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
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
COMMISSION FOR GENDER EQUALITY	Third Respondent
INFORMATION REGULATOR	Fourth Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1. The applicant approaches this Court for an order, inter alia, declaring that Parliament, comprising the National Assembly's Portfolio Committee on Women, Youth and Persons with Disabilities, failed to comply with its constitutional obligation to facilitate reasonable public involvement before recommending persons to be appointed as members of the Commission for Gender Equality (**"Commission"**).[1]

2. The source of this obligation is section 193 of the Constitution of the Republic of South Africa, 1996 (**"Constitution"**), which provides as follows:

> *(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who-*
>
> *(a) are South African citizens;*
>
> *(b) are fit and proper persons to hold the particular office; and*
>
> *(c) comply with any other requirements prescribed by national legislation.*
>
> *(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.*
>
> *(3) . . .*
>
> *(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of-*
>
> *(a) the South African Human Rights Commission;*

[1] Notice of motion, p 1, para 1.

(b) the Commission for Gender Equality; and

(c) the Electoral Commission.

(5) The National Assembly must recommend persons-

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote-

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59 (1) (a).

3. Section 193 of the Constitution is to be read with section 3(1) of the Commission for Gender Equality Act 39 of 1996 (**"the Act"**), which provides for two additional criteria for members of the Commission. In terms of section 3(1), members shall –

3.1. have a record of commitment to the promotion of gender equality; and

3.2. be persons with applicable knowledge or experience with regard to matters connected with the objects of the Commission.

4. The parties are in agreement that members of the public were afforded an opportunity to comment on the shortlisted candidates for appointment to the Commission. The dispute pertains to the reasonableness of the opportunity afforded to the public.

5. The applicant's challenge is directed at three elements of the public participation process in particular:

    5.1. The time afforded to members of the public for the submission of comments in relation to the shortlisted candidates;

    5.2. The online form adopted for the submission of public comments; and

    5.3. The publication of the shortlisted candidates' qualifications rather than their full *curricula vitae*.

6. The first respondent maintains that the opportunity afforded to members of the public to participate in the recommendation process was reasonable, regard being had to the following considerations:

6.1. The discretion afforded to Parliament in terms of section 59(1)(a)[2] of the Constitution in determining the public participation process to be followed;

6.2. The fact that members of the public were afforded an opportunity to participate at multiple points in the recommendation process. In particular, the public was invited to submit nominations in respect of candidates to be shortlisted.[3] The manner in which such invitations were published was carefully crafted to ensure maximum coverage within the available budget, opting for an advertisement widely-circulated newspaper that included indigenous African languages in its text;[4]

6.3. The fact that some 156 individuals were nominated pursuant to this public nomination process;[5]

6.4. The fact that a total of 656 public comments in respect of the shortlisted candidates was received from a variety of stakeholders, including civil society organisations, trade unions and interested individuals;[6]

6.5. The rigorous screening and vetting process applied to each candidate in addition to the opportunity afforded to members of the public to comment on the shortlisted candidates, ensuring a comprehensive assessment of

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[2] Section 59(1)(a) of the Constitution provides that the National Assembly must *"facilitate public involvement in the legislative and other processes of the Assembly and its committees"*.
[3] Annexure "KS1" to the founding affidavit, p 52.
[4] Annexure "KS2" to the founding affidavit, p 63.
[5] Answering affidavit, p 258, para 26.
[6] Answering affidavit, pp 262 – 263, para 36.

each candidate, including their fitness and propriety to hold a position on the Commission;[7] and

6.6. The fact that the public participation process followed in respect of recommendations for appointment to the Commission was aligned with, and in some cases allowed for more time than, similar processes in respect of other appointments to other Chapter 9 institutions.[8]

7. These submissions will first set out the general principles applicable to the obligation on Parliament to facilitate public involvement, following which each of the challenges to the process followed in recommending candidates for appointment to the Commission will be addressed.

THE DUTY TO FACILITATE PUBLIC INVOLVEMENT

8. The obligation imposes on Parliament in terms of section 59(1)(a) of the Constitution is one to "facilitate public involvement". The Constitution does not elaborate on what this duty entails. This omission is by design.

9. There has to date been little guidance from our courts in relation to the duty to facilitate public involvement in respect of recommendations for appointment to Chapter 9 institutions. While there is more guidance in the context of public involvement in the legislative process, it is submitted that any application of these

[7] Answering affidavit, pp 252 – 253, para 15.2.
[8] Answering affidavit, pp 253 – 255, para 15.4.

principles to the process applicable to recommendations for appointment to a Chapter 9 institution be done with caution, given the different contexts within which the duty to facilitate public involvement arises.

10. In *Mary Patricia King and others v Attorneys Fidelity Fund Board of Control and another*[9] the Supreme Court of Appeal held as follows:

> *'Public involvement' is necessarily an inexact concept, with many possible facets, and the duty to 'facilitate' it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it. Whether or not the National Assembly has fulfilled its obligation cannot be assessed by examining only one aspect of 'public involvement' in isolation of others, as the appellants have sought to do here. Nor are the various obligations s 59(1) imposes to be viewed as if they are independent of one another, with the result that the failure of one necessarily divests the National Assembly of its legislative authority.*

[9] 2006 (1) SA 474 (SCA) para 22, emphasis added.

11. Sachs J made a similar observation in *New Clicks*:[10]

> *The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. Prudence allied to principle indicates that this is an area where the law should develop in a fact-sensitive and incremental way.*

12. Sachs J also held that –

> *An appropriate balance will need to be struck between facilitating meaningful public access to the process and achieving economic use of time and resources, indeed, it should be borne in mind that endless consultation can be as paralysing to democratic decision-making as insufficient consultation.*[11]

13. What follows from this is that there is no one-size-fits-all approach to be adopted. On the contrary, each case is to be decided within its particular context,[12] with a *"significant measure of discretion"* afforded to Parliament to determine how best to fulfil its duty to facilitate public involvement.[13]

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[10] *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) para 630, emphasis added.
[11] Id para 629, emphasis added.
[12] *Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development* 2004 (6) SA 505 (CC) para 49.
[13] *South African Iron and Steel Institute and others v Speaker of the National Assembly and others* [2023] 10 BCLR 1232 (CC) para 47.

14. This Court has, however, enumerated the following factors that are relevant in assessing the reasonableness of public involvement adopted in the course of the legislative process:

> *Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement.*[14]

15. There is accordingly a high degree of deference to Parliament as to the appropriate process to follow in the circumstances of each case. While this does not afford Parliament *carte blanche* to facilitate or not to facilitate any public involvement process at all, it does mean that this Court ought not to interfere with

[14] *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416 (CC) para 128, emphasis added.

the public involvement process adopted by Parliament in the absence of clear evidence that the process followed was unreasonable.

16. As is demonstrated below, no such evidence has been provided.

THE TIME PERIOD FOR PUBLIC PARTICIPATION WAS SUFFICIENT

17. The first respondent afforded members of the public a period of 14 days to submit their comments on the shortlisted candidates. The formulation of this time period was based on two fundamental considerations.

18. First, the first respondent used as a reference point previous processes for the recommendation of candidates for appointment to Chapter 9 institutions.[15] In this regard, members of the public were invited to submit comments on candidates shortlisted for positions in Chapter 9 institutions within the following time periods:

    18.1. Four days in respect of candidates for the position of Deputy Public Protector;

    18.2. Nine days in respect of candidates for the Office of the Public Protector in 2023;

    18.3. Four days in respect of candidates for the Office of the Public Protector in 2016;

[15] Answering affidavit, pp 254 – 255, para 15.4.

18.4. Eleven days in respect of candidates shortlisted for positions on the South African Human Rights Commission; and

18.5. Eight days in respect of candidates shortlisted for the position of Auditor-General.

19. The period for the submission of public comments in these proceedings thus exceeded all of these examples. It bears noting that there is nothing before this Court to suggest any allegation that the time periods afforded in respect of these nomination processes was inadequate in any way.

20. The applicant nonetheless denies that these time periods are of assistance in assessing the reasonableness of the time frame for public comments in these proceedings.[16] They suggest that a longer period was required for submissions in relation to the shortlisted candidates for recommendation for appointment to the Commission, given the "specific factual context" of such recommendations.[17] Apart from reiterating their complaint that the candidates' full *curricula vitae* were not provided, however, they give no indication of what this unique factual context is. It is submitted that there are no facts that establish that a longer period of time ought to be afforded.

[16] Replying affidavit, p 429, para 19.
[17] Replying affidavit, pp 429 – 431, paras 20 – 22.

21. Indeed, the circumstances of this case militate against longer time periods being provided, given the need to fill vacancies on the Commission to enable it to be quorate and to discharge its important constitutional mandate. The applicant does not dispute that this was a concern held by the Portfolio Committee, and that it played a role in the formulation of the public involvement process.[18]

22. The applicant attempts to draw parallels between the process currently before the Court and the process that was criticized by the Court in *Land Access Movement of South Africa (**"LAMOSA"**)*.[19] It is submitted that do so would not be justified: the Court in *LAMOSA* was faced with a public involvement process that was littered with defects at almost every stage. In particular, the deficiencies in the process that were identified by the Court included the following:

    22.1. Most of the hearings conducted by the provincial legislatures were rushed. In many cases, the Bill in question was one of a number of other Bills to be discussed at the hearings in question, with the hearings being adjourned before any meaningful engagement could take place.

    22.2. Many provincial legislatures gave inadequate notice of these hearings to members of the public, as well as failing to translate the bill in question into the dominant languages in the provinces.

[18] Founding affidavit, p 47, para 108.
[19] *Land Access Movement of South Africa v Chairperson of the National Council of Provinces and others* 2016 (5) SA 635 (CC).

22.3. The practice of the National Council of Provinces Select Committee was to attend the hearings conducted by provincial legislatures. In that case, however, most of them failed to do so and therefore had no knowledge of what transpired at the hearings and what concerns were raised in relation to the legislation in question.

22.4. Five of the nine provinces either did not prepare reports of the provincial hearings, or did not share the reports they had prepared. As a result, the National Council of Provinces Select Committee could not get a proper understanding of the concerns raised by members of the public in relation to the bill.

23. In this case, the Portfolio Committee received some 656 comments from members of the public, all of which were read and considered prior to recommendations for appointment to the Commission being made.[20]

24. In the circumstances, it is submitted that the applicant has not established that the fourteen-day period for the submission of comments in relation to the shortlisted candidates was inadequate,

THE PURPORTED LIMITATION ON THE LENGTH OF THE SUBMISSIONS MADE

25. The second complaint raised by the applicant pertains to the alleged limitation on the length of comments that could be submitted in relation to each shortlisted

[20] Answering affidavit, pp 262 – 263, para 36; annexure "PC10" to the answering affidavit, pp 314 – 341.

candidate. To refute any suggestion that this arose from an arbitrary limitation on the ability of members of the public to submit their comments, it bears emphasis that the limitation was an unforeseen consequence of a decision to make use of a format that would facilitate the processing and consideration of submissions received.[21]

26. It was also remedied as soon as it was discovered.

27. In response to a complaint from the applicant about the limitation, the Portfolio Committee met to discuss the matter, and took the following resolution, which was communicated to the applicant:

> *Should individuals or civic organisations have additional information they wish to submit in relation to the candidates, they must feel free to do so to the Chairperson or Secretary of the Portfolio Committee. The Committee would not disqualify an individual because of negative public comment without offering audi alteram partem to the concerned candidate and weighing its gravity in relation to the position applied for. Furthermore, please be advised that the Committee will also conduct its own screening through the State Security Intelligence for the vetting to be completed by the appointing authority. Lastly, the process of public involvement in the processes also involve screening by State Security Agents that includes checks on the personal information of the candidates.*[22]

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[21] Answering affidavit, p 259, para 28.1.
[22] Annexure "PC9" to the answering affidavit, pp 311 – 312.

28. The applicant was therefore well aware that, should it wish to make submissions in excess of what was possible in the format adopted by the Portfolio Committee, it would be entitled to e-mail those submissions to the Secretary of the Portfolio Committee for consideration.

29. This Court has recognized the importance of a responsive government that takes appropriate steps to accommodate concerns raised with it by those affected by its decisions.[23] It is submitted that the stance adopted by the first respondent in accommodating the applicant's complaint regarding the format of submissions illustrates such responsiveness and accountability, and meaningful efforts to facilitate public involvement in line with the first respondent's constitutional obligations.

30. Having removed the administrative obstacle that inadvertently limited the length of public comments that could be submitted, it is submitted that the first respondent acted in line with its constitutional obligations.

THE DECISION NOT TO PUBLISH THE CANDIDATES' FULL CURRICULA VITAE

31. The Portfolio Committee's decision to publish the shortlisted candidates' qualifications rather than their full curricula vitae was informed by its reading of the Protection of Personal Information Act 4 of 2013 (**"POPI Act"**). In this regard –

[23] See *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) para 96.

31.1. The Portfolio Committee considered that it would be prohibited from disclosure of the shortlisted candidates' personal information without their consent. None of the parties 9including the shortlisted candidates themselves) has suggested that the candidates consented to the wide publication of their *curricula vitae* to members of the public.

31.2. The definition of consent in the POPI Act requires such consent to be voluntary, specific and informed. This requires, *inter alia*, that separate consent be provided for each instance of processing of personal information. Consent for processing of personal information in one instance cannot be inferred or assumed to have been given for another instance.

31.3. Candidates consented to their personal information being scrutinized by members of the Portfolio Committee only, The Portfolio Committee as the responsible party as defined in the POPI Act is required to exercise discretion in determining the purpose and means of processing the personal information and the extent of the information to be published, while bearing a duty to protect the confidentiality of the candidates' personal information.

31.4. Since the shortlisted candidates had not consented to their *curricula vitae* being made available to members of the public, the Portfolio

Committee considered it inappropriate for the full *curricula vitae* to be published.

31.5. Once released into the public domain, the Portfolio Committee would have no control over how the personal information pertaining to each of the shortlisted candidates would be used, including any further distribution. As the responsible party, the Portfolio Committee bears a duty to guard against this.[24]

32. This is in line with the analysis provided in the fourth respondent's explanatory affidavit, albeit that the fourth respondent goes further to record that personal information may, in terms of section 11(1)(e) of the POPI Act, be processed without the consent of the data subject if this is necessary for the proper performance of a public law duty by a public body.[25]

33. The Portfolio Committee, however, considered that it was not necessary for the full curricula *vitae* to be distributed, because sufficient information pertaining to each of the shortlisted candidates was provided.[26]

34. While the applicant contends that this was not the case, the receipt by the Portfolio Committee of 656 submissions pertaining to the shortlisted candidates supports the first respondent's assertion. An analysis of these comments makes

[24] Answering affidavit, pp 269 – 270, paras 53.2 – 53.4.
[25] Fourth respondent's explanatory affidavit, pp 220 – 221, para 28.
[26] Answering affidavit, p 259, para 28.1.

clear that those who sought to engage comprehensively with the suitability and qualifications of the shortlisted candidates were able to do so.[27]

35. For example –

35.1. One member of the public, in submitting comments relating to Ms Thando Hlopa, stated that *"she's always involved herself in intersectional approaches regarding gender equity. She has been an activist in various platforms and has been consistent in pursuing equitable frameworks. Her legal background provides her with a vast amount of analytical thinking, an ability to provide a needs analysis within different contexts and is very hard working. Thando is quite adaptive to learning and understanding information and experiences she's unfamiliar with. She has a very broad view of institutionalized discrimination and has innovative solutions to marry her analysis. The candidate os of a high quality."*[28]

35.2. The comments in relation to Ms Bernadine Bachar include the submission that *"Ms Bernadine, has demonstrated a good awareness of gender and the needs of women affected by violence. Her educational background and the fact that she works in a CSO would benefit the Commission."*[29]

[27] Annexure "PC10" to the answering affidavit, pp 314 – 341.
[28] Annexure "PC10" to the answering affidavit, pp 320 – 321.
[29] Annexure "PC10" to the answering affidavit, p 323.

36. What is plain from these submissions is that the general public was clearly provided with sufficient information to enable them to engage meaningfully with each candidate's suitability and qualifications. The applicant's assertion that it was unable to do so – whether well-founded or not – does not accord with the evidence before this Court confirming that sufficient information was provided to enable hundreds of detailed and substantive comments, which ultimately informed the Portfolio Committee in its list of recommendations.

37. It is accordingly submitted that the assertion that insufficient information was provided to enable meaningful public involvement is unfounded.

CONCLUSION

38. For the above reasons, it is submitted that the first respondent complied with its obligation to facilitate public involvement and that the application stands to be dismissed with costs on that basis.

NIKKI STEIN

Counsel for the first respondent

Chambers, Sandton

22 November 2024

LIST OF AUTHORITIES

1. *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416 (CC).
2. *Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development* 2004 (6) SA 505 (CC).
3. *Land Access Movement of South Africa v Chairperson of the National Council of Provinces and others* 2016 (5) SA 635 (CC).
4. *Mary Patricia King and others v Attorneys Fidelity Fund Board of Control and another* 2006 (1) SA 474 (SCA).
5. *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC)
6. *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC)
7. *South African Iron and Steel Institute and others v Speaker of the National Assembly and others* [2023] 10 BCLR 1232 (CC).