

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 333/23

In the matter between:

CORRUPTION WATCH (RF) NPC

Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Second Respondent

COMMISSION FOR GENDER EQUALITY

Third Respondent

INFORMATION REGULATOR


Fourth Respondent

NOTICE OF SERVICE AND FILING

PLEASE TAKE NOTICE THAT the Fourth Respondent hereby serves and files the following:

1. Explanatory Affidavit – Faith Dikeledi Pansy Tlakula

DATED AT BRAAMFONTEIN ON THIS 14th DAY OF MARCH 2024.



THE INFORMATION REGULATOR

Fourth Respondent

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2001

Tel: 010 023 5200

Ref: Jaco Jansen

Email: JJJansen@inforegulator.org.za

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT

AND TO: POWER & ASSOCIATES

Per: Tina Power

Attorneys for the Applicant

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Ref: PSICW-202212

By Email

AND TO: SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

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Email: zngoma@parliament.gov.za

By Email

AND TO: THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Second Respondent

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PRETORIA, 0002

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AND TO: COMMISSION FOR GENDER EQUALITY

Third Respondent

2 Kotze Street, Constitution Hill, Braamfontein

JOHANNESBURG, 2017

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By Email

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FOURTH RESPONDENT'S EXPLANATORY AFFIDAVIT

I, the undersigned,

FAITH DIKELEDI PANSY TLAKULA

do hereby make oath and state that:



1. I am the Chairperson of the fourth respondent, being the Information Regulator ("the Regulator").
2. I am duly authorised to depose to this affidavit on behalf of the Regulator by virtue of my position and the duties and functions that are associated with such position. I depose to this affidavit in my official capacity.
3. The contents of this affidavit fall within my personal knowledge, save where the context indicates to the contrary, and are true and correct.
4. I have read the founding affidavit deposed to by Karam Singh, the Executive Director of Corruption Watch on behalf of Corruption Watch (the applicant in the above matter).
5. The Regulator has elected to file a notice to abide by the decision of the court. However, the Regulator wishes to shed light with respect to the interpretation of certain sections of the Protection of Personal Information Act 4 of 2013 ("POPIA"), to assist the court as it relates to the processing of personal information in the process of appointing the prospective Chairperson and members of the Commission for Gender Equality ("the Commission").
6. The Regulator does not intend to oppose the application, or the relief sought by the applicant in the above matter. Accordingly, the Regulator will not respond to the applicant's affidavit *ad seriatim*.
7. I make this affidavit in relation to the interpretation of POPIA regarding the processing of personal information as it relates to the publication of the Curriculum Vitae ("CVs") of the prospective Chairperson and members of the Commission during the process of appointing them to the Commission.
8. This affidavit will not address any other legal or factual averments which are not the subject of this application.
9. I will first provide a brief explanation on the relevant definitions in POPIA, before continuing with the background to the establishment and mandate of the Regulator.



Thereafter I will attempt to provide guidance to the above Honourable Court on the importance of personal information and how it is to be dealt with.

RELEVANT DEFINITIONS OF POPIA

10. I will hereunder quote the relevant definitions in POPIA for the Honourable Court to take cognisance of. However, I will not burden this affidavit by quoting definitions word-for-word.
11. A “data subject” means the person to whom the personal information relates. This could refer to the prospective Chairperson and members of the Commission.
12. “Personal Information” is widely defined in POPIA but in essence includes information that identifies a person (which can refer to both a natural person or a juristic person) such as their race, gender, sex, employment history, identifying number, e-mail address, physical address, telephone number, location information, correspondence sent by a person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence. Personal information can therefore relate to the prospective Chairperson and members of the Commission.
13. “Processing” means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including-
 - (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation, or use;
 - (b) dissemination, by means of transmission, distribution, or making available in any other form; or
 - (c) merging, linking, as well as restriction, degradation, erasure, or destruction of information.
14. A “responsible party” means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information. In the context of this matter, the first and second respondents are regarded as responsible parties as they process the personal information of the prospective Chairperson and members of the Commission.

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15. I will make use of the above terms throughout this affidavit and trust that this will assist the above Honourable Court when reading this affidavit.

ESTABLISHMENT AND FUNCTIONS OF THE REGULATOR

16. The Regulator is an independent institution established in terms of section 39 of POPIA. It has jurisdiction throughout the Republic of South Africa and is subject only to the Constitution and to the law and must be impartial and perform its functions and exercise its powers without fear, favour, or prejudice.

17. It exists to promote the protection of personal information processed by public and private bodies and to promote access to information. The Regulator is empowered to exercise its powers and perform its functions in accordance with POPIA and the Promotion of Access to Information Act 2 of 2000 ("PAIA"). For purposes of this affidavit, I will only focus on the relevant POPIA sections and principles.

18. The mandate of the Regulator that is relevant to this affidavit include *inter alia*: to provide education by promoting and understanding and acceptance of the conditions for the lawful processing of personal information, and the objects of those conditions; and giving advice to data subjects in the exercise of their rights, as envisaged in sections 40(1)(a)(i) and (iv) of POPIA.

THE PURPOSE AND INTERPRETATION OF POPIA

19. The purpose of POPIA is provided for in sections 2 which includes the following:

"The purpose of this Act is to-

(a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at-

(i) balancing the right to privacy against other rights, particularly the right of access to information; and



(ii) protecting important interests, including the free flow of information within the Republic, and across international borders.

(b) regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information”.

20. Section 3 of POPIA provides the application and interpretation of the Act, and more relevant to this affidavit, section 3(2) and (3) of the Act provides that the Act must be interpreted in a manner that:

“(2)

(a) This Act applies, subject to paragraph (b), to the exclusion of any provision of any other legislation that regulates the processing of personal information and that is materially inconsistent with an object, or a specific provision, of this Act.

(b) If any other legislation provides for conditions for the lawful processing of personal information that are more extensive than those set out in Chapter 3, the extensive conditions prevail.

(3) This Act must be interpreted in a manner that –

(a) gives effect to the purpose of the Act set out in section 2; and

(b) does not prevent any public or private body from exercising or performing its powers, duties, and functions in terms of the law as far as such powers, duties, and functions relate to the processing of personal information and such processing is in accordance with this Act or any other legislation, as referred to in subsection 2 that regulates the processing of personal information.”

CONDITIONS FOR LAWFUL PROCESSING

21. Section 4 of POPIA provides a brief overview of the 8 conditions of lawful processing of personal information, which are as follows:

- Accountability

- The responsible party must ensure that the conditions and all the measures set out in POPIA that give effect to such conditions are complied with at the time of determining the purpose and the means of the processing.
- Processing limitation
 - Personal information may only be processed in a fair and lawful manner and only with the consent of the data subject.
- Purpose specification
 - Personal information may only be processed for specific, explicitly defined, and legitimate reasons.
- Further processing limitation
 - Personal information may not be processed for a secondary purpose unless that processing is compatible with the original purpose.
- Information quality
 - The responsible party must take reasonable steps to ensure that the personal information collected is complete, accurate, not misleading, and updated where necessary.
- Openness
 - The data subject whose information is collected must be aware that his, her or its personal information is being collected and the purpose for which such personal information will be used.
- Security safeguards
 - Personal information must be kept secure against the risk of loss, unlawful access, interference, modification, unauthorised destruction, and disclosure.
- Data subject participation
 - Data subjects may request whether their personal information is held, as well as the correction and/or deletion of any personal information held about them.



22. It should be borne in mind that the constitutional right to privacy entrenched in section 14 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") is further contained in section 5 of POPIA which provides that a data subject has the right to have his, her or its personal information processed in accordance with the conditions for the lawful processing as referred to in Chapter 3 of POPIA and summarised above.
23. It is important for a responsible party who processes personal information to adhere to all the above conditions, save in respect of applicable exemptions and exceptions, failing which there will be non-compliance with POPIA and the Regulator may conduct an investigation or assessment of the responsible party.
24. In the context of this affidavit, the responsible party for the purpose of the publication of CVs of the prospective Chairperson and members of the Commission, is the first respondent. The data subjects are the shortlisted candidates whose CVs stood to be published for the purposes of facilitating public participation during the recommendation process.
25. In response to paragraphs 89 to 92 of the applicant's founding affidavit, I will provide the Regulator's view with respect to how some of the above conditions apply with respect to the publication of CVs of the prospective Chairperson and Members of the Commission.
26. It should be noted that some of the information which the applicant requests publication by the first respondent, as indicated in paragraph 85 of the applicant's founding affidavit, includes education and employment history, which fall within the ambit of personal information as defined in terms of section 1 of POPIA.
27. Section 11(1)(a) of POPIA provides that personal information may be processed if the responsible party has obtained consent from the data subject. The consent must be explicit, informed, and obtained freely and voluntarily as envisaged in section 1 of POPIA.
28. However, the first respondent will not have to comply with section 11(1)(a) of POPIA if one or more of the justifications for the lawful processing of personal information listed in section 11(1)(b) to (f) of POPIA are applicable. For example, in terms of section 11(1)(e) of POPIA it is not necessary for the responsible party to obtain consent of a data



subject before processing his, her or its personal information if such processing is necessary for the proper performance of a public law duty by a public body.

29. The first respondent and by implication the National Assembly's Portfolio Committee on Women, Youth and Persons with Disabilities, is a public body as defined in terms of section 1 of POPIA. Public body is defined as:

"(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when -

(i) exercising a power or performing a duty in terms of the Constitution or a provincial Constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation."

30. The first respondent is therefore an institution exercising a power or performing a duty in terms of the Constitution.

31. Section 11(1)(e) of POPIA provides that "personal information may only be processed if processing is necessary for the proper performance of a public law duty by a public body". The first respondent therefore performs a public law duty in terms of section 59(1)(a) of the Constitution. The first respondent could rely on section 11(1)(e) of POPIA as justification for the lawful publication of the CVs of the Chairperson and Members of the Commission. However, it must redact personal information such as their ID numbers and contact details, before publishing such CVs.

32. POPIA supports an approach that strikes a balance between the right to privacy against other rights, particularly the right of access to information. Furthermore, it does not prevent public or private bodies from exercising or performing their powers, duties and functions in terms of the law. However, if such powers, duties and functions relate to the processing of personal information, such processing must comply with POPIA. Therefore, POPIA does not prevent the Portfolio Committee from exercising or performing its powers, duties and functions in terms of section 59(1)(a) of the Constitution, which provides for public involvement in the legislative and other processes of the National Assembly and its committees.



CONCLUSION

33. I attempted in this affidavit to explain to the above Honourable Court the importance of personal information in terms of POPIA and the obligation of responsible parties to ensure that it is processed in accordance with the conditions for lawful processing.

34. I trust that this affidavit will be of assistance to the above Honourable Court when hearing the argument for this matter and arriving at its judgment.



DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this the 13 day of March 2024, and that the Regulations contained in Government Notice R. 1258 of 21 July 1972, as amended, have been complied with.



COMMISSIONER OF OATHS

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