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
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
LEONASHA LEIGH-ANN VAN DER MERWE	Ninth Respondent
and	
MEDIA MONITORING AFRICA	Amicus Curiae

Neutral citation: *Corruption Watch (RF) NPC v Speaker of the National Assembly and Others* [2025] ZACC 15

Coram: Madlanga ADCJ, Dambuza AJ, Goosen AJ, Kollapen J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J

Judgments: Goosen AJ (unanimous)

Heard on: 6 March 2025

Decided on: 1 August 2025

Summary: Public participation — other processes — Chapter 9 institution — access to information — reasonableness — exclusive jurisdiction — obligations of the National Assembly — section 167(4)(e) of the Constitution — Commission for Gender Equality

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ORDER

On application for direct access in terms of section 167(4)(e) of the Constitution:

1. Direct access is granted.
2. It is declared that:
   (a) Parliament failed to comply with its constitutional obligation to facilitate reasonable public involvement in recommending persons to be appointed as members of the Commission for Gender Equality.
   (b) The appointment of the fifth to ninth respondents as Commissioners to the Commission for Gender Equality with effect from 1 March 2023 is invalid.
   (c) The declaration of invalidity in paragraph 2(b) is suspended for a period of 12 months from the date of this order to enable the first respondent to conduct an appointment process and the second respondent to make appointments in a manner that is consistent with the Constitution.

3. The first respondent must pay the applicant's costs, including the costs of two counsel where employed.

JUDGMENT

GOOSEN AJ (Madlanga ADCJ, Dambuza AJ, Kollapen J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J concurring):

Introduction

[1] The right of members of the public to participate meaningfully in democratic governance is a hallmark of our constitutional democracy. Public involvement in the legislative and other processes of all three spheres of government is not merely a fashionable accessory; it is a thread woven into the fabric of our democracy.

[2] This case concerns an alleged failure, on the part of the National Assembly, to comply with its constitutional obligations to facilitate public involvement in the appointment of Commissioners to the Commission for Gender Equality (CGE). It comes before the Court by way of an application in terms of section 167(4)(e) of the Constitution[1] for an order to declare the appointments of certain Commissioners to be invalid. Reliance is placed upon section 193(6) read with section 59(1)(a)[2] of the Constitution.

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[1] Section 167(4)(e) provides:

> "Only the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation."

[2] Section 193(6) provides:

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

Section 59(1)(a) provides:

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

Parties

[3] The applicant is Corruption Watch, a non-profit company that aims to advance principles of transparency, accountability and integrity in an effort to contribute towards a society that is fair and free from corruption. It runs campaigns that focus on the appointment processes of key leadership positions in public institutions – including those established in terms of Chapters 9 and 10 of the Constitution. In doing so Corruption Watch seeks to ensure that the appointment processes are transparent, merit-based and include meaningful public participation.

[4] The first respondent is the Speaker of the National Assembly (Speaker) and the second respondent is the President of the Republic of South Africa (President). The third respondent is the CGE. The fourth respondent is the Information Regulator, established in terms of the Protection of Personal Information Act[3] (POPIA), and the fifth to ninth respondents are the Commissioners of the CGE who were appointed in terms of the impugned appointment process.

[5] The Speaker opposes the application. I shall refer to the opposition as that of the National Assembly. The President, who made the impugned appointments based on the recommendation of the National Assembly, abides by the decision of this Court. The Information Regulator filed an explanatory affidavit regarding the impact of certain provisions of POPIA, but did not otherwise participate in the proceedings. The fifth to ninth respondents (to whom I shall refer as the Commissioners) filed affidavits in response to directions issued by the Chief Justice. The Commissioners did not oppose the principal declaratory relief sought by Corruption Watch. They sought, instead, to explain the potential impact that a declaration of invalidity would have upon the CGE and upon them personally. They advanced submissions relevant to the exercise of the

[3] 4 of 2013.

Court's discretion to suspend an order of invalidity in terms of section 172 of the Constitution.[4]

[6] Media Monitoring Africa was admitted as an amicus curiae (friend of the court) prior to the hearing. It filed written submissions which addressed the nature of information required for, and the role of the media in, fostering meaningful public involvement in the processes of the National Assembly.

Factual background

[7] On 26 June 2022, the National Assembly's Portfolio Committee on Women, Youth and Persons with Disabilities (Portfolio Committee) invited members of the public and organisations to nominate suitable candidates for appointment as members of the CGE. The closing date for the nominations was midnight on 18 July 2022.

[8] On 23 and 24 August 2022, the Portfolio Committee convened to shortlist candidates from the nominations and applications it had received. It resolved to publish the curricula vitae (CVs) of the shortlisted candidates on the parliamentary website.

[9] On 2 September 2022, the Portfolio Committee called for public comment on the suitability of the shortlisted candidates. Comments were to be submitted on or before 16 September 2022. The comments were to be submitted on an online form accessible to the public via a link provided on the parliamentary website. The form consisted of a list of names of the 24 shortlisted candidates and a further link to additional information

[4] Section 172(1) reads:

> "(1) When deciding a constitutional matter within its power, a court—
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including—
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

about the candidates. This link provided access to a spreadsheet which contained the full names of the candidates and their qualifications. Their CVs were, however, not published.

[10] The online form consisted of three fields that a member of the public or an interested organisation was required to complete: the commenter's name or organisation; the name of the candidate to whom the comments related; and a section for comments. These comments were limited to 2 000 characters, which the applicant suggested was roughly equivalent to 500 words.

[11] On 6 September 2022, Corruption Watch, with the support of 44 civil society organisations and 17 prominent members of the public, sent a letter of objection to the Portfolio Committee regarding the latter's proposed manner of public participation in the recommendation process. Corruption Watch requested that the Portfolio Committee extend the period within which public comments could be submitted to at least 30 days, and that the CVs of the shortlisted candidates be made public, suitably redacted of personal information. Corruption Watch also requested that the word limitation on public submissions be removed to permit written submissions in the usual manner. The Portfolio Committee did not respond to the letter.

[12] On 16 September 2022, Corruption Watch sent another letter to the Portfolio Committee reiterating the concerns with the appointment process. It requested that the Portfolio Committee suspend the process and extend the period for submissions by 30 days and make available to the public the CVs of the shortlisted candidates. Corruption Watch alleged that the appointment process was flawed and opaque in that it failed to provide the public with a reasonable opportunity to participate meaningfully. The Portfolio Committee also did not respond to this letter.

[13] On 20 September 2022, Corruption Watch again wrote to the Portfolio Committee requesting an urgent response to its prior letters. The Portfolio Committee responded on 22 September 2022, at a stage when it was already

conducting interviews with the shortlisted candidates.[5] It rejected the request to extend the time for comments, stating that the 14 days it had allowed was reasonable. It further rejected the request to remove the character limitation on comments. Regarding the publication of the candidates' CVs, the Portfolio Committee stated that POPIA imposed a "processing limitation" on the publication of the CVs and that it met this by publishing the least amount of information possible.

[14] On 20 October 2022, Corruption Watch, with the support of 10 civil society organisations, wrote to the Information Regulator to address the approach adopted by the Portfolio Committee with regard to the provisions of POPIA. Corruption Watch requested the Information Regulator to advise members of the Portfolio Committee regarding personal information which could lawfully be published. The Information Regulator did not respond to the letter.

[15] Following the interviews, the Portfolio Committee met on 25 October 2022 to select candidates for nomination. On 26 October 2022, it tabled its report before the National Assembly. The report recorded that 156 applications were received. In regard to public participation, the report stated that the Portfolio Committee had followed an open and transparent process in line with section 59(1) of the Constitution, and that it had provided "a platform for civil society to comment on all candidates" because of the public interest in gender equality issues. It reported that the Portfolio Committee published the names of all candidates with their qualifications on Parliament's website to allow the public to comment. The report also stated that the Portfolio Committee had received a total of 656 comments relating to 22 of the shortlisted candidates with comments per candidate ranging from one to 99 comments.

[16] The Portfolio Committee urged the National Assembly to adopt the report as a matter of urgency, as it was concerned that the CGE would not be quorate from 1 November 2022 because six posts would become vacant at the end of October 2022.

[5] The interviews were conducted from 20 to 23 September 2022.

On 1 November 2022, the National Assembly adopted the report and resolved to recommend the suggested candidates for appointment by the President. The names of the recommended candidates were then communicated to the President for consideration and appointment.

[17] On 25 February 2023, the President announced the appointment of a chairperson and four new members to the CGE as Commissioners, with effect from 1 March 2023. The term of the Chairperson and three of the Commissioners will end on 28 February 2028. The term of the fourth Commissioner will end on 31 December 2027.

In this Court

Jurisdiction and direct access

[18] Corruption Watch brings this application under the Court's exclusive jurisdiction in section 167(4)(e) of the Constitution. This section provides that only this Court may decide that the National Assembly has failed to fulfil a constitutional obligation. *Doctors for Life*[6] settled the question of this Court's jurisdiction in relation to a similar challenge concerning the question of whether Parliament had complied with its obligation to facilitate public involvement. We accordingly have jurisdiction to entertain this application.

[19] Corruption Watch commenced the application nine months after the appointment of the Commissioners was announced. It explained the delay in its condonation application as arising from the time taken to secure funding and to obtain the assistance of legal representatives. The condonation application was not opposed. The National Assembly also brought an application for condonation of the late filing of its answering affidavit. Corruption Watch did not oppose that application. For reasons which will become apparent in addressing the merits of the application, the interests of

[6] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 27.

justice favour the granting of condonation to both parties. No prejudice arose because of the delay. Condonation for the late filing of the application and the answering affidavit is granted. The Commissioners sought condonation for the late filing of their written submissions. The delay was minimal and no prejudice was caused thereby. Condonation is granted.

[20] Shortly before the hearing of the application, Corruption Watch sought leave to file a supplementary affidavit. The affidavit dealt with a subsequent number of appointments to the CGE. The evidence was presented on the basis that it may bear upon the remedy, if any, that this Court might grant. The application was also not opposed. Indeed, the Commissioners made common cause with the remedial implications said to flow from the supplementary evidence. The supplementary affidavit was therefore admitted. Leave to file the supplementary affidavit is granted.

Corruption Watch's case

[21] The nub of Corruption Watch's challenge is that the National Assembly failed to comply with its constitutional obligations imposed in terms of section 59(1)(a) of the Constitution in three interrelated respects. Corruption Watch avers that the National Assembly:

(a) failed to provide members of the public and civil society organisations with adequate information about the shortlisted candidates to enable meaningful and effective comments to be submitted;

(b) failed to provide a reasonable opportunity to submit written representations because the period for submissions was restricted to 14 days, thereby unduly limiting the opportunity for members of the public to consider, consult and provide written feedback regarding the shortlisted candidates; and

(c) imposed an unreasonable restriction upon public involvement by utilising an online form and limiting written submissions to 2 000 characters.

[22] These were not discrete challenges. Corruption Watch's case is that their individual and collective effect rendered the public participation process unreasonable and ineffective.

The National Assembly's case

[23] The National Assembly's case on the other hand is that it had, through the conduct of the Portfolio Committee, provided the public with a reasonable opportunity to participate in the recommendation process. It contended that this was demonstrated by the fact that 156 nominations had been solicited, and that 656 comments on the shortlisted candidates had been received. Regarding the 14-day period for public participation, it submits that this was reasonable. It accorded with periods allowed for appointments to other Chapter 9 institutions. It was also necessary to fill the vacancies on the CGE to enable it to function effectively.

[24] As to the limitation on the length of submissions, the National Assembly denies that it was arbitrary. It arose because of the use of an online submission form. The Portfolio Committee had not initially been aware of this limitation and when it became aware it resolved to allow Corruption Watch and members of the public to submit comments directly to it.

[25] The National Assembly's case is that the Portfolio Committee decided not to publish the CVs of the shortlisted candidates because it believed that it was prohibited from doing so by the provisions of POPIA, in the absence of consent given by the candidates. The Portfolio Committee took the view that the information it did publish was, in any event, sufficient to enable members of the public to make meaningful comments.

The right to public participation in governance

[26] Public participation is a central feature of our democracy. In *New Clicks*[7] Sachs J described what he termed a new philosophy expressed by the Constitution, namely that persons who are affected by legislation have a right to be heard before such legislation is enacted. This right finds expression in numerous provisions of the Constitution. He went on to say:

> "What all these provisions, both constitutional and statutory, have in common is a commitment to accountability, responsiveness and openness in government. They presuppose a democracy that is not only representative but participatory. Indeed, the Constitution itself was a product of national dialogue, first outside of then inside Parliament. We have developed a culture of imbizo, lekgotla, bosberaad and indaba. Hardly a day goes by without the holding of consultations and public participation involving all stakeholders, role-players and interested parties, whether in the public or private sector. The principle of consultation and involvement has become a distinctive part of our national ethos."[8]

Later in his judgment, Sachs J stated:

> "The right to speak and be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity."[9]

[27] This characterisation of the nature and importance of public participation was endorsed in *Doctors for Life.*[10] At issue in that case was the nature of the obligation imposed by section 72(1)(a) of the Constitution in relation to the legislative processes of the National Council of Provinces. The equivalent provision in relation to the National Assembly, at issue in the present matter, is section 59(1)(a). It provides that

[7] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) at para 621.

[8] Id at para 625.

[9] Id at para 627.

[10] *Doctors for Life* above n 6.

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

[28] In *Doctors for Life* this Court held that the right of members of the public to participate in the legislative and other processes of Parliament is an aspect of the right to political participation.[11] The right to political participation is a fundamental human right which consists of a general right to take part in the conduct of public affairs and the more specific right to vote or to be elected. Public participation, the Court said, is considered in international law instruments to be a necessary condition for the full and effective exercise of democracy.[12] This Court held that the duty to facilitate public involvement, encapsulated in sections 59(1)(a) and 72(1)(a), is a manifestation of the international law right to political participation.[13] What the duty envisages, however, is more specific than the general expression of the right contained in Article 25 of the International Covenant on Civil and Political Rights.[14]

[29] *Doctors for Life* held, unequivocally, that ours is a participatory democracy that envisages a far more expansive role for public involvement in parliamentary processes and public affairs.[15] Public participation is an integral feature of our constitutional democracy. Significant leeway must necessarily be given to Parliament to determine appropriate and effective forms of public involvement.[16] Nevertheless, Parliament's

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[11] Id at para 89.

[12] Id at para 94.

[13] Id at para 107.

[14] Id. Article 25 of the International Covenant on Civil and Political Rights, 23 March 1976 states:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
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> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
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> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country."

[15] See *Doctors for Life* above n 6 at para 129.

[16] See *New Clicks* above n 7 at paras 634 and 636.

conduct is to be judged by an objective standard of reasonableness. This Court sketched the contours of the standard of reasonableness as it relates to the legislative process, in these terms:

> "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.
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> What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. *Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided*."[17] (Emphasis added.)

[30] Since *Doctors for Life*, this Court's jurisprudence on public involvement in the legislative and other processes of legislatures has expanded significantly. In *Matatiele II*[18] the question of public involvement in the legislative process arose in the context of an amendment to the Constitution which altered the boundaries of a province. The amendment required the approval of the provincial legislature of KwaZulu-Natal province in terms of section 74(8) of the Constitution. The question was whether such provincial approval required the facilitation of public involvement in accordance with section 118(1)(a) of the Constitution. This Court held that the obligation to facilitate

[17] *Doctors for Life* above n 6 at paras 128-9.

[18] *Matatiele Municipality v President of the Republic of South Africa (2)* [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2007 (6) SA 477 (CC).

public involvement was not confined to the process of enacting provincial legislation. Section 74(8) required the provincial legislature to involve itself in the law-making functions of Parliament since the constitutional scheme required provincial approval. The provincial legislature was therefore involved in a law-making process in the exercise of its authority. Section 118(1)(a) thus applied and mandated public involvement facilitated by the provincial legislature.

[31] Significantly, *Matatiele II* also held that it is not sufficient that a legislature enacts rules or procedures to facilitate public involvement. Nor does the fact that legislatures comprise persons elected to represent the public negate or diminish the obligation to facilitate public involvement. Instead, this Court stated that:

> "Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy.
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> . . .
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> Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves."[19]

[32] What is required is the achievement of a balanced relationship between the representative and participatory elements of our democracy.[20]

[33] In *Mogale*[21] Theron J reiterated the essential principles established by the judgments of this Court as follows:

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[19] Id at paras 57-8.

[20] Id at para 60, citing *Doctors for Life* above n 6 at para 122.

[21] *Mogale v Speaker of the National Assembly* [2023] ZACC 14; 2023 (6) SA 58 (CC); 2023 (9) BCLR 1099 (CC).

> "This Court has repeatedly emphasised that, regardless of the process Parliament chooses to adopt, it must ensure that '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'. A reasonable opportunity to participate in legislative affairs 'must be an opportunity capable of influencing the decision to be taken'. It is unreasonable if the content of a public hearing could not possibly affect Parliament's deliberations on the legislation. If the hearing is not effectively or timeously advertised, if people are unable to attend the hearing, or if the submissions made at the hearing are not transmitted or accurately transmitted to the legislature, then the hearing is not capable of influencing Parliament's deliberations. This does not mean that the legislature must accommodate all demands arising in the public participation process, even if they are compelling. The public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public's views. Even if the lawmaker ultimately does not change its mind, it must approach the public involvement process with a willingness to do so."[22]

[34] The National Assembly contends that these principles, which were developed in relation to legislative processes, are not readily "translatable" to the "other processes" of Parliament. Reliance is placed on *New Clicks* where Sachs J referred to the "infinite variation" of public participation processes.[23] It is suggested that since Parliament is accorded a wide discretion to determine the manner in which it facilitates public involvement, a fact-based assessment is required in each instance where "other processes" are at issue.

[35] The principles upon which this Court adjudicates public participation challenges are well settled. They may be summarised as follows:

(a) Parliament is under a constitutional obligation to facilitate public involvement in its legislative and other processes.[24]

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[22] Id at para 35.

[23] *New Clicks* above n 7 at para 630.

[24] Section 59(1)(a) of the Constitution explicitly obliges public participation in the "other processes" of the National Assembly.

(b) A failure to comply may render the conduct (whether or not it is legislative) invalid and liable to be struck down as unconstitutional.

(c) Parliament is accorded a wide discretion to determine the manner in which it facilitates public involvement, and the courts must take due cognisance of what Parliament considers to be reasonable.

(d) The nature of the legislation or other process and its importance to particular interest groups or sectors of the public may warrant the employment of different measures to facilitate appropriate public involvement.

(e) The subject matter of the parliamentary process which requires public involvement, its purpose and importance, the urgency with which the process must be conducted and considerations of practicality and efficiency are all relevant to determining whether the measures adopted are reasonable.

(f) Whether, in relation to a specific challenge, the obligation has been met is to be judged by an objective standard of reasonableness. The test is sufficiently flexible to permit an evaluation of a wide range of factors in a fact-specific enquiry.

[36] This Court's judgments serve as a guide to the elements of an effective and meaningful public involvement process.[25] The public and organs of civil society must be informed of the matter requiring public involvement. This is an elementary notice requirement. Sufficient time must be given to allow for public participation. Participation must occur at a stage in the process when it is possible for the public participation input to alter or influence the outcome of the parliamentary process. Parliament must consider the views and comments of members of the public in its deliberations and decision-making. Parliament is not bound by the views or comments but should demonstrate a preparedness to be guided by the public involvement process.

[25] *New Clicks* above n 7; *Doctors for Life* above n 6; *Matatiele II* above n 18; *Mogale* above n 21; and *South African Iron and Steel Institute v Speaker of the National Assembly* [2023] ZACC 18; 2023 (10) BCLR 1232 (CC) (*SA Iron and Steel*).

Members of the public and organs of civil society must have access to sufficient information about the subject matter to enable meaningful and informed deliberation. The process selected for public involvement should be accessible to the public so as to foster inclusive public engagement.

The nature of the parliamentary process

[37] The starting point for determining the scope of the obligation to facilitate public involvement is an appraisal of the nature and importance of the process in which the public has a right to participate. In this case we are concerned with the appointment of Commissioners to the CGE.

[38] The CGE is a Chapter 9 institution established in terms of the Constitution to strengthen democracy. Section 181(2) provides that Chapter 9 institutions are "independent, and subject only to the Constitution and the law, and they must be impartial and they must exercise their powers and perform their functions without fear, favour or prejudice".

[39] Other organs of state are obliged to assist and protect these institutions, and no person may interfere with their functioning.[26] These provisions in effect provide for institutional independence from the arms of government in terms similar to that provided in relation to the courts. Thus, while these institutions are independent of government, they are required to fulfil their primary functions to strengthen democratic governance.

[40] Section 187(1) defines the principal purpose of the CGE. It must "promote respect for gender equality and the protection, development and attainment of gender equality".[27] The CGE is clothed with the power to "monitor, investigate, research,

[26] Section 181(3) and (4) of the Constitution.

[27] Section 187(1) of the Constitution.

educate, lobby, advise and report on issues concerning gender equality".[28] Section 11 of the Commission for Gender Equality Act[29] (CGE Act) confers upon the CGE its powers and functions.[30]

[41] The CGE thus plays a vital role in the development of social norms and values which promote the achievement of gender equality in South Africa. Its reason for establishment is to facilitate the transformative agenda endorsed by the Constitution.[31] It serves as an important intermediary between the public and government in relation to its role of promoting gender equality. Murray describes this role as "providing a different opportunity for public participation in public life to that provided in political processes".[32] In this sense, the CGE by its nature gives expression to the value of participatory democracy. Its purpose is to support the democratic, open, transparent, and accountable exercise of state power.

[42] The appointment of Commissioners to the CGE is regulated by section 193(4)[33] of the Constitution read with section 3(2) of the CGE Act. Section 193(6) of the

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[28] Section 187(2) of the Constitution.

[29] 39 of 1996.

[30] Section 11(1)(a) of the CGE Act states:

> "(1) In order to achieve its object referred to in section 187 of the Constitution, the Commission—
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> (a) shall monitor and evaluate policies and practices of—
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> (i) organs of state at any level;
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> (ii) statutory bodies or functionaries;
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> (iii) public bodies and authorities; and
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> (iv) private businesses, enterprises and institutions, in order to promote gender equality and may make any recommendations that the Commission deems necessary."

[31] *Speaker of the National Assembly v Public Protector; Democratic Alliance v Public Protector* [2022] ZACC 1; 2022 (3) SA 1 (CC); 2022 (6) BCLR 744 (CC) at para 5.

[32] Murray "Human Rights Commission et al: What is the role of South Africa's Chapter 9 Institutions?" (2006) 2 *Potchefstroom Electronic Law Journal* 1 at 6-7.

[33] Section 193(4) provides:

> "(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;

Constitution provides that "[t]he involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a)". It is not without significance that section 193(6) contains a specific reference to the involvement of civil society organisations in the process of recommending persons for appointment as Commissioners. It references the general obligation, contained in section 59(1)(a), to facilitate their involvement.

[43] Although Corruption Watch based its challenge upon both sections of the Constitution, it did not assert a failure to comply with a specific obligation arising from section 193(6). In light of this, it is not necessary to consider the interplay between these two sections, nor whether section 193(6) imposes a specific obligation upon the National Assembly to take steps to involve organs of civil society. That question must be left open. It suffices to observe that the reference to organised interest groups suggests the centrality of public participation in the appointment of Commissioners to a Chapter 9 institution. This is consonant with the importance of these institutions and the roles they are required to play in the development of our democratic order.

[44] In this instance, the procedure followed by the National Assembly involved distinct stages. The first was a public call for nomination of suitable candidates. Thereafter, the Portfolio Committee considered the nominations it received and selected candidates to be interviewed. A shortlist of candidates was compiled. Public comments on the shortlisted candidates were invited and thereafter the Portfolio Committee conducted interviews. It selected candidates to be recommended and presented these to the National Assembly. The National Assembly adopted a resolution recommending persons for appointment and this was placed before the President, who appointed the persons.

(b) the Commission for Gender Equality; and

(c) the Electoral Commission."

[45] It is not in dispute that public involvement was confined to an opportunity to comment upon a shortlist of candidates selected for interview. As indicated earlier, Corruption Watch challenged the appointment process on three interrelated grounds. I shall address each in turn.

The published information

[46] Access to information is a prerequisite for effective public participation.[34] The information which is provided must be sufficient and of a character that allows the public to deliberate upon and make informed submissions about the subject matter of the consultative process.

[47] The requirements for appointment are set out in section 193(1) of the Constitution and section 3(1) of the CGE Act. They are that the person should be a South African citizen; is fit and proper to hold the particular office; have a record of commitment to the promotion of gender equality; and have applicable knowledge or expertise with regard to matters connected with the objects of the CGE.

[48] Corruption Watch argued that in order to participate meaningfully, the public would need to have access to information regarding the candidates' knowledge, experience and record of commitment to promoting gender equality, that is, the qualifying requirements for appointment, to inform their participation. Only the names and qualifications of the candidates were published. The National Assembly's justification for the provision of limited information was said to be the restrictions imposed upon the processing of personal information contained in POPIA.

[49] This contention was elevated, during oral argument, to a submission that the National Assembly acted reasonably in relying upon the internal legal advice it had received. Ordinarily such justification would need to be pleaded in order to be considered. In this case the National Assembly did not do so. No such evidence was

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

presented upon which the reasonableness of reliance on the advice could be judged. In any event, the provisions of POPIA do not support the stance adopted by the Portfolio Committee.

[50] It was not in dispute that the publication of CVs supplied by the candidates to the Portfolio Committee would constitute the "processing" of "personal information" as defined by POPIA.[35] Section 11 of POPIA, in relevant part, provides as follows:

> "(1) Personal information may only be processed if—
>
> (a) the data subject or a competent person where the data subject is a child consents to the processing;
>
> . . .
>
> (c) processing complies with an obligation imposed by law on the responsible party;
>
> . . .
>
> (e) processing is necessary for the proper performance of a public law duty by a public body."

[51] Section 11 of POPIA provides for publication with the consent of the data subject. It also excludes unlawfulness if the publication of the personal information is required to fulfil a public law duty. The constitutional obligation to provide sufficient information to facilitate public involvement is plainly the type of public law duty which would entitle the Portfolio Committee to publish the personal information of the candidates.

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[35] "Processing" of information is defined in section 1 of POPIA to mean **"**any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

> (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
>
> (b) dissemination by means of transmission, distribution or making available in any other form; or
>
> (c) merging, linking, as well as restriction, degradation, erasure or destruction of information."

[52] What constitutes sufficient information will depend upon the subject matter on which public involvement is sought. In this case the question at issue was whether the candidates were suitably qualified and had the necessary experience to meet the requirements for appointment as Commissioners to the CGE. The question could only be answered by considering the personal information provided by the candidates in their CVs with reference to the requirements stipulated in the Constitution and the CGE Act.

[53] One example suffices to illustrate the point. To assess a candidate's commitment to gender equality, information about that candidate's work history, involvement in the activities of civil society organs and the like is essential. This is the type of information which would typically appear in a detailed CV. Furthermore, the selection of a suitably qualified candidate from amongst competing candidates inevitably involves comparative assessment. If members of the public and civil society organs are to provide meaningful input which will enrich and influence the selection process, the scope for proper comparative assessment must exist.

[54] The scant information which was published was not sufficient. Publication of the candidates' CVs would have provided the type of information upon which meaningful and effective public participation could be based. The publication of their CVs was therefore necessary to ensure that the right to public participation could be exercised. Section 11(1)(e) of POPIA provides the lawful basis upon which the National Assembly could have met its public law obligation while protecting the rights to privacy which POPIA seeks to ensure.

[55] In any event, section 11(1)(a) of POPIA provides that the data subject may consent to publication of personal information. The National Assembly claimed that candidates had only given limited consent to the processing of their personal information to members of the Portfolio Committee. No evidence of consent in this limited form was, however, presented. The National Assembly also did not explain why a broader consent was not sought when the Portfolio Committee was alerted to the potential impact of POPIA upon the appointment process.

[56] Corruption Watch argues that in the context of appointments of office bearers to public or state institutions and where those appointments are subject to public involvement, the provision of a CV by a candidate ought to be regarded as conveying an implied consent to publication. There is some force in this argument. It is, however, not necessary to decide this question.

[57] The National Assembly also made no attempt to provide candidate CVs which were suitably redacted to protect personal information that was not relevant to the requirements for appointment. It was called upon to do so during the initial exchanges between Corruption Watch and the Portfolio Committee. This request was supported by many civil society organisations and numerous prominent public figures, demonstrating the significant public interest in the appointment of Commissioners to the CGE. The request was made at a stage when it was possible to correct the initial failure to provide adequate information. Yet, the Portfolio Committee ignored the request and, in these proceedings, provided no rationale for its stance. The failure to publish the CVs of the shortlisted candidates resulted in relevant information being shielded from public and media scrutiny. The public was therefore precluded from meaningfully participating in the appointment process.

[58] The National Assembly relied upon the fact that candidates underwent a rigorous "vetting procedure" to determine their suitability for appointment. The proposition was that this "vetting procedure" in some respects served to overcome deficiencies of public involvement in the appointment process. There is no substance to the proposition. It is akin to an argument that this Court rejected in *Matatiele II*.[36] In that case the argument was that elected representatives of a legislature represented the public and exercised decision-making on behalf of the public. On the strength of this, public involvement was unnecessary.

[36] *Matatiele II* above n 18.

[59] This Court held that representative decision-making does not obviate the need for public involvement. Public participation in decision-making is not, as this Court has repeatedly affirmed, a nice-to-have accessory. It is integral to an open, transparent and democratic process which seeks to ensure the integrity and legitimacy of the process of governance.

[60] It was also suggested that the limited information provided about the shortlisted candidates could be supplemented by publicly available information because of the "online presence" of the candidates. As I understand the contention, it is that members of the public were able to undertake their own research in order to obtain relevant information upon which comments could be based. It strikes me as an unfortunate proposition which does not appreciate the nature of the constitutional obligation to facilitate public involvement. Members of the public are, as of right, co-participants in decisions which concern matters that affect them. Meaningful participation necessarily requires that they have access to the same essential information which bears upon the decision to be made. If that were not so, the deliberative process would flounder and be susceptible to misdirection arising from the inadequacy of information which informs the decisions.

[61] In summary, the information provided to the public was insufficient to allow meaningful and effective participation in the appointment process. On this basis alone, Parliament did not comply with the obligation to facilitate public involvement. I move on to consider the period allowed for public comments.

The period allowed for comments

[62] The periods were motivated by the "urgent" need to appoint Commissioners to allow the CGE to continue to operate once the terms of existing Commissioners expired. This ostensible urgency, which was conveyed to the National Assembly by the Portfolio Committee in its report, is difficult to understand. It must have been apparent to the Portfolio Committee that the terms of office of the Commissioners would expire and that further appointments would need to be made long in advance. No explanation

is offered as to why the process could not have been initiated at an earlier stage. The National Assembly suggested that the 14-day period it allowed for comments was in keeping with similar time periods provided on other occasions such as the appointment of the Public Protector and the appointment of Commissioners to the South African Human Rights Commission. Such comparators do not, per se, establish the reasonableness of the time allowed for comments.

[63] The period cannot be considered in isolation. In light of the restricted information made available, the limited period operated as a further impediment to effective and meaningful public involvement. When an extension of time was first requested, the Portfolio Committee ignored the request. It only responded when its appointment procedure had effectively run its course and then it refused the requested extension. This was not explained. The National Assembly did not advance any rationale for its selection of the 14-day comment period.

The mode of submission of comments

[64] Digital information systems and online platforms to facilitate public involvement are, undoubtedly, innovations which ought to be encouraged. However, in a society wracked by unequal access to resources and technology, such innovation ought to be approached with caution where it is the exclusive mode of participation. In *LAMOSA*[37] this Court considered the methods chosen to facilitate public involvement.[38] In that case, the language in which notices were published and information made available and the accessibility of the meetings which were held were relevant. While these factors are not strictly relevant in this case, what they point to is the need to take reasonable steps to ensure that the mode of public involvement does not exclude or inhibit participation. The selection of an online form, with character limitations, inherently excludes participation by those who have little or no access to the technology needed to participate.

[37] *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC).

[38] Id at paras 65-82.

[65] Furthermore, the evidence establishes that the Portfolio Committee was initially unaware of the character restriction which applied to the online form. When it was drawn to its attention, the Portfolio Committee, to its credit, recognised the need to permit longer form submissions. It resolved to inform members of the public that they could do so by sending submissions directly to them. However, it did not act upon its own resolution. The public was not informed of this decision and, in any event, the time period for submissions was not extended.

[66] In summary, I conclude that the mechanisms adopted by the Portfolio Committee to facilitate public involvement in the appointment of Commissioners to the CGE failed to allow for effective public participation. While a court must take due cognisance of what the National Assembly chooses to do to facilitate public involvement, the assessment of what was done is objective. In this instance, the National Assembly acted upon an interpretation of POPIA which was manifestly incorrect. It took no steps to ensure compliance with its obligations within permissible exceptions provided by POPIA. This conduct was unreasonable. This, coupled with the short period allowed for public comments and the restriction on such comments, materially affected the appointment process as a whole. In the circumstances, the appointment process conducted by the National Assembly therefore did not comply with the obligations imposed by section 59(1)(a) of the Constitution.

[67] In this case, the failure to take reasonable steps to ensure effective public involvement in the appointment of Commissioners to the CGE served to undermine the legitimacy of the appointments to a crucial state institution charged with serving as the "guardians and protectors" of our democracy.[39] I wish to emphasise that the appointments are tainted by procedural irregularity. It was not suggested that the Commissioners did not, objectively, meet the criteria for appointment. Nevertheless, the legitimacy of the appointments rests upon the outcome of a lawful process.

[39] See *Speaker of the National Assembly v Public Protector* above n 31 at para 2.

Furthermore, even though the Commissioners may have met the criteria for appointment, they were not necessarily the only candidates who did so or the most suitable candidates for selection. It follows that the appointment process is unconstitutional and that the appointments of the Commissioners are invalid.

Remedy

[68] Section 172(1)(b)(ii) of the Constitution permits this Court, upon a declaration of invalidity, to make any order that is just and equitable, including an order suspending the declaration of invalidity, "to allow the competent authority to correct the defect". Corruption Watch moved for a suspension for a period of 18 months. In argument, Corruption Watch made the point that part of its initial rationale was to avoid a situation where the CGE was unable to function or its work was disrupted. As was explained in the supplementary affidavit it had filed, that reason has since fallen away in light of the additional appointments of Commissioners to the CGE by the President. Any concern that the CGE would have insufficient Commissioners to continue its work or would lack leadership are no longer relevant considerations. The Commissioners accepted that this is indeed the case.

[69] Corruption Watch nevertheless argues for suspension of the order on the basis that the declaration of invalidity will negatively impact the Commissioners who have already been appointed. The Commissioners, in turn, contended for a suspension period to allow them to serve out the full period of their terms of office.

[70] As indicated earlier in the judgment, the Commissioners filed affidavits and participated in the hearing in order to deal with the potential adverse consequences of a declaration of invalidity upon them. Relying on this Court's judgment in *Nxasana*,[40] the Commissioners submitted that the prejudice which they will suffer would outweigh the harm of retaining the status quo. They submitted that an order permitting them to

[40] *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC).

complete their terms of office was consistent with the case advanced by Corruption Watch because Corruption Watch had not challenged the Commissioners' suitability to hold office.

[71] The challenge by Corruption Watch impugned the legitimacy of the appointments. That, as stated earlier, concerns both the process and the consequential outcome of the process. The purpose of a remedy, in this context, must be to vindicate the infringed right and to allow the breach of the right to be corrected. Declaratory relief alone may serve as a form of vindication. However, effective relief ordinarily requires correction of the defect. Thus, where corrective conduct or action is possible, it ought to form part of the remedial order.[41] What stands to be corrected in this instance is the process by which Commissioners of the CGE were appointed and the consequential legitimacy of those appointments.

[72] Suspension of the declaration of invalidity seeks to avoid the disruptive and negative prospective consequences of the order of invalidity.[42] Considerations of disruption and good governance would apply equally where, as in this case, an immediate order of validity affects the appointment of a person to a public post. In such event, a court will consider whether invalidating an appointment would hamstring the institution in its ability to carry out its functions. In the absence of such disruption, the declaration of invalidity would ordinarily take immediate effect unless there are other circumstances which, on the basis of justice and equity, warrant a suspension.

[73] In this case, an immediate order will cause the Commissioners obvious economic hardship and disrupt their personal lives. They are victims of the National Assembly's unconstitutional conduct and played no part in it. The immediate consequences of the declaration of invalidity ought therefore to be ameliorated in the interests of justice and equity. That said, I do not believe that a suspension which permits the Commissioners

[41] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (II)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at para 30.

[42] See *Doctors for Life* above n 6; *LAMOSA* above n 37; *Mogale* above n 21; and *SA Iron and Steel* above n 25.

to complete their terms of office would be appropriate. Such an order would have no practical remedial effect. It would permit the National Assembly to ignore the consequences of its unconstitutional conduct. This Court's judgment would, in that event, serve only to guide the National Assembly in relation to its future obligation to ensure a constitutionally compliant process for the *next* routine round of appointments. That is not desirable.

[74] Furthermore, it is undesirable that a Chapter 9 institution should perform its vital constitutional role under the taint of illegality. The fact that the Commissioners' appointments are invalid will, no doubt, cause substantial reputational harm to the CGE because it implicates the rule of law and the principle of legality. Such harm should not be compounded by the remedial relief that this Court grants. The suspension should therefore operate only for so long as may be required to correct the unconstitutional conduct. A suspension order necessarily balances competing interests. Even though the failures here are procedural, and there is no suggestion that the Commissioners do not meet the criteria for appointment, the public interest in a lawful appointment process outweighs the personal interests of the Commissioners.

[75] The 18-month period suggested by Corruption Watch is unduly generous. It was initially motivated by concerns about the impact that the declaration would have upon the functioning of the CGE. That consideration has fallen away. In this instance, we are not dealing with a legislative process which, by its nature, is protracted. It was implicit in the National Assembly's case that an appointment process could be conducted in a constitutionally compliant manner in approximately six months, as they attempted in this case. The process was, however, not compliant in part because the time allowed for public participation was unduly restricted. In my view, a period of 12 months would be long enough to permit the National Assembly to conduct an appointment process which complies with its obligation to facilitate meaningful and effective public involvement.

Costs

[76] Corruption Watch relies upon the principle set out in *Biowatch*[43] to claim costs in the event of success. In my view, an award of costs, including those of two counsel, payable by the National Assembly is justified. The Commissioners did not oppose the principal relief. They sought merely to place facts and submissions before the Court concerning the period of suspension of the order of invalidity. They should not be mulcted in costs. They did not seek an order that their costs be paid by the National Assembly. In the circumstances no order relating to their costs should be made.

Order

[77] The following order is made:

1. Direct access is granted.
2. It is declared that:
   (a) Parliament failed to comply with its constitutional obligation to facilitate reasonable public involvement in recommending persons to be appointed as members of the Commission for Gender Equality.
   (b) The appointment of the fifth to ninth respondents as Commissioners to the Commission for Gender Equality with effect from 1 March 2023 is invalid.
   (c) The declaration of invalidity in paragraph 2(b) is suspended for a period of 12 months from the date of this order to enable the first respondent to conduct an appointment process and the second respondent to make appointments in a manner that is consistent with the Constitution.
3. The first respondent must pay the applicant's costs, including the costs of two counsel where employed.

[43] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

For the Applicant:	K Hardy and T Power instructed by Power and Associates
For the First Respondent:	N Stein instructed by Office of the State Attorney, Cape Town
For the Fifth, Sixth, Seventh, Eighth and Ninth Respondents:	S Baloyi SC and N Seme instructed by Kganare and Khumalo Incorporated
For the Amicus Curiae	M Mbikiwa and E van Heerden (written submission only) instructed by Bowman Gilfillan Incorporated