Special Petitions

Following the request by Hon. Dr MG Oriani-Ambrosini MP for all the minutes of the Committee on Private Members' Legislative and Special Petitions meeting, I have only received minutes from meetings held in 2010 and 2011. I have been informed by the committee secretary, Barbara Loots, that she is not in possession of any minutes of meetings that took place before January 2010.

I would appreciate any assistance you could offer in tracing the minutes for the committee meetings that were held in the past.

Kind Regards,

Ashlinn Barendilla
Secretary to the IFP Caucus Chairperson
Tel: +27 21 403 2277
Fax: +27 86 658 9462
Email: abarendilla@ifp.co.za

ANNEXURE ACM 2

PRIVATE MEMBERS' BILLS

DATE	SUBJECT MATTER	PROPONENT [PARTY]	DECISION	REASON GIVEN
11/2007	Draft Constitution 18th Amendment Bill: Systems of the Executive	Hon Prince MG Buthelezi [IFP]	Declined	?
20/5/2008	Amendment to Remuneration of Public Office Bearers Act 20 of 1998	Hon S Seaton [IFP]	Lapsed	?
27/5/2008	Amendment of Employment Equity Act 55 of 1998	Hon A Dreyer [DA]	?	?
6/6/2008	Repeal of St Andrews College, Grahamstown (Private) Amendment Act, No 82 of 1985	Hon P A Gerber [ANC]	?	?
6/6/2008	Repeal of St Andrews College, Grahamstown (Private) Amendment Act No 15 of 1932	Hon PA Gerber [ANC]	?	?
6/6/2008	Repeal of The Diocesan College Rondebosch (Private) Act 7 of 1942	Hon PA Gerber [ANC]	?	?
6/6/2008	Repeal of Natal Ecclesiastical Properties and Trust Amendment(Private) Act, No 60 of 1975	Hon P A Gerber [ANC]	?	?
23/9/2009	Land and Agriculture Bank: Appointment to board	Hon P. Pretorius [DA]	Declined 2/3/2011	Legislation should not be amended on a piecemeal basis
23/2/2009	Amend Human Rights Commission Act	Hon V. Mentor [ANC]	Declined 26 /3/2010	likely to be unconstitutional
19/3/2010	Removal of Presidential Pardon	Hon P. De Lille [ID]	Declined 15/9/2010	Resignation of Hon P. De Lille as an MP prohibited her from proceeding with the Bill
19/3/2010	Removal of Presidential Pardon	Hon J. Selfe [DA]	Declined 15/9/2010	Would encroach upon President's constitutional

				power to pardon
7/5/2010	Prohibition of party political office bearers, public representatives as well as parties from contracting with the state	Hon I. Davidson [DA}	Declined date not minuted	Not minuted
7/5/2010	Choice on termination of pregnancy	Hon C. Dudley [ACDP]	Declined Date not minuted	Not minuted
1/6/22010	Correct certain anomalies in the Executive Members ethics Act	Hon I. Davidson [DA]	?	?
1/6/2010	Repeal South African Boxing Act	Hon D. Lee [DA]	Declined 9/3/2011	Pre-empts national legislation soon to be introduced by executive
20/10/2010	Amendment of Labour Relations Act	Hon I. Ollis [DA]	?	?
2/3/2011	Regulation of private funding of political parties	Hon. L. Greyling [ID]	Declined	Contrary to the spirit of the constitution

ANNEXURE ACM 3

Submission on Private Members Bill to Regulate Private Political Party Funding Submission by Lance Greyling, MP Independent Democrats

Introduction

Private funding of political parties is an issue that has starkly come into focus over the last few months and there have been calls from both the public and from senior members of the ruling party for legislation to be formulated that can provide much needed regulations. As our democracy matures, it is incumbent on all of us as political parties to assess where our current democratic framework is falling short of the constitutional vision, whether that is in terms of electoral reform or in this instance the vexing issue of private funding of political parties. It is my considered belief that the absolute lack of regulations governing the private funding of political parties is a major gap in our democratic framework and it is one that now needs to be urgently rectified. All mature democracies around the world have instituted some form of regulation governing the private funding of political parties, with greater or less success it must be stated, and South Africa urgently needs to embark on a similar initiative.

I would therefore firstly like to thank the committee for giving me the opportunity to present on my legislative proposal which I believe is essential in promoting both good governance and in strengthening democracy in South Africa. This legislative proposal is the culmination of a campaign that has spanned over five years and has been fought not only by the Independent Democrats and myself but also by a number of public interest organisations that firmly believe that this legislation is sorely needed. In order to give substance to my legislative proposal I believe that it is firstly necessary to give a brief summation of the historical context of this campaign.

High Court Case brought by IDASA in 2004

Based on their belief in the public's Right to Know, IDASA on behalf of a number of civil society organisations brought a high court case against the four largest political parties represented in the National Assembly in 2004 asking that they disclose all of their private donors.

IDASA Position Paper – Regulation of Private Funding to Political Parties

In support of their high court challenge, IDASA brought out a position paper on the issue outlining a number of important arguments that are worth repeating in this submission:

"While the private financing of political life is desirable and necessary it also presents a problem if left unregulated. Secret donations from private sources, such as wealthy individuals or large corporations, can exert undue influence on the political system, secretly drowning out the interests of the poor and less powerful.

Private donations exert influence over politics in a number of ways and can have a

corrupting effect on government. Private donations to parties in return for an unauthorised favour or the promise of a favour if elected to office or accepting contributions from disreputable sources are two such examples.

Corruption can also have a distorting effect on the functioning of government and may skew socio-economic development and increase inequality and poverty. Progressive parties in government have been distracted from the wider socio-economic agenda by donations from big business.

Trust in democracy can also be undermined. When public policy decisions are made, or are perceived to be made, on the basis of political contributions, not only will policy be suspect, but government will not be seen as accountable to the people, and the principles of participation and legitimacy will be undermined.

In a country such as South Africa, with profound socio-economic disparities and demographic differences, money in politics has the very real prospect of compromising the priorities of the public agenda and eroding democratic gains. "

Outcome of the Court Case

Although the judge in the case did not ultimately rule in their favour he did make the following important statement in his judgment:

"[this decision] does not mean that political parties should not, as a matter of principle, be compelled to disclose details of private donations made to their coffers…[Idasa] have nevertheless made out a compelling case – with reference both to principle and comparative law – that private donations to political parties ought to be regulated by way of specific legislation in the interest of greater openness and transparency".

Noting in conclusion that Idasa had "raised matters of great public interest and concern", it is clear that the Court relied substantially on the assertions made by the political parties, and the ANC in particular, that a legislative process is the best way to design the regulation of private donations.

Ruling Party's Commitment to Legislation

In its Heads of Argument, the ANC stated 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".

The ruling party further gave the commitment that it would be bringing to Parliament such legislation in the near future. Unfortunately since that judgement five years ago such legislation has not been brought to Parliament.

It is my absolute conviction that this legislation is now desperately needed so as to promote the principles of good governance and strengthen our multiparty democracy. It is a sad fact that almost all of the biggest scandals that have occurred in our democracy since 1994 have in some way been due to the lack of party funding regulation. These have ranged from the Arms Deal, Oilgate, Roodefontein Golf Estate, the Harksen debacle and the Brett Kebble intrigues to name just a few.

What should also be evidenced in the above examples is that almost all political parties have been compromised by the lack of such regulations and it is in the interest of all political parties as well as the public at large that such legislation is now enacted.

Form of such Legislation

Unfortunately when this issue has been discussed it has often been reduced to the simple point of disclosure of party donors. I believe that this is too simplistic for an issue that is extremely complex. There are a number of unintended consequences that one has to avoid in drafting such legislation which therefore requires a great deal of thought and debate around a number of other issues. I have merely listed four issues that I think should form part of such overarching legislation.

1) Disclosure above a Certain Amount – This legislation should not force every donor to reveal their political affiliation, particularly if the individual is wanting to make a small private donation to the party of their choice. A threshold should therefore be set such as all donations above R20 000 or R50 000 should be disclosed to the public.

2) Ban on Foreign Donations – In a cursory study of other democracies I have found this to be a common thread. Most democracies including the UK, US and Ghana ban donations from foreigners including governments, corporations and individuals. This is something we should certainly consider.

3) Restrictions on Election Expenditure – This is in fact one of the best ways in which to level the electoral playing field and ensure that a party's message is more important than its money in an election. A number of countries have in fact enacted such restrictions and this is something that the proposed legislation should consider.

4) Ban on political parties doing business with the State – This is a very important issue if one wants to avoid massive conflicts of interest where a ruling party in the country or in a province is able to financially benefit from a government contract. This practice should definitely not be permitted within the ambits of this legislation.

Conclusion

I hope I have made the case adequately for the dire need for this legislation. In fact almost all political parties represented in Parliament have at some stage or another publically expressed their support for such legislation. The ruling party has even passed a resolution at their Polokwane Conference on this very issue. This issue should no longer just be debated in the media or at conferences but should now rather be debated in Parliament and legislation must be drafted. I recognize the complexities of this issue and the fears that that some political parties have with regards to this proposed legislation. I believe, however, that these fears can be addressed and some of the anticipated loopholes closed if we are able to engage in a truly multiparty process that displays the political will to finally regulate this form of political activity. Our country needs it, our democracy requires it and the public at large is demanding it! Let us show political leadership and finally get it done.