THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 333/23

In the matter between:

CORRUPTION WATCH (RF) NPC	First 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
and	
MEDIA MONITORING AFRICA	*Amicus curiae*

AMICUS CURIAE'S **WRITTEN SUBMISSIONS**

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INTRODUCTION AND OVERVIEW

1 Central to parliament's mandate is the facilitation of public participation in its processes.[1] This is encapsulated in section 59(1) of the Constitution, which requires the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committees.

2 This matter concerns parliament's alleged failure to comply with its constitutional obligation to facilitate public participation in the appointment of members to the Commission for Gender Equality ("**Commission**"). The specific question that arises for determination is whether the National Assembly adopted a reasonable public participation process when recommending persons to be appointed as members of the Commission.[2]

3 The applicant, **Corruption Watch**, contends that parliament failed in three respects:

3.1 insufficient information was provided to the public to enable meaningful participation;

3.2 the timeframe within which the public was required to makes submissions was inadequate; and

3.3 the limit placed on the length of the submissions was unreasonable.

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1 *South African Iron and Steel Institute v Speaker of the National Assembly* 2023 JDR 2331 (CC) at para 29. In terms of section 59(1)(a) of the Constitution, public involvement must be facilitated in both the legislative and other processes of the National Assembly and its committees.

2 The standard for adequate participation is one of reasonableness. *SA Iron and Steel* above n 1 at para 44; and *Mogale v Speaker, National Assembly* 2023 (6) SA 58 (CC) at para 34.

4 Media Monitoring Africa ("**MMA**") has been admitted as *amicus curiae*, and has been granted leave to make written submissions.[3]

5 MMA confines its submissions to the first ground of unreasonableness advanced by Corruption Watch: the failure to provide the public with access to relevant information about the candidates, and the consequent failure to facilitate meaningful public participation.

6 The full extent of the information provided to the public regarding the candidates for appointment was an "*excel spreadsheet listing the full names and qualifications of each candidate"*.[4] The CVs of the candidates were not provided to the public. This, despite the fact that the minimum requirements for appointment include having suitable experience and a demonstrable track record in relation to the promotion of gender equality and the objects of the Commission.

7 The first respondent, **the Speaker** of the National Assembly, contends that publishing the candidates' full CVs (and additional information) would have contravened the Protection of Personal Information Act, 2013 ("**POPIA**").[5] She contends, in any event, that even if POPIA allowed for the disclosure of the information, such disclosure was not necessary because sufficient information pertaining to the shortlisted candidates was provided.[6]

8 MMA submits that parliament was obliged to publish the candidates' CVs in order to enable meaningful participation. Access to adequate information is an

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3 Order of this Court dated 5 February 2025.

4 Corruption Watch FA, para 42, p 21, and KS5, p 75. Speaker AA, para 89 – 91, p 278.

5 Speaker AA, para 31.1 and 31.2, p 261, para 53.2, p 269, and paras 89 – 91, p 278.

6 Speaker's HoA, para 33.

"*absolute prerequisite*" for effective public participation.[7] POPIA posed no obstacle to parliament doing so. It could and should have relied on one of two provisions in POPIA, namely:

8.1 section 11(1)(e), which allows for the processing of personal information if it is necessary for the proper performance of a public law duty by a public body; or

8.2 section 11(1)(a), which allows for the processing of personal information if the subject consents.

9 POPIA is thus not a shield behind which the National Assembly can hide to avoid proper public scrutiny and public participation in important parliamentary processes. This is an important matter of principle, which extends beyond the circumstances of this case, and will have a bearing on every appointment process that parliament conducts in future.

10 In these submissions, we address the following topics, with a view to assisting the Court in its assessment of the Speaker's POPIA defence:

10.1 First, we address the approach to interpreting the provisions of POPIA, having regard to general principles of statutory interpretation, particularly where competing constitutional rights and values are at play.

10.2 Second, we make submissions regarding the merits of the Speaker's POPIA defence, by interpreting and applying POPIA, and particularly section 11(1)(a) and 11(1)(e), in a constitutionally compliant manner.

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7 *SA Iron and Steel* above n 1 at para 30.

THE APPROACH TO INTERPRETING POPIA

The proper approach to statutory interpretation

11 It is now well-established that statutory interpretation is a unitary exercise, considering the text, context and purpose of the provision together.[8] This approach comprises recourse to the plain, ordinary, grammatical meaning of the words, considered purposively in the context in which such words appear. Context gives colour to the language used, and "*is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background*."[9]

12 This interpretive process is guided by the requirements of section 39(2) of the Constitution – which "*fashions a mandatory constitutional canon of statutory interpretation".*[10] Section 39(2) requires courts, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights. Its purpose is to ensure that our law is infused with the values of the Constitution.[11] In this regard:

> *"[A]ll statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all*

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8 *Chisuse v Director-General, Department of Home Affairs* 2020 (6) SA 14 (CC) at para 52; *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) at para 65.

9 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at 89, quoting Schreiner JA's dissent in *Jaga v Dönges, N.O.; Bhana v Dönges, N.O.* 1950 (4) SA 653 (A) at 662.

10 *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC) at para 43.

11 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 17.

> *citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights."*[12]

13 The Constitution itself is thus the starting point in interpreting any legislation.[13] Courts should prefer an interpretation of a statutory provision that promotes rights rather than limits them.

14 But what of the situation where more than one right is implicated by a statutory provision, and the rights appear to pull in opposite directions?

15 Our courts have provided the following guidance to interpreting legislation where competing rights are implicated:

15.1 Section 39(2) cannot be invoked in a "*partisan way*".[14]

15.2 It is *"not permissible for a litigant to simply carve out those provisions that are favourable to it*" when applying section 39(2).[15]

15.3 It is also not permissible to establish a hierarchical arrangement between the different interests involved, or to "*privilege in an abstract and mechanical way*" one right over another.[16]

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[12] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at para 21.

[13] *Bato Star Fishing* above n 9 at para 72.

[14] *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC) at para 54.

[15] *Phumelela Gaming and Leisure Limited v Grundlingh* 2007 (6) SA 350 (CC) at para 37. Whilst *Phumelela Gaming* concerned the development of the common law in terms of section 39(2) and not the interpretation of legislation in terms of section 39(2), the section 39(2) command in both these situations are considered to be "*like obligations on the courts*". See, *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 31.

[16] *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at para 31, with reference to *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 23.

15.4 Competing rights should not be pitted against each other. Instead, all implicated constitutional provisions must be considered in harmony with each other.[17]

15.5 This entails a balancing exercise,[18] which requires a process of weighing up of all the provisions of the Bill of Rights that might be relevant to the issue.[19]

15.6 The Court must consider the implicated rights congruently and reach an interpretation that "*give[s] effect to the normative force of the spirit, purport and objects of the Bill of Rights."*[20]

15.7 In balancing constitutional rights, each right's "*implications for democracy*" constitute a critical consideration.[21] Where two values compete, in other words, it is the value "*whose protection most closely illuminates the constitutional scheme… that should be protected*."[22]

Implicated constitutional rights and values

16 The Speaker relies on the candidates' constitutional right to privacy – as given effect to in POPIA – as a basis for not having published the candidates' CVs or additional information in the appointment process.[23]

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17 *Qwelane v SAHRC* above n 14 at para 50.

18 *Phumelela Gaming* above n 15 at para 37.

19 *Phumelela Gaming* above n 15 at para 35.

20 *Qwelane v SAHRC* above n 36 at para 54.

21 *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 607H to 608A, relying on Chaskalson P in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) on balancing rights under the limitations clause.

22 *Holomisa* at 607H to 608A.

23 Speaker AA, para 53.2, p 269.

17 However, in determining whether, properly interpreted and applied, POPIA can legitimately preclude the publication of candidates' CVs, the candidates' privacy is only one consideration. And as we shall explain, having regard to the constitutional scheme, and the competing web of rights that facilitate meaningful public participation, an interest in privacy over one's employment and educational history and experience is not a particularly weighty consideration where one seeks appointment to public office.

18 Public participation is an essential tenet of participatory democracy. As this Court has recently held, its importance cannot be understated.[24] The public must be given sufficient information to have an adequate say and to make their participation meaningful. This Court has held that "*[i]nformation is . . . an absolute prerequisite for effective public participation*"[25] and "*[p]eople must have access to information and the ability to speak freely about state conduct*."[26] The right of the public to receive information and ideas, and of the media to impart information and ideas, is intertwined with, and indivisible from the right of access to information.

19 Each of these rights have been analysed by this Court on multiple occasions. We highlight some of the key principles in the subsections that follow.

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[24] *Mogale v Speaker* above n 2 at paras 3 and 33.

[25] *SA Iron and Steel* above n 1 at para 30.

[26] *Mogale v Speaker* above n 2 at para 4.

The section 14 right to privacy

20 The right to privacy, guaranteed by section 14 of the Constitution, "*embraces the right to be free from intrusions and interference by the state and others in one's personal life.*"[27]

21 This right lies on a continuum: the more a person inter-relates with the world, the more attenuated the right to privacy becomes.[28] Whilst the mere fact that a person interacts outside of their intimate sphere does not deprive them of the right to privacy, the right to privacy is most sacred in the truly personal realm and "*as a person moves into communal relations and activities such as business and social interaction, the scope of the personal space shrinks accordingly*".[29] In the public realm, privacy would "*only remotely be implicated*".[30]

22 The right to privacy comes into play "*[w]herever a person has the ability to decide what [they] wish to disclose to the public and the expectation that such a decision will be respected is reasonable*."[31] The scope of a person's privacy thus extends only to those aspects in respect of which a legitimate expectation of privacy can be harboured.[32]

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[27] *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) at para 47.

[28] *Hyundai* above n 12 at para 15.

[29] *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 67.

[30] *Mistry v Interim National Medical and Dental Council* 1998 (4) SA 1127 (CC) at para 27.

[31] *Hyundai* above n 28 at para 15.

[32] *Bernstein v Bester NO* above n 29 at para 75.

23 In the present case, MMA submits that any expectation of privacy that candidates may have in relation to their professional experience and expertise is at its most attenuated:

23.1 First, the candidates' knowledge, experience and track record in relation to the promotion of gender equality and the objects of the Commission does not constitute information of an intimate nature, or information that lies at the heart of a person's identity or personal life.[33]

23.2 Second, where a person seeks appointment to public office, such a person cannot have a reasonable expectation of privacy over information that is relevant to their suitability for that office, such as their employment and educational history.[34] On the contrary, a candidate for public office must expect that the public has an interest in their appointment, and that participation, accountability and transparency are integral to the position.

24 The candidates' highly attenuated interest in privacy must, in addition, be considered in light of, and alongside, the other rights and values that are implicated.

The section 16 right to freedom of expression

25 Section 16(1) of the Constitution enshrines the right to freedom of expression, including the freedom to express and to receive information or ideas.

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[33] See the summary of information that would be required in Corruption Watch's HoA, para 44.

[34] See a similar rationale applied by this Court in *Mistry v Interim National Medical and Dental Council* 1998 (4) SA 1127 (CC) at para 27.

26 This right has been described as the "*the cornerstone of democracy*",[35] a "*benchmark for a vibrant and animated constitutional democracy",*[36] the "*lifeblood of a genuine constitutional democracy",*[37] and "*an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability.*"[38]

27 Freedom of expression is also "*of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm*".[39] The Constitution envisages a democratic state founded on, amongst others, the values of accountability, responsiveness and openness, and a democracy with both representative and participatory elements.[40] A properly functioning participatory democracy needs public information and awareness, through the exchange of information and ideas.[41]

28 In order to participate effectively in society, individuals need to be able to "*hear, form and express opinions and views freely.*"[42] In this way, freedom of expression, including the right to receive and impart information, works to protect democracy through keeping citizens informed, exposing the truth, and

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35 *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at para 122.

36 *Qwelane v SAHRC* above n 14 at para 67.

37 *Economic Freedom Fighters v Minister of Justice and Correctional Services* 2021 (2) SA 1 (CC) at para 1.

38 *EFF v Minister of Justice* above n 37 at para 1.

39 *S v Mamabolo* 2001 (3) SA 409 (CC) at para 37.

40 *Mogale v Speaker* above n 2 at para 2.

41 *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) at para 28.

42 *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) at para 7.

encouraging debates.[43] It takes on particular importance in the context of appointing persons to positions of public office.[44]

The section 32 right of access to information

29 Closely related to the right to freedom of expression is the right of access to information. Access to information is crucial both to the ability to participate in democratic processes, and to the exercise of the right to freedom of expression itself.

30 This Court has emphasised the importance of keeping those who operate the levers of power accountable, including those officers specifically mandated to strengthen and support accountability (i.e. those appointed to Chapter 9 institutions).[45] It is only through providing the public with timely, accessible and accurate information that transparency and accountability can be fostered.[46]

31 We submit that, just as the effective exercise of the right to vote depends on the right of access to information – without which *"the ability of ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined"*[47] – meaningful participation in the appointment of candidates to Chapter 9 institutions, such as the Commission, can only be achieved if the public has access to adequate information about the candidates.

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43 *DA v ANC* above n 35 at para 122.

44 *DA v ANC* above n 35 at paras 124 and 132.

45 *Speaker of the National Assembly v Public Protector; Democratic Alliance v Public Protector* 2022 (3) SA 1 (CC) at para 1.

46 *Brümmer v Minister for Social Development* 2009 (6) SA 323 (CC) at paras 54 and 62.

47 *President of the Republic of South Africa v M & G Media Limited* 2012 (2) SA 50 (CC) at para 10.

32 There can be no meaningful participation in the appointment process if the public is not provided with the information necessary to determine, for example, whether a particular candidate meets the minimum criteria.

The role of the media in facilitating access to information

33 Any discussion of the rights of freedom of expression and access to information would be incomplete without considering the role of the media.

34 The role of the media in our democratic society cannot be gainsaid.[48] It is a "*public sentinel*" in the functioning of our constitutional democratic society.[49]

35 The jurisprudence of this Court highlights that:

35.1 the media are the *"primary agents of the dissemination of information and ideas"*;[50]

35.2 the media "*bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture";*[51]

35.3 *"[a]ccess to information is crucial to accurate reporting and thus to imparting accurate information to the public*";[52] and

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48 *Brümmer* above n 46 at para 63.

49 *Print Media South Africa v Minister of Home Affairs* 2012 (6) SA 443 (CC) at para 54.

50 *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 24.

51 *Khumalo v Holomisa* above n 50 at para 24.

52 *Brümmer* above n 46 at para 63.

35.4 "*the ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate*."[53]

36 Parliament's failure to publish information regarding the candidates for appointment to the Commission necessarily undermined the ability of the media to carry out its constitutional mandate. It prevented the media from disseminating such information to the public more generally; it prevented the media from undertaking analyses and critiques of particular candidates based on their historical records; and it prevented the media from providing a platform for members of the public to exchange ideas regarding particular candidates.

THE SPEAKER'S POPIA DEFENCE

The failure to publish CVs

37 In terms of section 193(1) of the Constitution, as well as section 3(1) of the Commission for Gender Equality Act, 1996 ("**the Commission Act**"), the minimum criteria for appointment as a commissioner include being 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.

38 Thus, when section 193(6) requires that public involvement in the recommendation process must be in accordance with section 59(1)(a) of the Constitution, these are the essential matters on which the views of the public

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[53] *SABC v NDPP* above n 41 at para 24.

must be sought. That is, the public must be provided with a meaningful opportunity to comment on the suitability of the candidates, with specific regard to whether they are fit and proper, whether they have a record of commitment to the promotion of gender equality, and whether they have knowledge or experience regarding matters connected with the objects of the Commission.

39 It is entirely unclear, however, how the public could conceivably comment on such matters in any meaningful way, having been given nothing more than each candidate's name and qualifications. It is equally unclear how the media could meaningfully *report* on such matters publicly, given the dearth of information provided.

40 Indeed, we respectfully submit that this concern is borne out by the comments that *were* received. While the Speaker seems to suggest that the receipt of 656 submissions is itself evidence of the adequacy of the process,[54] even a cursory consideration of the comments demonstrates that this is not so. For the most part, the comments were either submitted by people who appeared to have independent knowledge of the relevant candidate,[55] or they constituted unhelpful platitudes that could hardly have assisted the Portfolio Committee.[56]

41 What is entirely precluded by the information made available by the Portfolio Committee is the disclosure of information to the public and to the media that would illustrate – simply by way of example – that, despite having suitable qualifications, a particular candidate is entirely lacking in relevant experience in

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[54] Speaker's HoA para 34.

[55] See the two examples cited by the Speaker at Speaker's HoA paras 35.1 and 35.2.

[56] See "PC10", p 314 to p 341.

matters connected with the objects of the Commission. Or, for example, that a particular candidate may have worked for an organ of state at a time when allegations of maladministration or corruption were rife, calling into question their fitness and propriety.

42 This is the kind of information that the public and the media require in order to be in a position to make meaningful submissions, and to contribute to the public process of appointing suitable people to public office. The Speaker's approach precludes information of this kind being made public. It therefore precludes meaningful participation.

Section 11(1) of POPIA in context

43 The Speaker says that the Portfolio Committee's decision not to publish full CVs was informed by its reading of POPIA, which was that it was prohibited from disclosing the candidates' personal information without their consent.[57]

44 POPIA was enacted to promote the "*processing*" of personal information by public and private bodies.[58] "*Processing*" has a broad meaning, and is defined to include, *inter alia*, dissemination by means of transmission, distribution or making available in any other form. The purpose of the Act is to prevent unlawful processing of personal information and to prescribe a manner of lawful processing that gives effect to the constitutional right to privacy, whilst balancing this right against the right of access to information and other important interests.[59]

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[57] Speaker's HoA para 31.

[58] POPIA's long title.

[59] POPIA, section 2(a).

45 In addition to the general principles of statutory interpretation set out above, POPIA prescribes that its provisions must be interpreted in a manner that harmonises the processing of information standards in South Africa with international standards,[60] and in a manner that gives effect to POPIA's purposes. In addition, and importantly, it must be interpreted so as not to impede any public body from exercising or performing its powers, duties and functions, as long as any processing of personal information in the execution of such powers or duties is in accordance with POPIA or other legislation that similarly regulates processing of information.[61]

46 Section 11 of POPIA is headed "**Consent, justification and objection**". It sets out certain circumstances in which personal information may be lawfully processed. These include where there has been consent;[62] where processing is necessary for the conclusion or performance of a contract,[63] complies with an obligation imposed by law[64] or protects a legitimate interest of the data subject,[65] is necessary for the proper performance of a public law duty by a public body[66] or for pursuing the legitimate interests of the responsible party or a third party.[67]

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60 POPIA, section 3(3) read with section 2(b).

61 POPIA, section 3(3).

62 POPIA, section 11(1)(a).

63 POPIA, section 11(1)(b).

64 POPIA, section 11(1)(c).

65 POPIA, section 11(1)(d).

66 POPIA, section 11(1)(e).

67 POPIA, section 11(1)(f).

47 MMA submits that Parliament had a duty to process relevant and necessary personal information of the candidates in terms of one or more of the applicable sub-provisions in section 11(1) of POPIA.

48 This duty arises, in the first instance, out of Parliament's constitutional obligation to facilitate meaningful public engagement, which must also be considered in light of the fundamental rights to access to information and freedom of expression, and in accordance with the Constitution's foundational values of participatory democracy, accountability and openness. Whilst the right to privacy is engaged, it is at its most attenuated in respect of information that is directly relevant to a candidate's potential appointment to public office.

49 Put differently, MMA submits that Parliament was required to publish the information about the candidates that was necessary to facilitate public participation in the appointment process. MMA submits that it was required to do so lawfully, in terms of section 11(1)(e), *alternatively*, section 11(1)(a) of POPIA.

Section 11(1)(e) of POPIA

50 Section 11(1)(e)[68] reads as follows:

> *"Personal information may . . . be processed if . . . (e) processing is necessary for the proper performance of a public law duty by a public body."*

[68] We start with a consideration of section 11(1)(e) as this is the subsection in POPIA that, we submit, most closely reflects the true nature of the purpose of disseminating the information. POPIA must be interpreted in a manner that harmonises South Africa's approach to processing information with the approach in other jurisdictions. Under the United Kingdom's General Data Protection Regulation ("**GDPR**"), consent is one of the lawful bases for processing personal information, but the Information Commissioner's Office has highlighted that a party should always choose the lawful basis that most closely reflects the true nature of the purpose for processing and the relationship with the individual. See: https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/consent/ .

51 We submit that parliament was required to invoke section 11(1)(e) and to publish the relevant information about the candidates in accordance with that provision.

52 This is for the following reasons:

52.1 Parliament is plainly a public body. The recommendation and approval of members to the Commission, and the public participation process associated therewith, are public law duties imposed on parliament in accordance with sections 59(1) and 193 of the Constitution.

52.2 In other words, the jurisdictional requirements of section 11(1)(e) have been met in full. This is confirmed by the Information Regulator.[69]

52.3 In fact, if anything, this appears to be precisely the kind of scenario in which section 11(1)(e) is intended to operate.

52.4 Section 11(1)(e) states that personal information "*may"* be processed if the requirements in that provision are met. It appears that the Speaker interprets this as a purely permissive or discretionary provision, and that the Portfolio Committee was at large to decide not to act in accordance with it in the recommendation process.

52.5 However, whilst the word "*may*" sometimes indicates a permissive provision, such language "*cannot be dispositive of the enquiry into whether the power . . . is permissive or may be regarded as mandatory*

This is also the position adopted by our Information Regulator. See, Information Regulator's explanatory affidavit, para 28, p 220-221.

69 Information Regulator's explanatory affidavit, paras 29 to 32, p 221.

in certain circumstances, notwithstanding the permissive language used in the section".[70]

52.6 Corbett JA described the position as follows:

> *"A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying it's exercise have been satisfied."*[71] (our emphasis)

52.7 Put differently, the use of the word "*may*" can be read as conferring a power *coupled with a duty to use it in a proper case*.[72] This does not change the word "may" to "must". Rather, it is "*a question of whether the grant of the permissive power also imports an obligation in certain circumstances to use that power".*[73]

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[70] *The Helen Suzman Foundation v The Speaker of the National Assembly* 2020 JDR 2119 (GP) at para 49.

[71] *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 474A. This approach has been applied consistently by our Courts, including the Supreme Court of Appeal and this Court, for a number of years since at least *Noble & Barbour v South African Railways and Harbours* 1922 AD 527 at 539 – 540, where Innes CJ held as follows:

"*As remarked by COTTON, L.J in Nickalls v Baker (44 Ch. D. at p. 270) "may" never can mean "must" as long as the English language retains its meaning. It merely confers a power; but the question may arise as to when it becomes the duty of the person entrusted with the power to exercise it in favour of an applicant. In Julius v The Bishop of Oxford (5 A.C p. 244) where this point was carefully considered LORD CAIRNS, L.C remarked: "There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." And LORD BLACKBURN more tersely added: 'the enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right*.'" (Our emphasis)

[72] *Motala v Master, North Gauteng High Court* 2019 (6) SA 68 (SCA) at para 64; *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 937C to D (referred to with approval by this Court in *van Rooyen* below n 74 at fn 163).

[73] *Schwartz v Schwartz* at 474D to E.

52.8 It will often be the case that section 39(2) of the Constitution requires reading "*may*" as imposing a power, coupled with a duty. Such an approach was adopted, for example, by this Court in *van Rooyen* in order to read the impugned section in a manner that was consistent with judicial independence.[74]

52.9 It was also adopted in *South African Police Service v Public Servants Association*,[75] where Sachs J concluded that the discretionary power in question had to be exercised in a particular manner so as to account for the protection of the constitutional interests at play.[76]

52.10 We submit that, properly interpreted in light of section 39(2), section 11(1)(e) confers a power, coupled with a duty to use it, when the requisite circumstances are present: that is, in the present case, where processing the information is necessary for the proper performance of parliament's duty to facilitate public participation in the appointment of candidates for public office.

52.11 Given the highly attenuated nature of the right to privacy in these circumstances, together with parliament's obligation to publish information that is necessary to fulfil its obligation to facilitate meaningful public engagement, parliament was obliged to invoke section 11(1)(e) of POPIA in order to publish the CVs of candidates.

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[74] *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at paras 181 and 182, and fn 163.

[75] 2007 (3) SA 521 (CC).

[76] *SA Police Services v Public Servants Association* above n 16 at para 31 and 33.

52.12 Instead, the Speaker focused, inappropriately and one-sidedly, on the privacy interests of the candidates, and used POPIA as a shield against proper participation, transparency, accountability.

52.13 We note that the High Court has interpreted *section 11(1)(c)* in a manner similar to that we have advanced in relation to section 11(1)(e) – i.e. as reading the permissive "may" as a duty in certain instances. That sub-section says that personal information "*may*" be processed if processing complies with an obligation imposed by law on the responsible party. The High Court has found that a party who is subpoenaed under the Rules of Court cannot raise POPIA as a defence to complying with the subpoena, but must in those circumstances provide the requested information.[77]

Section 11(1)(a) of POPIA

53 We now turn briefly to address section 11(1)(a) of POPIA. This provision only arises, we submit, if this Court were to find that parliament was not required to invoke section 11(1)(e).

54 In terms of section 11(1)(a), personal information may be processed where the person consents to the processing of their personal information.

55 The Speaker contends that consent in POPIA must be voluntary, specific and informed, and that the candidates only consented to their information being scrutinized by members of the Portfolio Committee (and not more widely).

56 We make three submissions in this regard:

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[77] See, for example, *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* 2021 (4) SA 206 (WCC).

56.1 First, in circumstances where candidates were applying for public office, through an appointment process which the Constitution requires to include public participation, the candidates' consent to the disclosure of their information to the Portfolio Committee must be understood to include consent that their information would be made available to the public.

56.2 Second, the Speaker does not suggest that candidates were ever even *asked* to consent to the disclosure of their personal information to the public. Given the need for meaningful public participation, parliament was required, at a minimum, to seek the candidates' consent.

56.3 Third, and relatedly, parliament should in fact have gone further: it ought to have *required* candidates to consent to the publication of their CVs as a condition for running for public office. Candidates would have been free not to consent; but the consequence would have been that they were ineligible to run for appointment to the Commission.

57 The Speaker's approach has the perverse result that a person applying for public office could simply refuse to give consent for the publication of their personal information, and parliament could then simply elect (i) not to exercise its discretion under section 11(1)(e), and (ii) not to seek or require such consent. The result is that relevant information is shielded from public and media scrutiny, and the public are precluded from participating meaningfully in the appointment process.

CONCLUSION

58 MMA asks this Court to take these submissions into account when determining Corruption Watch's complaint that parliament failed to provide access to sufficient information in the appointment process.

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