

**THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE 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

**NTHABISENG SEPANYA-MOGALE**

Fifth respondent

**THANDO GUMEDE**

Sixth respondent

**BONGANI NGOMANE**

Seventh respondent

**PRABASHNI SUBRAYAN NAIDOO**

Eighth respondent

**LEONASHIA LEIGH-ANN VAN DER MERWE**

Ninth respondent

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**APPLICANT'S SUBMISSIONS**

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## INTRODUCTION

1. This matter concerns the National Assembly's constitutional obligation to facilitate public participation in the process to recommend persons to be appointed to chapter 9 institutions. The Speaker of the National Assembly does not dispute the existence of the duty to facilitate public involvement in these processes.<sup>1</sup>
2. The issue to be decided by this court is whether the public participation process adopted by the National Assembly to recommend persons to be appointed to the Commission for Gender Equality was reasonable.
3. These submissions demonstrate that the National Assembly failed to act reasonably because (1) it failed to provide access to relevant information; (2) the timeframe to provide submissions was unreasonable; and (3) the limit placed on the length of submissions was unreasonable.
4. These submissions have six parts. The first two briefly address this court's jurisdiction and the applicant's standing. The third and fourth part set out the legal principles governing public participation in Parliament's processes, and the context and importance of the recommendation process. The fifth part demonstrates why the National Assembly failed to reasonably facilitate public participation. The final part deals with remedy.

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<sup>1</sup> Speaker AA vol 3 p 251 para 8.

## **JURISDICTION**

5. The National Assembly's failure to reasonably facilitate public involvement implicates its constitutional obligation in terms of section 59(1)(a) of the Constitution.<sup>2</sup> This court has exclusive jurisdiction under section 167(4)(e) of the Constitution to decide whether Parliament has failed to fulfil a constitutional obligation.
6. The Speaker admits that this court has exclusive jurisdiction.<sup>3</sup>
7. This court has not yet had an opportunity to decide a matter concerning Parliament's duty to facilitate public involvement in its processes to recommend persons for appointment to chapter 9 institutions. For this reason, we submit that it is also in the interests of justice for this court to hear this application.

## **STANDING**

8. Corruption Watch brings this application in terms of section 38 of the Constitution in its own interest and in the public interest. Since 2016, Corruption Watch has monitored 11 recommendation processes to appoint leaders to key public institutions to ensure that these processes are transparent, merit-based, and include meaningful public participation.<sup>4</sup> The Speaker does not dispute the applicant's standing.<sup>5</sup>

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<sup>2</sup> *Mogale and Others v Speaker, National Assembly and Others* 2023 (6) SA 58 (CC) para 14.

<sup>3</sup> Speaker AA vol 4 p 288 para 141.

<sup>4</sup> Corruption Watch FA vol 1 p 15 para 25.

<sup>5</sup> Speaker AA vol 3 p 277 paras 82 – 83.

9. The Speaker does contend, however, that Corruption Watch refused to participate in the recommendation process.<sup>6</sup> The evidence demonstrates that Corruption Watch continuously sought to participate in the process and engaged with the Portfolio Committee, the Speaker, and the President about its concerns regarding the adequacy of the process.<sup>7</sup> We submit that this is not an opportunistic public participation challenge where no attempt was made to participate in the process.<sup>8</sup>

## THE OBLIGATION TO FACILITATE PUBLIC PARTICIPATION

10. The National Assembly has the constitutional obligation to “*facilitate public involvement in the legislative and other processes of the Assembly and its committees*”.<sup>9</sup> The obligation exists because South Africa is a constitutional democracy that upholds representative and participatory democracy.<sup>10</sup>
11. The purpose of public participation is “*primarily to influence decision-making processes that affect the will of the people*”.<sup>11</sup> “*Public participation is premised on the belief that those who are affected by a decision have the right to be involved in the decision-making process*”.<sup>12</sup> The political rights in the Constitution

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<sup>6</sup> Speaker AA vol 3 p 265 para 42.1.

<sup>7</sup> Corruption Watch FA vol 1 p 24 – 33 paras 50 – 71.

<sup>8</sup> *Mogale* paras 19 – 20.

<sup>9</sup> Constitution s 59(1)(a).

<sup>10</sup> *South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others* 2023 JDR 2331 (CC) para 28.

<sup>11</sup> *South African Iron and Steel Institute* para 28.

<sup>12</sup> *South African Iron and Steel Institute* para 28.

facilitate a continuing entitlement by the people to be involved in political decision-making.<sup>13</sup>

12. The majority judgment in *Matatiele Municipality* recognised that a commitment to a right to “*public participation in government decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect*”.<sup>14</sup>
13. This court has set a standard for public participation facilitated by the National Assembly.<sup>15</sup> Parliament and the provincial legislatures have also set their own standards in the Public Participation Framework (Framework) and the Practical Guide for Members of Parliament and Provincial Legislatures (Practical Guide).
14. Although the duty to facilitate public involvement has been developed by this court in the context of Parliament’s law-making processes, Parliament is constitutionally obligated to facilitate public involvement in all ‘other processes’ it is involved in.<sup>16</sup> The Speaker admits that Parliament has the obligation to facilitate public participation in recommendation processes and that the standard to be applied in determining whether it has met its obligation is one of reasonableness.<sup>17</sup>

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<sup>13</sup> *SA Veterinary Association v Speaker of the National Assembly and Others* 2019 (3) SA 62 (CC) para 18.

<sup>14</sup> *Matatiele Municipality and Others v President of the RSA and Others* 2007 (6) SA 477 (CC) para 66.

<sup>15</sup> *Mogale* para 33 with reference to the public participation cases that have been decided by this court.

<sup>16</sup> Constitution s 59(1)(a); *Matatiele Municipality* para 45.

<sup>17</sup> Speaker AA vol 3 p 251 – 252 paras 8 – 9, 14, p 276 para 78.

15. Below we address the content of the standard of reasonableness and its application to other processes of the Assembly and its committees.

### **The standard of reasonableness**

16. The standard for constitutionally appropriate public participation is “*one of reasonableness*”,<sup>18</sup> that “*depends on the peculiar circumstances and facts at issue*”.<sup>19</sup> This court has emphasised that “*regardless of the process Parliament chooses to adopt, it must ensure that ‘a reasonable opportunity is afforded to members of the public and all interested parties to know about the issues and to have an adequate say’*”.<sup>20</sup> A reasonable opportunity to participate is an opportunity capable of influencing the decision to be taken.<sup>21</sup>
17. In *Mogale*, reasonable public participation was assessed in light of the high standard that Parliament had set for itself in respect of public participation.<sup>22</sup> Parliament’s Framework sets the minimum norms and standards for public participation within the legislative sector.<sup>23</sup>

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<sup>18</sup> *South African Iron and Steel Institute* para 44.

<sup>19</sup> *Land Access Movement of South Africa and Others v Chairperson, National Council of Provinces and Others (LAMOSA)* 2016 (5) SA 635 (CC) para 60.

<sup>20</sup> *Mogale* para 35.

<sup>21</sup> *Mogale* para 35.

<sup>22</sup> *Mogale* para 38.

<sup>23</sup> Framework p 7, 30 para 7.2.

18. The Framework states that the first stage of public participation is to inform the public by providing balanced and objective information to assist the public in understanding the problems, alternatives and solutions.<sup>24</sup> Providing participants with the information they need to participate in a meaningful way is a core value of public participation.<sup>25</sup> Parliament recognises that access to information is an absolute prerequisite for effective public participation, and that the further stages of public participation cannot be undertaken without first providing information relevant to the public participation process.<sup>26</sup>
19. The Framework stipulates that the considerations in facilitating public involvement are based on what is appropriate in light of the specific process, content, importance, urgency, and the response from the public. These considerations are dependent on the nature of the process.<sup>27</sup>
20. This court has explained that “*reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case*”.<sup>28</sup> When dealing with the issues of reasonableness, “*context is all-important*”.<sup>29</sup>
21. This court has also identified factors that are important in determining whether Parliament has been reasonable in the context of public participation in the law-making process. These factors are (1) what Parliament itself has determined is

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<sup>24</sup> Framework p 28 – 29 para 6.2(1).

<sup>25</sup> Framework p 31 para 8.1

<sup>26</sup> Parliament’s public participation model series 4 p 18.

<sup>27</sup> Framework p 7.

<sup>28</sup> *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 127.

<sup>29</sup> *Doctors for Life* para 127.



reasonable and how it has decided it will facilitate public involvement; (2) the importance of the legislation and its impact on the public; and (3) time constraints and the potential expense.<sup>30</sup>

22. We submit that these factors are equally relevant and applicable to other processes of the National Assembly, with the necessary adaptations to cater for the context specific to the process. We address the context of the process to recommend persons for appointment to the Commission below.

## **THE SIGNIFICANCE OF THE COMMISSION**

23. The Commission is established by the Constitution to strengthen constitutional democracy.<sup>31</sup> The Commission is independent, subject only to the Constitution and the law, and must exercise its powers and perform its functions without fear, favour or prejudice.<sup>32</sup> Other organs of state must assist and protect the Commission to ensure its independence, impartiality, dignity and effectiveness, and may not interfere with its functioning.<sup>33</sup> The Commission is accountable to the National Assembly.<sup>34</sup>

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<sup>30</sup> *Mogale* para 37.

<sup>31</sup> Constitution s 181(1)(d).

<sup>32</sup> Constitution s 181(2).

<sup>33</sup> Constitution s 181(3), 181(4).

<sup>34</sup> Constitution s 181(5).

## Constitutional mandate

24. The Commission has a constitutional mandate to promote respect for gender equality and the protection, development and attainment of gender equality.<sup>35</sup> The Commission is a critically important chapter 9 institution that contributes to the constitutional project of transformation and whose oversight enhances governmental accountability.<sup>36</sup>
25. The Commission must fulfil its constitutional mandate in a country that faces a plethora of challenges regarding gender equality, including the feminisation of poverty, the feminisation and impact of HIV and AIDS on women, and gender-based violence.<sup>37</sup> Women continue to bear the brunt of inequality, poverty, and unemployment.<sup>38</sup>
26. Our courts have recognised the shame we face as a nation “*plagued by a scourge of gender-based violence to a degree that few countries in the world can compare*”.<sup>39</sup> The high number of sexual violence crimes places a premium on the rights to equality and human dignity.<sup>40</sup> Gender-based violence wreaks unabated

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<sup>35</sup> Constitution s 187(1).

<sup>36</sup> Corruption Watch FA vol 1 p 8 para 8; *Speaker of the National Assembly v Public Protector and Others* 2022 (3) SA 1 (CC) para 5.

<sup>37</sup> Corruption Watch FA vol 1 p 9 para 9.

<sup>38</sup> Corruption Watch FA vol 1 p 13 para 18.

<sup>39</sup> *Tshabalala v the State; Ntuli v the State* [2019] ZACC 48 para 61; *AK v Minister of Police* 2023 (2) SA 321 (CC) para 2;

<sup>40</sup> *Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others* 2024 JDR 4378 (GP) para 17.

destruction in our communities and hate crimes and discrimination against members of the LGBTQIA+ communities often go unchecked.<sup>41</sup>

27. Women hold numerous fundamental and important roles in our society. Consequently, these issues affect us all. The Commission has the constitutional mandate to address these issues. It is not surprising that there is a strong public interest in the selection of the leaders of this critically important institution.
28. To achieve its constitutional object and fulfil its challenging mandate, the Commission is empowered *inter alia* to (1) monitor, evaluate and make recommendations regarding the policies and practices of public and private bodies to promote gender equality; (2) evaluate any law likely to affect the status of women and to make recommendations to Parliament; (3) investigate gender-related issues; and (4) develop information and education programmes to foster public understanding of the promotion of gender equality and the role and activities of the Commission.<sup>42</sup>

### **Role of the commissioners**

29. The Commission's powers and functions are exercised through and under the supervision of a chairperson and members appointed to the Commission. The commissioners must be fit and proper persons, and are required to have a record of commitment to the promotion of gender equality and applicable knowledge or

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<sup>41</sup> Corruption Watch FA vol 1 p 13 para 18.

<sup>42</sup> Constitution s 187(2) read with Commission Act s 11; Corruption Watch FA vol 1 p 9 para 10.

experience with regard to matters connected with the objects of the Commission.<sup>43</sup>

30. The commissioners are responsible to (1) determine the strategic direction of the Commission; (2) ensure compliance with applicable laws; (3) preserve institutional autonomy and independence; (4) exercise fiduciary and oversight duties to ensure good corporate governance; (5) appoint a chief executive officer; and (6) undertake collective decision-making as a Commission, with individual responsibility for delivery on assigned work areas.<sup>44</sup>
  
31. The members of the Commission are vital for its effective functioning and fulfil a crucial role in advancing gender equality in South Africa.<sup>45</sup> This court has described the heads and commissioners of chapter 9 institutions as “*the guardians and promoters of our constitutional democracy*”.<sup>46</sup>
  
32. The Speaker admits the important role of the Commission, particularly in the context of the challenges faced in South Africa.<sup>47</sup>

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<sup>43</sup> Constitution s 193(1), Commission Act s 3(1).

<sup>44</sup> Corruption Watch FA vol 1 p 10 para 12.

<sup>45</sup> Corruption Watch FA vol 1 p 11 para 13.

<sup>46</sup> *Speaker of the National Assembly v Public Protector and Others* 2022 (3) SA 1 (CC) para 2.

<sup>47</sup> Speaker AA vol 3 p 276 para 76.

## The recommendation process

33. The importance of the role of the commissioners is reflected in the robust process for their appointment provided in the Constitution and the Commission for Gender Equality Act 1996.
34. The President appoints members of the Commission on the recommendation of the National Assembly.<sup>48</sup> The National Assembly recommends persons nominated by a committee of the Assembly and approved by a resolution of a majority of the Assembly.<sup>49</sup>
35. Public involvement in the recommendation process must be in accordance with section 59(1)(a) of the Constitution.<sup>50</sup>

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<sup>48</sup> Constitution s 193(4), Commission Act s 3(2).

<sup>49</sup> Constitution s 193(5), Commission Act s 3(2).

<sup>50</sup> Constitution s 193(6).

## **THE NATIONAL ASSEMBLY FAILED TO REASONABLY FACILITATE PUBLIC PARTICIPATION**

36. For all the reasons detailed below, the National Assembly did not meet its obligation to reasonably facilitate public involvement.

37. The National Assembly, through the Portfolio Committee on Women, Youth, and Persons with Disabilities, invited written submissions from the public on 24 shortlisted candidates. The invitation did not afford the public with an appropriate and meaningful opportunity to participate in the recommendation process because the public was not provided with access to relevant information, and the limit placed on the length of submissions as well as the timeframe within which to provide those submissions were unreasonable.<sup>51</sup>

38. The facts in this regard are not in dispute.

38.1 On 26 June 2022 the Portfolio Committee invited the public to nominate suitable candidates for appointment to serve as members of the Commission. The invitation stipulated the constitutional and legislated requirements for appointment and stated that a list of shortlisted candidates and their resumes would be published on Parliament's website to allow the public to comment on the suitability of the candidates.<sup>52</sup>

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<sup>51</sup> Corruption Watch FA vol 1 p 12 para 16.

<sup>52</sup> Corruption Watch FA vol 1 p 19 – 20 para 38, annexure KS1 vol 1 p 52, Speaker AA vol 3 p 278 para 88.

- 38.2 The Portfolio Committee convened on 23 and 24 August 2022 to shortlist candidates from the nominations and applications received.<sup>53</sup>
- 38.3 The Portfolio Committee published a call for comment on the suitability of the shortlisted candidates on 2 September 2022. The call for public comment was made in accordance with section 59(1)(a) of the Constitution. It listed the names of the shortlisted candidates and stipulated that the closing date for public comment is 16 September 2022 and comments must be submitted through an online form.<sup>54</sup>
- 38.4 The online form contained three fields that the public was required to complete and limited the comments section to 2000 characters, which is the equivalent of a word limit of approximately 285 to 500 words.<sup>55</sup>
- 38.5 An excel spreadsheet listing the full names and qualifications of each candidate was provided. No further information about the candidates was provided and the candidates' CVs were not published.<sup>56</sup>
- 38.6 The Portfolio Committee conducted interviews with the shortlisted candidates over a period of four days from 20 September 2022 until 23 September 2022.<sup>57</sup>

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<sup>53</sup> Corruption Watch FA vol 1 p 20 para 39, annexure KS2 vol 1 p 53, Speaker AA vol 3 p 278 para 89.

<sup>54</sup> Corruption Watch FA vol 1 p 20 – 21 para 40, annexure KS3 vol 1 p 71, Speaker AA vol 3 p 278 para 91.

<sup>55</sup> Corruption Watch FA vol 1 p 21 para 41, annexure KS4 vol 1 p 74, Speaker AA vol 3 p 278 para 91.

<sup>56</sup> Corruption Watch FA vol 1 p 21 para 42, annexure KS5 vol 1 p 75, Speaker AA vol 3 p 278 para 91.

<sup>57</sup> Corruption Watch FA vol 1 p 22 para 43, annexure KS6 – KS9 vol 1 – 2 p 76 – 124, Speaker AA vol 3 p 279 para 92.

- 38.7 On 26 October 2022 the Portfolio Committee announced ten candidates recommended to fill positions as members of the Commission.<sup>58</sup>
- 38.8 The Portfolio Committee filed its report with the National Assembly on 26 October 2022. The report provides an overview of the recommendation process. In the section on public participation, the Committee reports that it (a) agreed to an open and transparent process that caters for public participation in line with section 59(1) of the Constitution; (b) provided a platform for civil society to comment on all candidates because it is aware of the public interest on gender equality issues; (c) published the names of all candidates with their qualifications to facilitate public involvement; and (d) received a total of 656 comments relating to 22 of the shortlisted candidates with comments per candidate ranging from one to 99 comments.<sup>59</sup>
- 38.9 The report was adopted by the National Assembly on 1 November 2022. On 15 November 2022, the Portfolio Committee adopted a supplementary report following a request for clarification on the specific terms to be served by each of the recommended candidates.<sup>60</sup>

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<sup>58</sup> Corruption Watch FA vol 1 p 22 para 44, annexure KS10 vol p 125, Speaker AA vol 3 p 279 para 92.

<sup>59</sup> Corruption Watch FA vol 1 p 22 – 23 para 45, annexure KS11 vol 2 p 128, Speaker AA vol 3 p 279 para 92.

<sup>60</sup> Corruption Watch FA vol 1 p 23 para 48, annexure KS12 – KS13 vol 2 p 137 – 145, Speaker AA vol 3 p 279 para 95.



38.10 On 25 February 2023 the President announced the appointment of a chairperson and four new members to the Commission with effect from 1 March 2023.<sup>61</sup>

39. In its report to the National Assembly, the Portfolio Committee states that its process was guided by the Constitution and the Commission Act. It also states that it relied on the standard guidelines for the appointment of Commissioners to the Commission, which outline considerations to be taken into account in the recommendation process.<sup>62</sup> The guidelines state that there is a need to ensure that public participation in the recommendation process is enhanced.<sup>63</sup> The Portfolio Committee did not do so.

### **The failure to provide access to information**

40. This court has said that information is an absolute prerequisite for effective public participation.<sup>64</sup> Access to information in Parliament's processes includes information dissemination as well as subject specific information, information relating to issues of importance, and specific information relating to public hearings so that the public is able to meaningfully participate in the decision-making processes that affect their lives.<sup>65</sup>

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<sup>61</sup> Corruption Watch FA vol 1 p 24 para 49, annexure KS14 vol p 146, Speaker AA vol 3 p 279 para 95.

<sup>62</sup> Annexure KS11 vol 2 p 129 para 4, annexure PC11 vol 4 p 345 para 4.

<sup>63</sup> Guidelines p 2 para 1.

<sup>64</sup> *South African Iron and Steel Institute* para 30.

<sup>65</sup> Parliament's public participation model series 4 p 18.

41. Despite Parliament's own view that access to information is a core value of public participation<sup>66</sup> and a prerequisite to the further stages of public participation,<sup>67</sup> the Portfolio Committee did not provide the public with access to information regarding the candidates' knowledge, experience and record.<sup>68</sup>
42. The failure to provide access to relevant information renders the recommendation process unreasonable.
43. The minimum criteria for appointment as a commissioner include the requirement to be a fit and proper person with a record of commitment to the promotion of gender equality, and applicable knowledge or experience regarding matters connected with the objects of the Commission.<sup>69</sup>
44. To participate in a meaningful way, the public must know about the candidates to have an adequate say in a manner which may influence the decision to recommend a candidate. To know about the candidates, the public is entitled to information that is relevant to the minimum criteria for appointment including information on (1) educational background and qualifications; (2) employment history and experience; (3) skills and abilities; (4) areas of expertise and interests; (5) any potential conflicts of interest; (6) board positions, professional affiliations or memberships; and (7) any publications or similar information.<sup>70</sup>

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<sup>66</sup> Framework p 31 para 8.1.

<sup>67</sup> Parliament's public participation model series 4 p 18.

<sup>68</sup> Corruption Watch FA vol 1 p 37 para 85.

<sup>69</sup> Constitution s 193(1), Commission Act s 3(1).

<sup>70</sup> Corruption Watch FA vol 1 p 37 para 85.

45. None of this is meaningfully denied. In fact, it is confirmed by:

45.1 The guidelines which detail the selection criteria for commissioners and highlight relevant aspects of experience, knowledge, ability and traits to be considered in the recommendation process.<sup>71</sup>

45.2 The briefing provided to the Portfolio Committee regarding the criteria for shortlisting, which emphasised the factors to be considered in the shortlisting process and include (a) professional backgrounds; (b) engagement in board responsibilities; (c) knowledge base and activist experience; (d) experience in monitoring and evaluation; (e) demonstration of leadership, management and corporate governance; and (f) research output. It was explained to the Committee that some of these factors could be gleaned from the candidates' CVs.<sup>72</sup>

45.3 The Portfolio Committee's initial intention to publish the candidates CVs, appropriately redacted.<sup>73</sup>

45.4 The variety and depth of information relevant to the minimum criteria for appointment based on information provided in the candidates' CVs, apparent from the questions posed to the candidates during the interviews.<sup>74</sup>

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<sup>71</sup> Guidelines p 2 – 6 para 2.1, 2.2, 3.2.

<sup>72</sup> Annexure KS2 p 56 – 59.

<sup>73</sup> Annexure KS1 vol 1 p 52, annexure KS2 vol 1 p 69.

<sup>74</sup> Annexure KS6 – KS7 vol 1 – 2 p 91, 94, 97, 99-100, 108.

46. Instead, the Portfolio Committee provided a spreadsheet setting out the names and qualifications held by each candidate.<sup>75</sup> This did not allow for an assessment of the candidates suitability to be recommended for appointment.<sup>76</sup>
47. The National Assembly cannot fulfil its obligation to facilitate public involvement if relevant information regarding the candidates is not provided to the public. The public involvement process was reduced to a tick-box exercise, instead of a meaningful opportunity that is capable of influencing the recommendation process.

#### Parliament's incorrect interpretation of the POPI Act

48. The Portfolio Committee's decision to limit the information regarding the candidates was informed by an incorrect interpretation of Parliament's obligations under the Protection of Personal Information Act 2013 (POPI Act).<sup>77</sup>
49. The POPI Act gives effect to the right to privacy by safeguarding personal information when processed by a responsible party, subject to justifiable limitations aimed at balancing the right to privacy against other rights, particularly the right of access to information.<sup>78</sup> The Act must be interpreted in a manner that does not prevent a public body from exercising or performing its powers, duties and functions.<sup>79</sup>

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<sup>75</sup> Speaker AA vol 3 p 259 para 28.2.

<sup>76</sup> Corruption Watch RA vol 5 p 424 – 427 para 9 – 13.

<sup>77</sup> Corruption Watch FA vol 1 p 39 para 90, Speaker AA vol 3 p 261 para 31 p 270 – 271 paras 53.2 – 53.5.

<sup>78</sup> POPI Act s 2.

<sup>79</sup> POPI Act s 3(3)(b).

50. The chairperson of the Information Regulator delivered an explanatory affidavit regarding the interpretation of the POPI Act as it relates to the processing of personal information and the publication of the candidates' CVs in the recommendation process.<sup>80</sup> According to the Information Regulator:

50.1 Certain information contained in the candidates' CVs, including education and employment history, falls within the definition of personal information under the POPI Act.<sup>81</sup>

50.2 Section 11(1)(a) of the POPI Act provides that personal information may be processed if Parliament has obtained consent from the candidates.<sup>82</sup>

50.3 Parliament is a public body as defined in the POPI Act that exercises public power and performs duties in terms of the Constitution and legislation.<sup>83</sup> In the recommendation process, Parliament performs a public law duty in terms of section 59(1)(a) of the Constitution.<sup>84</sup>

50.4 Section 11(1)(e) of the POPI Act provides that personal information may only be processed if the processing is necessary for the proper performance of a public law duty by a public body. Parliament could rely on section 11(1)(e) as justification for the lawful publication of the candidates' CVs. The candidates' personal information not relevant to

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<sup>80</sup> Information Regulator EA vol 3 p 215 paras 5, 7.

<sup>81</sup> Information Regulator EA vol 3 p 220 para 26.

<sup>82</sup> Information Regulator EA vol 3 p 216 paras 11, 14 read with p 220 para 27.

<sup>83</sup> Information Regulator EA vol 3 p 220 - 221 paras 28 – 30.

<sup>84</sup> Information Regulator EA vol 3 p 221 para 31.

the recommendation process, including identity numbers and contact details, should be redacted before publication of the CVs.<sup>85</sup>

50.5 If reliance is placed on section 11(1)(e), Parliament would not have to comply with section 11(1)(a) of the POPI Act.<sup>86</sup>

50.6 The POPI Act supports an approach that strikes a balance between the right to privacy and the right of access to information. It does not prevent public or private bodies from exercising or performing their powers, duties and functions in terms of the law.<sup>87</sup>

50.7 The POPI Act does not prevent Parliament from exercising or performing its powers, duties and functions in public participation processes in terms of section 59(1)(a) of the Constitution.<sup>88</sup>

51. We agree with the Information Regulator's interpretation of the POPI Act and align ourselves with the submissions made. The interpretation is also consistent with Parliament's approach in other recommendation processes, detailed in the founding affidavit.<sup>89</sup>

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<sup>85</sup> Information Regulator EA vol 3 p 221 para 31.

<sup>86</sup> Information Regulator EA vol 3 p 220 para 28.

<sup>87</sup> Information Regulator EA vol 3 p 221 para 32.

<sup>88</sup> Information Regulator EA vol 3 p 221 para 32.

<sup>89</sup> Corruption Watch FA vol 1 p 41 – 45 paras 89 – 102.

52. Section 11 of the POPI Act permits the processing of personal information despite the objection of a data subject, if processing is necessary for the proper performance of a public law duty by a public body.<sup>90</sup>
53. The Portfolio Committee's incorrect interpretation of the POPI Act prevented it from performing its functions and fulfilling its constitutional obligation to meaningfully facilitate public involvement in the recommendation process. Meaningful participation necessitates the disclosure of relevant information about each candidate. The failure to publish sufficient and relevant information on candidates under the guise of protecting personal information defeats meaningful public participation in recommendation processes.

### **The failure to provide meaningful opportunities for public participation**

54. This court has recognised that a limited period between the notice (invitation to comment) and public hearings (deadline for submission of comments) does not allow for adequate preparation and is likely to have an adverse impact on the quality of submissions.<sup>91</sup> The Framework recognises that invitations for public hearings are often sent on short notice and the public have insufficient time to prepare inputs.<sup>92</sup>
55. Time is a relevant consideration in determining the reasonableness of Parliament's failure to provide meaningful opportunities for public involvement in

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<sup>90</sup> *De Vries Smuts NO and Others v Member of the Executive Council: Eastern Cape Department of Economic Development, Environmental Affairs and Tourism and Another* 2022 JDR 2133 (ECM) para 34.

<sup>91</sup> *LAMOS* para 77.

<sup>92</sup> Framework p 36 para 9.6.3.

a given case.<sup>93</sup> While there may be instances where circumstances of emergency require urgent legislative responses and short timetables, this court has warned when it comes to establishing legislative timetables that the temptation to cut down on public involvement must be resisted.<sup>94</sup> *“The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable”*.<sup>95</sup>

56. The public must be afforded a reasonable opportunity to participate effectively in the process.<sup>96</sup> A core value of the Framework is to seek input from participants in designing how they participate.<sup>97</sup>
57. The limit placed on the length of submissions as well as the timeframe within which to provide those submissions renders the recommendation process unreasonable.
58. The Portfolio Committee provided the public with 10 working or 14 calendar days for the submission of comments on the 24 shortlisted candidates. The period did not allow sufficient opportunity for the public to properly consider the candidates, consult with relevant stakeholders, and provide written feedback.<sup>98</sup> The problem of the shortened time was exacerbated by the fact that the only information provided to the public regarding the candidates was their names and

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<sup>93</sup> *Doctors for Life* para 194.

<sup>94</sup> *Doctors for Life* para 194.

<sup>95</sup> *Doctors for Life* para 194.

<sup>96</sup> *Doctors for Life* paras 128 – 129.

<sup>97</sup> Framework p 31 para 8.1.

<sup>98</sup> Corruption Watch FA vol 1 p 46 para 106.



qualifications.<sup>99</sup> It was unreasonable to expect the public to undertake extensive research and make submissions on 24 candidates within this time frame.

59. We submit that the fact that 656 public comments were received regarding the candidates is indicative of the high level of public interest in the recommendation process and does not suggest that sufficient time was afforded to the public.<sup>100</sup> The analysis of the summary of public comments, detailed in Corruption Watch's replying affidavit, also demonstrates that the majority of comments were made by members of the public and organisations either known to or acquainted with the candidates.<sup>101</sup>
60. The Speaker contends that it was necessary to ensure that the appointments were made prior to the vacancies arising as a failure to do so would result in an inquorate Commission.<sup>102</sup> Although the Speaker has not provided the facts in support of the contention that the Commission would be inquorate, the concern regarding an inquorate Commission arose even on the Portfolio Committee's proposed timetable. Despite the 'urgency' to complete the recommendation process by 31 October 2022, the date when the term of the incumbent commissioners was due to expire, the commissioners were only appointed with effect from 1 March 2023.<sup>103</sup>

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<sup>99</sup> Corruption Watch RA vol 5 p 431 para 23.

<sup>100</sup> Speaker AA vol 3 p 267 para 51.2.

<sup>101</sup> Corruption Watch RA vol 5 p 431 – 433 para 23.

<sup>102</sup> Speaker AA vol 3 p 268 para 51.3, p 287 para 139.

<sup>103</sup> Annexure KS2 vol 1 p 55, Speaker AA vol 3 p 268 para 51.3.

61. In any event, we submit that it is not correct that the Commission would have been inquorate. A decision of the Commission is a decision of the majority of commissioners present at a meeting of the Commission.<sup>104</sup> The quorum for any meeting of the Commission shall be a majority of the total number of Commissioners appointed.<sup>105</sup> If both the chairperson and the deputy chairperson are absent from a meeting, the commissioners present shall elect a commissioner to preside at that meeting.<sup>106</sup> In the event of an equality of votes, the commissioner presiding shall have a casting vote in addition to a deliberative vote.<sup>107</sup> A vacancy in the Commission shall not affect the validity of the proceedings or decisions of the Commission.<sup>108</sup> Therefore, in the absence of a chairperson, deputy chairperson and if there are fewer than seven commissioners appointed, the Commission would still be able to establish a quorum and make decisions in fulfilment of its mandate.
62. If the Speaker is correct that the Commission would not have been quorate after 31 October 2022, we submit the National Assembly knew the commissioners' terms and failed to properly plan to ensure that new members were appointed to avoid the Commission being inquorate. The National Assembly cannot rely on its failure to plan to unreasonably truncate the public participation process.

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<sup>104</sup> Commission Act s 5(4).

<sup>105</sup> Commission Act s 5(3).

<sup>106</sup> Commission Act s 5(2).

<sup>107</sup> Commission Act s 5(4).

<sup>108</sup> Commission Act s 4(2).

63. The Speaker has not demonstrated that circumstances of emergency required the short timetable. To the contrary, the timeline of the recommendation process until the appointment of the commissioners demonstrates the opposite.
64. The Portfolio Committee's self-imposed urgency is apparent from the lapse of time between the dates when the interviews were conducted from 20 September 2022 to 23 September 2022 and the date when the Committee convened to select candidates for nomination on 25 October 2022.<sup>109</sup> This one-month period demonstrates that the time provided for the submission of comments could have been extended whilst still ensuring that the Portfolio Committee meet its end-October 2022 deadline. The Speaker has not answered this contention and has not provided an explanation detailing reasons why the period of time between these dates could not have been utilised to extend the period for public comment.<sup>110</sup>
65. The public was required to submit comments on the candidates through an online form that limited submissions to 2000 characters (~285 to 500 words).<sup>111</sup> The underlying rationale for imposing this limit is not apparent and had not been explained by the Speaker.<sup>112</sup> The format unnecessarily curtailed the public's ability to meaningfully participate and provide adequate comment on candidates.

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<sup>109</sup> Corruption Watch FA vol 1 p 47 para 108.1.

<sup>110</sup> Speaker AA vol 3 p 287 paras 137 – 140.

<sup>111</sup> Corruption Watch FA vol 1 p 46 para 105.

<sup>112</sup> Speaker AA vol 3 p 268 para 52.

66. This is not meaningfully denied. The contention that the Portfolio Committee was amenable to receiving longer submissions via email to the secretary of the Portfolio Committee, as communicated to Corruption Watch, also does not remedy the failure.<sup>113</sup> Parliament cannot contend that the word limit was not a fixed restriction if it failed to take any steps to ensure that the public was aware of the change to the process.<sup>114</sup>
67. By providing limited scope for engagement and limited time to make submissions, the Portfolio Committee failed in its constitutional duty to provide members of the public with a meaningful opportunity to participate in the recommendation process.

## **REMEDY**

68. Corruption Watch seeks the following remedy:

- 68.1 A declaration that the National Assembly failed to comply with its constitutional obligation to facilitate reasonable public involvement before recommending persons to be appointed as members of the Commission.
- 68.2 A declaration that the appointment of the chairperson and members of the Commission on 1 March 2023 is unconstitutional and invalid.
- 68.3 An order suspending the declaration of invalidity for 18 months.

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<sup>113</sup> Speaker AA vol 3 p 268 para 52.2.

<sup>114</sup> Corruption Watch RA vol 5 p 435 para 30.

## The declaratory relief

69. The first two parts of the order flow naturally if Corruption Watch's case is successful on the merits.
70. The commissioners do not oppose the declaratory relief.<sup>115</sup>
71. The Speaker contends that there is no basis for this court to usurp the function of the legislative branch of government and to second-guess the approach adopted by the Portfolio Committee to facilitate public involvement.<sup>116</sup> This contention fails to recognise that the purpose of the provision giving exclusive jurisdiction to this court is to preserve the comity between the judicial branch of government, and the legislative and executive branches of government by ensuring that only the highest court intrudes into the domain of the principal legislative and executive organs of state.<sup>117</sup>
72. The Speaker's contention that the failure to meaningfully facilitate public involvement does not automatically invalidate the appointment of the commissioners is incorrect.<sup>118</sup> The majority judgment of this court in *Doctors for Life* held that while the doctrine of separation of powers is important in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent a violation of the Constitution.<sup>119</sup> The right and duty of this court to protect

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<sup>115</sup> Corruption Watch RA vol 5 p 566 para 6.

<sup>116</sup> Speaker AA vol 3 p 251 para 12, p 255 para 16.

<sup>117</sup> *King and Others v Attorneys Fidelity Fund Board of Control and Another* [2006] 1 All SA 458 (SCA) para 14.

<sup>118</sup> Speaker AA vol 3 p 284 para 119.

<sup>119</sup> *Doctors for Life* para 200.

the Constitution are derived from the Constitution.<sup>120</sup> If the conditions for the recommendation process have not been complied with, this court has the duty to say so and to declare the resulting appointment invalid.<sup>121</sup>

### **The suspension order**

73. The Speaker supports a suspension order to enable the matter to be remedied without an undue disruption to the discharge of the Commission's mandate.<sup>122</sup>

74. Surprisingly the commissioners oppose the suspension order. They ask this court to condone any constitutional invalidity and to retain their appointment as commissioners, as just and equitable relief in terms of section 172 of the Constitution.<sup>123</sup>

75. That is not relief that this court can grant.

76. A court does not have the power to condone conduct that is inconsistent with the Constitution and must declare such conduct invalid.<sup>124</sup> An order of constitutional invalidity has immediate retrospective effect. This default position can be varied by a court exercising the power under section 172(1)(b) of the Constitution, provided it is just and equitable to do so.<sup>125</sup>

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<sup>120</sup> *Doctors for Life* para 200.

<sup>121</sup> *Doctors for Life* para 211.

<sup>122</sup> Speaker AA vol 3 p 288 para 143.

<sup>123</sup> *Corruption Watch* RA vol 5 p 566 paras 7 – 8.

<sup>124</sup> Constitution s 172(1)(a), *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 103.

<sup>125</sup> *Britton v Minister of Justice and Correctional Services and Others* [2024] ZASCA 148 para 23.

77. The order of invalidity should be suspended because immediate invalidity will cause disruption. The disruption in the leadership and governance structure of the Commission will threaten the stability of the Commission and its ability to fulfil its constitutional mandate. It will also cause disruption to the commissioners' personal and professional lives.
78. All of these difficulties can be avoided by suspension. The work of the Commission will not be disrupted while Parliament conducts a constitutionally compliant recommendation process. A suspension will also provide the commissioners a reasonable time within which to organise their affairs.
79. The suspension order benefits the commissioners and ensures the protection of their interests whilst ensuring the constitutionality of the process and protecting the rights and interests of the public. The order strikes an appropriate balance between constitutionality and practicality, and is just and equitable in the circumstances.

## **COSTS**

80. Corruption Watch relies on the *Biowatch*<sup>126</sup> principle governing costs in constitutional matters. If successful, Corruption Watch seeks costs. If this application is dismissed, no costs order should be made against Corruption Watch.

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<sup>126</sup> *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

81. Corruption Watch is a non-profit public interest body, acting in the public interest in these proceedings and has not acted vexatiously, frivolously or unprofessionally.

## **CONCLUSION**

82. Corruption Watch respectfully seeks an order in terms of the notice of application.

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**TINA POWER**

Power & Associates, Rosebank  
Attorney with right of appearance  
14 November 2024



## **LIST OF AUTHORITIES**

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Tshabalala v the State; Ntuli v the State [2019] ZACC 48

### Parliament's public participation framework

Public Participation Framework for the South African Legislative Sector

Practical Guide for Members of Parliament and Provincial Legislatures

Guidelines for the appointment of commissioners at the Commission for Gender Equality