

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

NTHABISENG SEPANYA-MOGALE Fifth Respondent

THANDO GUMEDE Sixth Respondent

BONGANI NGOMANE Seventh Respondent

PRABASHHN I SUBRAYAN NAIDOO Eighth Respondent

LEONASHA LEIGH-ANN VAN DER MERWE Ninth Respondent

FIFTH TO NINTH RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

1. Corruption Watch's application impugns the process undertaken by the National Assembly's Portfolio Committee on Women, Youth and Persons with disabilities ("the Committee / Portfolio Committee") when selecting the candidates to be recommended as Commissioners for the Commission for Gender Equality (the Commission).¹
2. The Committee is faulted for its alleged failure to facilitate reasonable public involvement in the recommendation process leading up to the appointment of members of the Commission for Gender Equality ("the Commission") in 2022. This failure, according to Corruption Watch, invalidates the whole process and should be declared as such, and the appointments made by the President, following this process, should be set aside.²
3. Corruption Watch prays for the suspension of an order of invalidity for a period of 18 months, following the declaration of invalidity, to allow the National Assembly to recommence with the process of nominating Commissioners to be recommended to the President for appointment.
4. The Fifth to Ninth respondents (the respondents) take no issue with the declaratory relief sought by Corruption Watch in prayers 1 and 2 of the Notice of Motion. It is the relief sought by Corruption in prayer 3 that the respondents do not support.

¹ Founding affidavit, pp 7, at para 3.

² Notice of Motion, pp 1.

5. Section 172(1)(b) empowers a court to make any order that is just and equitable following a declaration that any law or conduct, including any contract, is constitutionally invalid.
6. The respondents implore this Court, in the event that the Court grants the declaratory relief as prayed for by Corruption Watch, to exercise its powers under section 172(1)(b) and order that a just and equitable remedy in the circumstances of this case would be to allow the Commissioners to complete their term of office.
7. The respondents submit that maintaining the *status quo* will support stability of the CGE and address the prejudice that will be faced by each Commissioner, should their term of office come to an end prematurely.
8. There is furthermore no prejudice that will be suffered by Corruption Watch, should the Court make such an order. Significantly, Corruption Watch does not say that the Commissioners are not suitable to hold their position as Commissioners.

THE APPOINTMENT PROCESS OF THE COMMISSIONERS

9. The Portfolio Committee nominates persons who must serve as Commissioners in the Commission and the National Assembly must approve those nominees by a resolution of a majority of the Assembly.³ The President then appoints members of the Commission on the recommendation of the

³ Constitution, s 193(5).

National Assembly.⁴ The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a) of the Constitution⁵, it reads:

“The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees.”

10. Following the Committee’s call for nominations of suitable candidates for appointment to serve as members of the Commission,⁶ candidates were shortlisted and a call for comments on the suitability of the shortlisted candidates was made on 02 September 2022.⁷

11. The closing date for public comment was 16 September 2022⁸ (the public had a total of 14 days to comment). The comments section was limited to 2000 characters.⁹ The information provided to the public on candidates was their full names as well as their qualifications.¹⁰

12. The Portfolio Committee filed its report with the National Assembly on 26 October 2022.¹¹ The report was adopted by the National Assembly on 01

⁴ Constitution, s 193(4).

⁵ Constitution, s 193(6).

⁶ Founding affidavit, pp 19-20, at paras 38.

⁷ Founding affidavit, pp 20, at para 40.

⁸ Founding affidavit, pp 21, at para 40.2.

⁹ Founding affidavit, pp 21, at para 41.

¹⁰ Founding affidavit, pp 21, at para

¹¹ Founding affidavit, pp 22, at para 45.

November 2022¹² and the names of the recommended candidates were communicated to the President.¹³

13. On 25 February 2023, the President announced the appointment of the Chairperson of the Commission as well as four new members of the Commission; the Commissioners.¹⁴

14. The Commission and its Commissioners are not part of this process and cannot therefore comment on the question of reasonableness.

THE RELIEF SOUGHT BY CORRUPTION WATCH

15. Corruption Watch's concerns are threefold:

- i) Inadequate information was provided on candidates;¹⁵
- ii) Unreasonable word limitation;¹⁶ and
- iii) Unreasonable timeframe within which comments should have been provided.¹⁷

16. Corruption Watch seeks an order declaring that:

¹² Founding affidavit, pp 23, at para 48.

¹³ Founding affidavit, pp 24, at para 49.

¹⁴ Founding affidavit, pp 33, at para 70.

¹⁵ Founding affidavit, pp 24, at para 51.1.

¹⁶ Founding affidavit, pp 25, at para 51.2.

¹⁷ Founding affidavit, pp 25, at para 51.3.

- i) 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;
- ii) the appointment of the Commissioners is invalid; and
- iii) the declaration of invalidity be suspended for a period of 18 months to enable the First Respondent to reconduct the appointment process.

FIFTH TO NINTH RESPONDENTS' SUBMISSIONS

17. It is important to state at the outset that the Fifth to Ninth Respondents cannot comment on whether or not the National Assembly afforded the public a meaningful opportunity to participate in the appointment process save to note that "*Parliament has a discretion to determine the manner in which to fulfil the obligation to facilitate public involvement; the question for this Court to determine is whether Parliament's process was reasonable*".¹⁸

18. The Commissioners appreciate that as per Section 172 of the Constitution, the court, when dealing with a constitutional matter, has the power to and in fact must declare any law or conduct invalid, if such law or conduct is inconsistent with the Constitution and then make a just and equitable order.¹⁹ Section

¹⁸ *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14, at para 34.

¹⁹ Chairperson's answering affidavit, pp 506, at para 43.

172(1)(b) provides the courts with the power to qualify the effect of their orders of invalidation.

19. In *Corruption Watch and Others v Abrahams and Others*²⁰ this Court held as follows in respect of its powers:

[68] There is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of section 172(1)(b) of the Constitution we may make *any* order that is just and equitable. The operative word “any” is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. This Court has laid down certain principles in charting the path on the exercise of discretion to determine a just and equitable remedy.

[69] What must be paramount in the relief that a court grants is the vindication of the rule of law. The effect of that is the reversal of the consequences of the constitutionally invalid conduct.

20. The Commissioners submit that the declaratory orders are sufficient to vindicate the rule of law, in the event that the Court finds that the public participation process embarked upon by the National Assembly was unreasonable and inadequate.

21. This Court in *Abrahams* wrestled with the question whether it must necessarily follow that because Mr Nxasana’s relinquishing of office was invalid, Mr

²⁰ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23, at par 68 - 69.

Nxasana must therefore re-occupy his office as the National Director of Public Prosecutions.

22. The Court's response is relevant to the remedy that the Commissioners are seeking. The response was:

“So, effectively this means Mr Nxasana remains in office as his vacation was invalid. All that would have to happen is for him to physically resume office. A natural consequence of that would be that Advocate Abrahams would have to be removed from office. **But must all that – that is the resumption and vacation** of office by Mr Nxasana and Advocate Abrahams, respectively – follow inexorably?

[71] The specific circumstances of a given matter may displace what should ordinarily be the position. In *Mhlope* we granted just and equitable relief *that was at odds with extant statutory provisions*. Mogoeng CJ held that the failure of the Electoral Commission to compile a voters' roll in accordance with section 16(3) of the Electoral Act was at “odds with the strictures not just of the law but also of the rule of law”. When it came to a choice between scuppering the local government elections which – in terms of the Constitution – had to take place by a certain date and upholding the strictures of the law, the Court opted for allowing the elections to go ahead.

[72] What starkly helps illuminate why section 172(1)(b) of the Constitution empowers us – where justice and equity dictate – to go so far as to make orders that are at odds with extant law is the Canadian Supreme Court's decision in the *Manitoba Language Rights* case. Without suggesting that – for a fact – this case informed the inclusion of section 172(1)(b) in our Constitution, it typifies difficult situations that explain why the framers of our Constitution may have

decided to avert those situations by expressly including this expansive remedial power.”

23. The Commissioners submit that their case falls within the difficult situations.

The prejudice that will be suffered by the individual Commissioner, through no fault of theirs and the reputational and institutional harm that will follow an order of invalidity, far outweigh the harm of retaining the *status quo*.

24. In **Allpay 2**,²¹ Froneman J noted that:

“[t]here can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights.”

25. The Commissioners call upon this court to provide effective relief, taking into account the context of the CGE and its Commissioners. It is the Commissioners’ case that should this Court find in favour of Corruption Watch, i.e., that the Portfolio Committee’s process of appointment Commissioners fell short and is therefore invalid, a just and equitable order would be to retain the status quo to ensure the stability of the Commission and to protect the

²¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC) (‘AllPay 2’) at para 42.

Commissioners from the prejudice that they stand to suffer, should their term of office come to a premature end.²²

26. It is common cause that Corruption Watch's application is not concerned with the Commissioners' suitability to hold office but rather the alleged failure by Parliament to fulfil its constitutional duty to facilitate reasonable public involvement in the recommendation process of appointing the said Commissioners.²³

27. The appointed commissioners are highly qualified. For example, apart from his various academic qualifications and human rights activism, the Fifth Respondent, Advocate Nthabiseng Sepanya-Mogale (Chairperson of the Commission), has worked with the Truth & Reconciliation Commission, People Opposing Women Abuse and other various entities.²⁴

28. Some Commissioners have already given sacrificed their careers and altered their lives as a result of these appointments.²⁵ As this Court held in *Hoffmann*:

“Appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked in the context of a comparable provision in the interim Constitution, '[i]t can

²² Chairperson's answering affidavit, pp 506, at para 44.

²³ Founding affidavit, pp 8, at para 6.

²⁴ Chairperson's answering affidavit, pp 490, at para 7.

²⁵ Chairperson's answering affidavit, pp 493, at para 16.

hardly be argued, in my view, that relief, which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate.”²⁶

29. The responsibility to serve as a full-time Commissioner required the Commissioners to abandon other opportunities, which they did,²⁷ including altering their financial affairs.²⁸ The Commissioners have commenced with their duties and responsibilities in the Commission and in a period of about 18 months from now, they would have completed more than half of their term of office.²⁹ The proverbial horse has in fact bolted. The granting of the suspension order sought by Corruption Watch can not be said to be fair and just in these circumstances and will not serve any justifiable purpose, in the circumstances of this case.

30. Following a number of challenges including low staff morale, in-fighting and bad media coverage, which Corruption Watch itself acknowledges, the Commission has since been more stable and has functioned effectively.³⁰ As evident from the Auditor General's reports, the Commission's performance has been good.³¹

²⁶ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), at para 42.

²⁷ Sixth Respondent's answering affidavit, pp 512, at para 7.

²⁸ Eighth Respondent's answering affidavit, pp 527, at para 15.

²⁹ Eighth Respondent's answering affidavit, pp 528, at para 16.

³⁰ Eighth Respondent's answering affidavit, pp 528, at paras 18 & 19. See also Ninth Respondent's answering affidavit, pp 539, at para 19.

³¹ Chairperson's answering affidavit, pp 495, at para 19.

31. In the circumstances, the Respondents contend that the suspension order prayed for by Corruption Watch should not be granted. The need to intervene in cases like this was aptly captured by Mogoeng CJ in *Mhlope* in these terms:

“It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted . . .”³²

32. The plight of women in this country, including a plethora of challenges faced by persons living with disabilities calls for a more cautious approach by this court in determining a remedy that is just and equitable. The Commission’s stability and continuity is a noteworthy consideration.³³ Thus, this is one such exceptional case that calls for a special just and equitable remedy.

33. This court is called upon to balance the competing interests involved. The court should carefully balance the need to ensure that they fulfil their role as guardians of the Constitution by awarding effective relief where rights need to be vindicated, while at the same time remaining conscious of the need not to overstep into the terrain of the National Assembly.

³² *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) (Mhlope) at para 137.

³³ Sixth Respondent’s answering affidavit, pp 512, at para 8.

34. In ***Black Sash Trust***, this court held as follows:

“it is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances.”³⁴

35. The retention of the *status quo*, in the form of the continuation of the Gender Commission as is, although the exception rather than the norm, is the Commissioners submit, the best effective and appropriate relief required by the particular facts of this case.

36. It is in the best interests of women and people living with disabilities, the public at large, the Commission and its Commissioners including the National Assembly’s autonomy (the need to respect the separation of powers).

37. Corruption Watch’s submission that the Commissioners will have plenty of time within the 18-month period to seek alternative employment, ignores the overall impact of the premature end of contract to the Commission and the Commissioners. The effect of the termination of the Commissioner’s appointment impacts directly on the Commissioner’s right to dignity and indirectly casts aspersions on the Commissioners, following a process they

³⁴ *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8, at para 51.

had no control over, save to accept their nomination and agree to serve the nation.

CONDONATION FOR THE LATE FILING OF THE FIFTH TO NINTH RESPONDENTS' ANSWERING AFFIDAVITS

38. It is trite that an application for condonation must give a full explanation for the delay and the explanation must cover the entire period of the delay and must be reasonable. The standard for considering an application for condonation is the interest of justice.³⁵ Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case.³⁶

39. The relevant factors that are considered in a condonation inquiry include the nature of the relief sought, the extent and the cause of the delay, the effect of the delay on the administration of justice and the litigants, the reasonableness of the explanation for the delay, the importance of the issues to be raised and the prospects of success.³⁷

40. The Commissioners filed their answering affidavits on 09 September 2024. In these answering affidavits, the Commissioners dealt extensively with the reasons for the delay, the extent of the delay and the likely prejudice to be suffered by the parties.³⁸

³⁵ *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC), at para 20.

³⁶ *Ibid* at para 20.

³⁷ *Brummer v Gorfil Brothers Investment (Pty) Ltd and Others* 2000 (2) SA 837 (CC), at para 3.

³⁸ See pages 506, 520, 529, 540, and 553.

41. Noteworthy is the fact that the Fifth to Ninth Respondents do not oppose the relief sought by Corruption Watch but simply seeks a just and equitable order which will protect the status quo of the Commission. It was therefore important for Commissioners to place their submissions on record in order to assist this court in determining an appropriate relief.

CONCLUSION

The Commissioners submit that a just and equitable order is the retainment of the *status quo* of the Commission for Gender Equality in the circumstances.

N SEME

Chambers, Sandton

29 November 2024