IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 21367/18

In the matter between:

AFRIFORUM NPC Applicant

and

THE CHAIRPERSON OF THE JOINT CONSTIUTITIONAL COMMITTEE OF THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Third Respondent

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FILING NOTICE

DOCUMENT FILED: **RESPONDENTS ANSWERING AFFIDAVIT**

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GWEN SELOWA

Attorney for Respondents

4th Floor

22 Long Street

Cape Town

(REF: 2722/18/P32)

TO: **THE REGISTRAR OF THE COURT**

CAPE TOWN

AND TO: **HURTER SPIES INCORPORATED**

Attorney for Applicant

(REF: merlinn@mmha.co.za)

c/o

MARAIS MULLER HENDRICKS INC

4th Floor

General Building

42 Burg Street

Cape Town

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: **21367/18**

In the matter between:

AFRIFORUM NPC	Applicant
and	
THE CHAIRPERSON OF THE JOINT CONSTIUTITIONAL REVIEW COMMITTEE OF THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent

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ANSWERING AFFIDAVIT:
PART A (APPLICATION FOR URGENT RELIEF)

L.P.M RM.

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I, the undersigned,

Lewis Nzimande

do hereby make oath and state that –

1. I am an adult male Member of Parliament. I am one of the two Co-Chairpersons of the Joint Constitutional Review Committee of the Parliament of the Republic of South Africa ("**the JCRC**"). I depose to this affidavit in my official capacity.

2. The facts in this affidavit are, to the best of my knowledge, true and correct. I have personal knowledge of these facts or I have ascertained them from documents under my control. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which I accept as being true and correct.

3. I am duly authorised to depose to this answering affidavit on behalf of the respondents. The following persons will depose to confirmatory affidavits.

    3.1. My Co-chair of the JCRC, the Hon. Mr Stan Maila, MP. He does so in this official capacity. (To the extent that the applicant, Afriforum NPC ("**Afriforum**"), only refers to the "Chairperson" in the singular, that is incorrect.)

LPM RM.

3.2. The second respondent, the Speaker of the National Assembly ("**the Speaker**"), who is cited in her official capacity. I note that no relief is sought against her.

3.3. The third respondent, the Chairperson of the National Council of Provinces ("**NCOP Chair**"), who is cited in her official capacity. I note that no relief is sought against her.

4. Due to the unreasonable timelines imposed by the applicant in these proceedings, these affidavits may not be served and filed together with this answering affidavit. They will be served at, or before, the hearing of this matter. To the extent necessary, I seek the Court's indulgence and condonation.

5. I do not intend to traverse the merits of the JCRC's Report, nor the recommendation for the Constitution to be amended. Importantly, for the reasons below, that is not before this Court. Accordingly, this application ought to be struck from the roll with punitive costs; alternatively, dismissed with punitive costs.

6. Where I do not respond to specific allegations contained in Afriforum's founding affidavit, which I have read, it should be taken as denied save as appears from the context.

WJM. RM.

THE APPLICANT'S CASE IN SUMMARY

7. Afriforum brings its application in two Parts.

7.1. In Part A, it seeks various relief on an urgent basis. Essentially that relief is aimed at restraining the JCRC Report from being passed onto Parliament. If successful, it will have the effect of halting the process of considering the amendment of section 25 of the Constitution ("**section 25**"). This interim stay will be in place until Part B is determined. (Afriforum also seeks access to various documents which is of less relevance to what this application is really about)

7.2. In Part B, it seeks to have the JCRC's *adoption* of the Report declared unlawful. It further seeks that the Report be remitted to the JCRC for reconsideration.

8. We demonstrate below that Afriforum's own case permits this Court to dismiss it with no need to consider the merits.

In Limine: This Court has No Jurisdiction

9. At the outset, I am advised that what Afriforum seeks to challenge is Parliament's conduct. This is evidenced by the fact that the consideration of the JCRC's Report

L.P.M. RM.

is still ongoing and Afriforum contends that *this* conduct is unlawful and ought to be set aside.

10. I am advised that in these circumstances, this Court has no jurisdiction to hear this matter. Had Afriforum waited and sought to challenge the amendment to the Constitution, if one is passed, it may have been correct in attacking the amendment in the High Court with any confirmation/appeal proceedings to be held later in the Constitutional Court.

11. However, what they have sought to do is attack is conduct that falls squarely within the ambit of section 167(4)(e). That section reads in full that "**Only the Constitutional Court may ... decide that Parliament or the President has failed to fulfil a constitutional obligation.**"

12. Given that Afriforum's challenge, such as it is, rests on the failure of Parliament to give effect to the right of public participation as contained in section 59 of the Constitution, it is abundantly clear that this matter falls within the exclusive jurisdiction of the Constitutional Court. I am advised that this is trite case law and is reflected by the precedent of that Court in similar matters where parliamentary procedure and conduct has been challenged.

13. This application ought to be struck from the roll with punitive costs on account of the fact that it is before the wrong Court.

WPM RM

In Limine: Afriforum's *Mala Fides* Interim Relief is Permanent in Effect

14. In truth, Afriforum seeks to permanently hobble the ability of Parliament to consider the amendment to section 25. It hopes to use this urgent application to end Parliament's ability to consider, let alone approve, an amendment to section 25.

15. This is evident from Afriforum's remarkable prayer that Part B be postponed *sine die*. Far from demonstrating Afriforum's genuinely urgent constitutional concerns, the prayer shows Afriforum's true intent. It hopes to, in effect, reverse the adoption of the Report which has started the process of a potential amendment to section 25.

16. I am advised that postponing the matter *sine die* is highly unusual where "Part A and Part B" relief is sought. In dressing up its relief as being "interim", Afriforum is deliberately trying to frustrate Parliament's legislative processes. Afriforum demonstrates that:

    16.1. It has no intention of ever setting Part B down for adjudication. (This is despite the fact that it seeks access to what it considers to be the excluded submissions so that it can supplement its Founding Affidavit within 10 days)

LRM RM

16.2. If Afriforum contends the matter will be set down, it betrays its desire to hold Parliament to ransom. It would seek to hijack Parliament's legislative agenda and subject it to its whims.

17. Neither of these outcomes is acceptable.

18. I highlight this as evidence of Afriforum's *mala fides* in approaching this Court on an urgent basis where it gave the respondents less than a day to answer this application. What Afriforum hopes to do is "steal a march" on Parliament.

19. This underscored by Afriforum's attorney's of record recent Tweet. Twitter is a micro-blogging site which allows a user to post messages of up to 280 characters onto their profile (otherwise called their timeline).

20. The tweet in question was tweeted by a Mr Daniel Eloff whose Twitter handle (or account name) is "@DJEloff". I attach a copy of Mr Eloff's Twitter profile as "**FA2**". From this profile, it is clear that Mr Eloff is in the employ of Afriforum's attorneys of record. He describes himself as an "Attorney in the making at @hurterspies".

21. "@hurterspies" is the account belonging to Afriforum's attorneys of record. I attach a copy of Afriforum's attorneys' of records' Twitter handle as "**FA3**" which also includes a link to their website www.hurterspies.co.za. (There is an error with that website).

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22. It is clear that these accounts belong to and/or are affiliated with Afriforum's attorneys of record and can be construed to act in their interest.

23. On 21 November 2018 at 4:18pm, Mr Eloff tweeted a picture of the Notice of Motion (with the Court stamp). He proceeded to say in his tweet, and I emphasise, that "We've approached the High Court on behalf of Afriforum on an urgent basis to declare the #EWC report by the CRC invalid. Under the *sub judice* rule of @ParliamentofRSA they cannot further debate the matter until the matter has been dealt with". I attach two screen shots of this Tweet as "**FA1.1**" and "**FA1.2**".

24. I am advised that Mr Eloff misunderstands the *sub judice* rule. The rule only applies where the discussion of the issues pertaining to a live matter before the Courts will influence the determination of that matter *by the Court*. This case is clearly distinguishable from the ordinary course of the *sub judice* rule. Further, I am advised that the Supreme Court of Appeal has criticised the *sub judice* rule to the extent that it has been brought into line with Constitutional values that promote free speech and the independence of the Court. That means even if Mr Eloff were correct and that the *sub judice* rule were of application, it is reconcilable with ongoing debate in Parliament.

25. In any event, this is the clearest evidence of Afriforum's *mala fides*. To the extent that Afriforum and/or its attorneys of record deny Mr Eloff's tweet as being true or correct or their beliefs and /or legal strategy, we call on them to do so on oath.

26. We also call on Mr Eloff to file an affidavit giving a full account of the matter. In particular, we call on him to explain whether Afriforum or any one at Afriforum's attorneys of record discussed and/or advised on the possibility of stopping Parliamentary discussion by means of launching this urgent application. We reserve our rights to seek leave from the Court, subject to what is contained in Mr Eloff's affidavit, to cross-examine Mr Eloff.

27. It is not in the interests of justice that this Court grant Afriforum any relief that will have the effect of denuding Parliament of its proper role in a constitutional democracy.

28. This reason alone justifies the matter being struck from the roll with punitive costs. It is an abuse of process.

In Limine: Afriforum Must be Non-Suited for Attacking the Wrong Decision

29. Afriforum dedicates much of its affidavit to attacking, *inter alia*:

LRM RM.

29.1. The JCRC's decision to "outsource" some of its functions to a third party service provider. Afriforum contends by inference that this was unlawful.

29.2. That third party service provider's decisions with respect to how it handled the submissions, and what it decided to pass on to the Committee. This included, but was not limited to, a complaint that MPs' had limited access to those submissions, etc.

30. I am advised that Afriforum *must* demonstrate to the Court that it has prospects of success in Part B. I am advised that where it fails to do so, its application in Part A can be dismissed. It does so in this particular way because it seems to believe that a "fruit from a poisoned tree" doctrine applies to the JCRC's *ultimate* decision. Thus, it can attack the third party service provider's appointment and conduct under the guise of seeking to declare unlawful the JCRC's *ultimate* decision.

31. However, Afriforum's targeting the operations and decisions of the third party service provider (ultimately endorsed by the JCRC *before* it adopted the Report) demonstrates why it should be non-suited.

32. It fails to seek relief attacking the JCRC's decision to appoint such a third party service provider, nor its decision to accept the third party service provider's conduct, in these proceedings.

LRM. RM.

33. Instead, Afriforum attacks the JCRC's *ultimate* decision to adopt the Report as unlawful. It does so under the misdirection that attacking the ultimate decision can necessarily be grounded on the separate decisions relating to the third party service provider, which is not squarely challenged in these proceedings.

34. This is a fundamental mismatch between the *facta probanda* in Afriforum's founding affidavit, and the relief it seeks. This mismatch demonstrates why it has no prospects of success.

35. I am advised that declaratory proceedings are appropriate when an applicant seeks a Court's intervention with respect to an existing, future, or contingent obligation in law. That obligation, in Afriforum's best-case scenario, was that the JCRC's obligation to give effect to section 59 of the Constitution. So the argument ought to have gone that by outsourcing the obligation and/or deferring to the third party service provider's interpretation of how to discharge that obligation, the JCRC conducted itself unlawfully.

36. Afriforum must either attack by means of declaratory relief and/or review proceedings. On the ex facie terms of its Notice of Motion, it does not. It simply attacks the JCRC's ultimate decision, not the "constitutive element" of the decision-making process upon which its case hangs. On the *ex facie* terms of its Notice of Motion, Afriforum contends that there are self-standing reasons to justify why the *ultimate* decision of the JCRC is unlawful.

LPM RM

37. It has elided two discrete legal issues. Its case, as pleaded, therefore, is without merit.

37.1. First, the alleged "illegality" of the JCRC's decisions (*both* to outsource the handling of the evidence to a third party service provider, and how the third party service provider sought to handle that evidence) is not attacked before the Court. Afriforum seeks no relief in that regard. Therefore, on a proper reading of its papers, those allegations are irrelevant and fall to be ignored.

37.2. Second, once those arguments are excised, there is no basis upon which Afriforum can obtain the declaratory relief sought against the JCRC's *ultimate* decision. This is because the only real ground of attack advanced before this Court do not relate to the relief it seeks. Afriforum have either attacked the wrong party and/or they have attacked the wrong decision or series of decisions, which *may* have rendered its *ultimate* decision unlawful. It has, so to speak, jumped the gun.

37.3. Thirdly, it effectively seeks review relief through the back door. Notwithstanding that it appears to do so for cynical reasons (namely, failing to launch a review in time), it also seems to do so because it hopes to obtain relief more typical of a review, on the relatively "lower" standard of a

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declaratory application. This despite the fact that they are not the same thing.

38. Afriforum has, thus, painted itself into a corner. It must either abandon this application in its present form and reformulate its relief. Or it must be held to the terms of the relief as indicated in its Notice of Motion and pleaded to and face the consequences. In either scenario, it has no prospects of success. This reason further justifies the matter being struck from the roll with punitive costs (without needing to consider the merits).

RESPONDENTS' DEFENCES ON THE MERITS IN SUMMARY

39. To the extent that the Court wishes to entertain Afriforum's application, despite its *mala* fides and being before the wrong Court, then the respondents contend that the application must still fail. We address the merits below *ex abudante cautela*.

40. First, the matter is not urgent. Any urgency on the part of Afriforum is self-created. Moreover, Afriforum fails to properly appreciate the JCRC's role in any potential amendment to the Constitution. That process will ensure that Afriforum can still enjoy substantive relief in due course (being the true test for urgency). This is dispositive of its case.

41. Second, to the extent that the Court may be willing to accept Afriforum's case on urgency, then Afriforum must still fail. It does not make out a proper case for interim

K.M.

relief. It has also undoubtedly failed to make out a case for final relief (which is the effect that this "interim interdict" will have)

41.1. Afriforum has no right to interdict Parliament. The JCRC's Report is an "interim step" akin to a Bill. It is not final in effect. It may be accepted. It may not. I am advised that the case law on the subject is trite. *Only* an Act of Parliament (including an Act of Parliament to amend the Constitution) can be interdicted from coming into effect and/or challenged for want of legality. Clearly, then, Afriforum must fail because the JCRC Report has no final effect in and of itself. All it does is begin the process by which a substantive future decision that will have final effect is to be taken. Should Afriforum accept, however, that their relief is designed to put the horses back in the stable after they have bolted, then the application must be dismissed. The effect of this relief will, if granted, serve as a gagging order to prevent Parliament from beginning to consider an amendment to section 25 where its doing so is in no way prejudicial to Afriforum. No final decision of legal effect has been made.

41.2. Moreover, to the extent that Afriforum hinges its case on section 59 of the Constitution (the right to public participation); it has already been given effect to. Afriforum, in essence, wants the JCRC to consider what it admits being duplicate submissions. In other words, it admits that the Committee has already considered the substance of those submissions (duplicate

WPM. RM

submissions being the same). This demonstrates why this application is a *brutum fulmen*. The right to participation, itself not absolute, has already been given effect.

41.3. There is no irreparable harm to Afriforum. Afriforum also has alternative remedies available to it. As stated above, Afriforum will have many more opportunities to substantively engage with the proposal to amend the Constitution. It cannot pre-empt nor pre-judge that outcome – the potential amendment is not a foregone conclusion. Parliament must still consider the matter, and must still exercise a substantive vote. The JCRC's Report is neither binding nor determinative. To the extent that it suffers from any legal effects, which it does not, does not serve to poison Parliament's yet to be exercised decision-making power. In any event, at all stages of this process, Afriforum and the people it corralled into participating will be able to raise their objections. This also includes *after* the amendment, assuming it is passed, becomes law (by means of judicial review).

42. Due to the severe time constraints which the applicants have unjustifiably imposed in this matter, I have not been able to address the Rules of Parliament in detail. I reserve my right to seek leave from the Court to supplement this affidavit at a later stage. I have been unable to address this in full on account of not wanting to be found in default of Afriforum's timelines, regardless of how prejudicial they are to the respondents. The Court would, respectfully, benefit from such an explanation

LPM. RM.

where it will be demonstrated that the need for *this* interdict at *this* stage is not necessary.

THE MATTER IS NOT URGENT

43. I am advised that the real test for urgency is whether there is substantial relief in due course. Although an applicant bears the onus of explaining its delay (if any), the real test is whether the refusal of relief on an urgent basis would render the applicant's rights meaningless if it were to pursue and be granted relief on the ordinary scale.

Afriforum Does Not Explain Its Unreasonable Delay

44. Despite Afriforum appearing to give a full account of the historical development of this matter, it seeks to justify its urgency by having regard to two dates:

44.1. 15 November 2018, being the date on which the final Report was adopted by the JCRC. Afriforum contends that and

44.2. 27 November 2018 being the day upon which the Report is scheduled for debate in Parliament (the National Assembly).

LPM RM

45. I note that the applicants have sought to have this matter heard the day before the debate scheduled to take place in the National Assembly on 26 November 2018.

46. Afriforum contends that its urgent relief is grounded in the fact that the JCRC only adopted the final Report on 15 November 2018. So the argument goes, Afriforum could not bring its application earlier because the final recommendations of the Committee were not known until that stage.

47. Following this line of thinking, the argument seems to be that notwithstanding the apparent flaws in the third party service provider's mandate and subsequent discharge of that mandate (in relation to the submissions), Afriforum may not have brought the application had the JCRC conducted itself differently with respect to the submissions and how they were handled.

48. Notwithstanding that this formulation of its attack is incorrect (because it attacks the wrong decision through the wrong proceedings), what Afriforum fails to explain is this:

48.1. Why it took some 5 days to draw and serve its papers;

48.2. Why it effectively only gave Parliament 1 day in which to answer thereto; and

LPM RM

48.3. Why it failed to bring this application any sooner.

49. In its account of this matter, Afriforum clearly indicates it had knowledge of the following:

49.1. On 3 July 2018, it became public knowledge that the JCRC would be using the services of a third party to assist it in relation to the submissions.

49.2. By 14 September 2018, alternatively 20 September 2018, the role of the third party service provider was confirmed by virtue of the fact that it accounted to the JCRC for its work on the submissions.

49.3. On 2 November 2018, it was reported that Opposition MPs were upset with the ongoing process by which the third party service provider was choosing to include/exclude certain submissions.

49.4. This was again reported on 13 November 2018 and 15 November 2018.

50. The applicants contend that it could not do anything until the JCRC's final recommendations were known.

51. But, on its current construction of its relief, and the facts relied thereupon, Afriforum clearly believes that the JCRC's *ultimate* decision is impeachable because the

LPM RM

illegality of the initial appointment and conduct of the third party service provider tainted the JCRC's *ultimate* decision. (Although it implicitly suggests that if the JCRC had dealt with the third partly service provider differently, it may have not brought this application. Be that as it may, the thesis of its case would still be applicable in that scenario).

52. If that is so, then Afriforum fails in its entirety to explain its delay:

52.1. It is common cause that the role of third party service provider became public on at least July 2018, some 4 months ago. According to Afriforum's "poisoned fruit theory", it had good grounds to bring this application (to challenge that decision and/or any subsequent conduct taken as a result of that decision). Yet it did nothing.

52.2. It is common cause that the third party service provider's first report became public in September 2018, some 2 months ago. *A fortiori*, the "poisoned fruit" thesis of Afriforum's case gave it good grounds to bring this application (to challenge that decision and/or any subsequent conduct taken as a result of that decision). Yet again, it did nothing.

52.3. By 2 November 2018, it ought to have been clear that the position from September 2018 had not changed. It was also, by that stage, and given the 27 November 2018 deadline, unlikely to change. Even not having to rely on

LPM. KM

the "poisoned fruit" thesis, Afriforum had grounds to approach this Court. Yet again, it did nothing.

53. In the absence of a sufficient explanation for its unreasonable delay in these circumstances, Afriforum cannot benefit from the Court's consideration of whether it will enjoy substantial relief in due course.

54. To the extent, however, that the Court does address this issue, we provide further reasons as to why Afriforum's application ought to be dismissed with punitive costs further below.

Afriforum Can Still Enjoy Substantial Relief in Due Course

55. Afriforum presents the exclusion of certain submissions as somehow final in effect, to the extent that they were not "counted". So the theory goes, this failure to "count" the excluded submissions means that those persons are deprived of their right to participate.

56. That argument does not withstand scrutiny.

56.1. First, as a matter of fact, their rights to participate were given effect to. The submissions were received and considered by the third party service provider.

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56.2. Second, they were only excluded by virtue of the fact that they were duplicate submissions. It is trite that an exclusion can only occur *after* an assessment had been made. Afriforum does not dispute this. In fact, it admits that it created a means by which these duplicate (near identically worded) submissions could be sent to Parliament. This means that, in terms of their substance, one submission would have made the same point (especially if eloquently drafted by Afriforum) as all the other excluded submissions. Only one would suffice.

56.3. Third, what Afriforum seems to contend is that the public consultation process is a simple numerical exercise. In its view, the greater the numbers in favour of one side or another, the less able the JCRC would be to recommend land reform. It is at pains to emphasise that the majority of excluded submissions would have the effect of dramatically increasing the overall majority that was against land reform. So the argument seems to go, the JCRC could, thus, find otherwise. The numbers would be *prima facie* proof of its unlawful decision (had it proposed land reform when the majority were against). That is inapposite for several reasons:

56.3.1. Public participation is not a numerical exercise;

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56.3.2. If it were, then the sample of submissions would not be truly representative of the feeling of the electorate (as the source of democratic legitimacy), but rather simply indicate the opinions of those who participated;

56.3.3. Although the *weight* of the numbers involved cannot be ignored, Parliament still retains a separate discretion to determine how to accept or reject those submissions. Parliament is trusted with making such decisions on policy according to its, or rather its MPs', exercise of their discretion. This is only subject to the Constitution as determined by the Courts.

57. In any event, Afriforum's application is peculiar in that it is both too late and premature.

57.1. It is too late to the extent that it seeks interdictory relief for prior events. To the extent that the excluded submissions are "not included" in the JCRC's deliberations, the relief sought by Afriforum does nothing to affect that. By postponing the matter *sine die*, the Report will not be reconsidered. In any event, if it is ever reconsidered, that is no basis upon which the excluded submissions ought to be reconsidered. There is no challenge to its

RM.

exclusion. The relief sought by Afriforum will, thus, never remedy the alleged wrong.

57.2. It is premature. This is owing to the fact that the JCRC Report is not final. It contemplates a further process – and Afriforum concedes as much. It acknowledges that Parliament still has a further public participation obligation to discharge in the process of sitting as a deliberative body in plenary. The JCRC's public participation process is not the only public participation process that will be held prior to any amendment being considered. The JCRC's processes are separate to but distinct from the two Houses' of Parliament respective processes. The JCRC's processes are also distinct from the legislative processes when an amendment bill serves before Parliament that must *also* include public participation.

57.3. Moreover, the exclusion of certain submissions *now*, does not in any way serve to limit the ability of any person to challenge the amendment, if it is adopted, which is the appropriate time when it should be challenged. I am advised that the case law in this regard is trite.

NO PRIMA FACIE RIGHT

58. Afriforum attempts to found its right of public participation in terms of section 59 of the Constitution. Although section 59 specifically applies to the National Assembly

RM

only, and not to the JCRC, the respondents admit that members of the public have a right to participate in its proceedings.

59. While section 59(1)(a) creates a peremptory obligation on the National Assembly to facilitate public access, section 59(1)(b) makes it clear that this right is not absolute. The section clearly allows for "reasonable" limitations on those rights.

60. On the circumstances of this case, Afriforum contends that the public right to participation is absolute. That is clearly incorrect.

60.1. The Constitution itself qualifies the right.

60.2. The JCRC did not exclude submissions save where those submissions were "enquiries, unrelated, blank, and duplicate". In other words, submissions were only excluded where they failed to meet the minimum threshold of constituting submissions.

60.3. There is nothing unreasonable about this. Indeed, spoilt ballots, abstentions, or similarly improper votes cast in elections are excluded from being considered.

L.P.M. RM.

60.4. *A fortiori*, only valid submissions would be considered as such. Where submissions are repeat or duplicate submissions, they clearly make no new contributions. Excluding them is not unreasonable.

60.5. Furthermore, even though the excluded submissions are not counted in the final "tally" of submissions, the fact remains that they are recorded and the reasons for their exclusion are recorded as well. That means that the submissions excluded for the reason of duplication are indicated as such. Logically, if they are duplicates of a submission in opposition, it is not difficult for any member of the JCRC or Parliament to give them some regard. (This assumes, but does not concede, that "numbers" are determinative)

61. Moreover, Rule 6(1) of the Joint Rules of Parliament, read with Rule 47(4), clearly entitles a member of the public to nothing more than reasonable participation. A copy of the Joint Rules of Parliament (with an index) is annexed as "**FA4**".

62. On the facts of this case, therefore, it is clear that the public was given reasonable rights of participation. They, in fact, exercised those rights. However, those rights were limited to the extent that the public may, at Afriforum and others' behest, inadvertently negated their rights by submitting improper and/or otherwise irregular submissions. I reiterate, however, that these submissions were "excluded" but their exclusion is in no way prejudicial.

63. Moreover, I am advised that the Constitutional Court has already ruled that a Bill before Parliament may not be challenged before Parliament has discharged its constitutionally enshrined function to accept / adopt / amend / reject the Bill as needed. The only time a Court may consider the validity of a Bill, and grant pre-enactment relief, is in limited circumstances where the appropriate constitutional functionary refers it to the Constitutional Court for adjudication in terms of the Constitution.

64. This trite principle must apply a fortiori where the Report of the Committee is a pre-pre-enactment process in that it will be the basis upon which a Bill to amend the Constitution may eventually be placed before Parliament for consideration. Only if and / or when the Bill is adopted can a Court's jurisdiction be engaged by a member of the public to impugn its content.

65. The Constitutional Court has accepted that there may be exceptional circumstances in which a pre-enactment challenge may be permissible. However, no such exceptional circumstances are pleaded in this case. Those cases are usually only reserved to being where enactment of the impugned instrument prior to adoption will have the effect of limiting the legal ability of a person to subsequently challenge that instrument after its adoption. This case is clearly distinguishable.

66. This applies with even greater force where the JCRC Report is an additional prior step before a Bill is considered by Parliament.

67. Once it is accepted, then, that Afriforum has no right – either to untrammelled public participation and / or the ability to attack a pre-pre-enactment instrument – it is clear that its application must be dismissed with punitive costs as an abuse of process.

68. In any event, I am further advised that there is additional case authority from the Constitutional Court that an interim interdict will only be granted in exceptional circumstances, where a strong case for relief is made out, when a party seeks to interdict an organ of State that seeks to exercise its statutory powers. This ought to apply *a fortiori* when that organ of State is relying on its primary powers afforded to it in terms of the Constitution.

69. Moreover, once it is clear that Afriforum does not have a *prima facie* right (or that such a right is open to strong doubt), then its ability to win interim relief depends on its ability to prove to the other remaining requirements for interim interdictory relief. As we will demonstrate below, it fails to do even that.

THE BALANCE OF CONVENIENCE IS AGAINST AFRIFORUM

L.P.M. R.M

70. I am advised that in the absence of establishing a strong *prima facie* right, the onus on Afriforum to establish that the grant of interim relief is convenient.

71. Respectfully, it is not convenient that Afriforum be granted its interim relief for the following reasons:

71.1. Its challenge to land reform is pre-emptive and will result in the ultimate amendment to the Constitution, if it is adopted, being litigated in a piecemeal fashion. This is not good either for the certainty of outcome, nor the conclusion of the legislative process.

71.2. The application is in effect a gagging order. To the extent that it has the effect of permanently halting this process, it will oblige Parliament to restart the process again, wasting time and money to do so.

72. This application is nothing other than an abuse of process that is deliberately aimed at shutting down Parliament's ability to *consider* policy options that Afriforum disapproves of. It ought not to be permitted to succeed simply because it is litigating tactically to dismantle Parliament's constitutionally enshrined duty to consider and pass legislation as it sees fit.

THERE IS NO IRREPARABLE HARM

L.P.M. RM

73. I have already addressed this above. The fact remains that Afriforum suffers no *irreparable* harm with the adoption of the JCRC Report. To the extent that Afriforum contends it is "harmed" by the exclusion of some of its submissions, the following serves to limit that harm:

73.1. The Report is not final. Thus, any harm suffered is open to be remedied.

73.2. It cannot suffer harm where it has no right, alternatively, where that right has been given effect to and it is harmed by the right being given effect in a way that it objects to.

73.3. The "harm" is not a real harm. The point of the excluded submissions is still taken into consideration by the JCRC. What it will not do is treat duplicate submissions as being separate submissions willing of separate deliberation.

74. Despite attaching voluminous papers to its founding affidavit most of which are irrelevant to these proceedings, including Afriforum's own submission, only Annexure E, being the report prepared by the third party service provider, is relevant to these proceedings. I note that having to wade through Afriforum's papers has caused the respondents undue prejudice in the context of urgent proceedings.

LPM. RM.

75. In any event:

75.1. At page 21, an explanation is given of why certain written submissions were excluded. This was due to duplications, blank submissions, unrelated emails, and enquiries. This means that they were "considered" but ultimately discarded because of the flaws therein. This appears to be common cause between the parties.

75.2. The latter four categories are, thus, properly explained and examples are provided. Afriforum does not engage on this reasoning. It simply makes the bald allegation that these were *wrongly* excluded. They were not.

75.2.1. For example with blank submissions, the emails were blank. There was nothing more to make of them, and no basis to include them.

75.2.2. The unrelated emails pertained to the emails of a personal nature sent to the email recipient's address, it included spam and adverts. It had nothing to do with the matter.

75.2.3. Enquiries were just that, and here too, one could not extract anything from them to include in the final tally. They were asking questions not making submissions;

LPM RM

76. Regarding the duplicate submissions, here the matter is slightly different. It seems institutes such as institute for race relations ("IRR") created a *pre-typed* email. Anyone wishing to send this pre-typed and "copy and paste email" would click a link and it would send an email using the IRR's email address. The *only* change would be that at the bottom of the email a different name would appear (i.e. that of the sender). The content was exactly the same, but perhaps different people endorsed the same position.

77. There were 176,780 of these duplicate emails.

78. The point remains that the contents of the emails were all captured, and taken into account. It was simply the duplication that was not counted.

79. Having regard to the purpose of the submissions, not being a referendum, it would the inclusion of these emails as submissions would not have bound the JCRC. It could still exercise its separate discretion as it did. The pure numbers game that Afriforum seeks to play is meaningless and does not constitute irreparable harm.

80. Indeed, the fact that Afriforum can bleat about the "true" statistics shows how pointless this application is.

81. Afriforum's application is, thus, an abuse of process. It ought to be dismissed with costs.

LRM. RM.

THERE ARE ALTERNATIVE REMEDIES

82. I have already addressed this above. The fact remains that if Afriforum is not granted relief *now*, it will still have the opportunity to challenge the amendment to the Constitution, if it is adopted.

83. Afriforum should not be allowed to abuse the Court's processes to steal a march on Parliament, where the effect will be to deny Parliament its ability to discharge its constitutional mandate to consider amendments to the Constitution.

NO REASON TO GRANT ACCESS FOR EXCLUDED SUBMISSIONS

84. Afriforum makes no case as to why it should be granted the submissions of third parties for which it holds no permission to do so. Accordingly, the relief sought is unsubstantiated and falls to be dismissed on that basis alone.

GROUNDS OF REVIEW

85. Although Afriforum contends that it has made out grounds for relief under the Promotion of Administrative Justice Act, No 3 of 2000 ("**PAJA**"), I am advised that

its reliance thereon is further reason as to why its application must be dismissed with costs.

85.1. PAJA does not apply to a Committee of Parliament. The decision of the JCRC is not an administrative decision that can be overturned relying on PAJA.

85.2. To the extent that Afriforum will try and switch tack to rely on the principle of legality, I am advised that it is not permitted to do so.

85.3. In any event, this decision is, relying on recent case law, not the kind of decision that is "reviewable" in the ordinary sense.

85.4. Moreover, Afriforum now seeks to bring an administrative challenge in circumstances where it seeks declaratory relief in Part B of the proceedings. It cannot have it both ways, as addressed above.

COSTS AND CONCLUSION

86. In these circumstances, the application ought to be struck from the roll with punitive costs for the fact that it is brought *mala fides*, mutually destructive in terms of the relief sought, and lacking in urgency.

LPM RM

87. In the alternative, it ought to be dismissed with punitive costs on account of the fact that Afriforum has simply failed to make out a proper case for interim relief.

88. I am further advised that the so-called "Biowatch" principle does not immunise Afriforum from the punitive costs sought against them. Further legal argument will be made at the hearing of this matter. However, those reasons, in summary, are as follows:

88.1. First, this does not directly engage a constitutional issue. Thus, Biowatch is of no application.

88.2. Second, to the extent that it is, Biowatch (relying on Affordable Medicines before it), does not deny the Court to award punitive costs in "constitutional litigation". What is of significance is the conduct of the litigant. For the reasons above, it is clear that this is an abuse of process and Afriforum's conduct deserves strong sanction.

88.3. Third, The only relevant annexure in this matter was annexure E. The unnecessary bulking of papers, coupled with the unreasonable truncation of time periods, services to severely prejudice the respondents in what is clearly a very important issue.

RM.

89. This application is an abuse of process and deserves the Court's strongest sanction.

SERIATUM

90. In the sections below I respond to particular paragraphs *seriatum*

Ad Para 3 – 4

91. The content of these paragraphs is denied.

Ad Para 6 – 7

92. The content of these paragraphs is denied on account of what I have said above.

Ad Para 8 – 9

93. The content of these paragraphs is admitted.

Ad Para 15 – 17

94. The content of these paragraphs is denied on account of what is said above. Afriforum has failed to make out a case for urgency.

LBM. RM.

Ad Para 18

95. The content of this paragraph is denied. Afriforum does not make a case for a right of participation. It has mistaken the right afforded to the public as being absolute. It is, in truth, subject to reasonable limitation. This is addressed above.

Ad Para 19

96. The content of this paragraph is denied. Afriforum cannot simply refer to an Act in order to overcome the threshold for hearsay evidence. It has not even complied with the obligations placed on it by the section of the Act that it glibly refers to. The hearsay evidence falls to be struck-out.

Ad Para 20

97. The content of this paragraph is denied on account of what is said above regarding hearsay evidence.

Ad Para 21

LPM. RM.

98. The content of this paragraph is denied to the extent that even though Afriforum may enjoy *locus standi* in general terms, it has failed to make out an appropriate case for interim relief as prayed for.

Ad Para 29 – 30

99. The content of these paragraphs is admitted. Afriforum concedes that it created a platform, which allowed members of the public to submit duplicate submissions. This is presumably in addition the submission it made as an organisation and which the individual duplicate submissions were versions of.

Ad Para 33

100. The content of this paragraph is denied. It is hearsay.

Ad Para 34 – 35

101. The content of these paragraphs is admitted.

Ad Para 37

102. The content of this paragraph is denied. It is hearsay.

WPM RM

Ad Para 43 – 44

103. The content of these paragraphs is denied. It is hearsay.

Ad Para 47

104. The content of this paragraph is admitted. The JCRC Report is not final and is subject to many subsequent processes, all of which give Afriforum and members of the public a further opportunity to participate.

Ad Para 48 – 49

105. The content of these paragraphs is denied.

Ad Para 51

106. The content of this paragraph is noted.

Ad Para 52

107. The content of this paragraph is admitted on account of what is stated above.

LPM RM

Ad Para 56 – 57

108. The content of this paragraph is denied as set out herein. Afriforum does not understand the difference between public hearings held on an open basis, and oral submissions on an invitation-basis.

Ad Para 59

109. The content of this paragraph is denied. It is hearsay.

Ad Para 60

110. The content of this paragraph is admitted. The JCRC Report is clearly not final.

Ad Para 62

111. The content of this paragraph is denied as set out herein. Afriforum does not set out a basis upon which to impugn the exclusion of duplicate submissions in particular as being unreasonable.

Ad Para 62

WPM. RM.

112. The content of this paragraph is denied as set out herein. Afriforum does not set out a basis upon which to impugn the exclusion of duplicate submissions in particular as being unreasonable.

Ad Para 63

113. The content of this paragraph is denied on account of what is stated above. Duplicate submissions being excluded does not render the process fatally flawed.

Ad Para 64

114. The content of this paragraph is denied on account of what is stated above.

Ad Para 64 – 70

115. The content of this paragraph is denied on account of what is stated above. Afriforum does not make out a case for urgency.

Ad Para 72

116. The content of this paragraph is noted. It is curious that Afriforum makes an argument regarding the illegality of "abdication" but has failed to challenge same.

LPM RM

Ad Para 74

117. The content of this paragraph is denied on account of what is set out above.

Ad Para 75

118. The content of this paragraph is denied on account of what is set out above. It is also pointed out that this is at odds and contradicted by what Afriforum states at para [47]. Afriforum cannot both accept that there will be further public participation opportunities and then simultaneously contend that the JCRC process was the *only* such opportunity.

Ad Para 76 – 77

119. The content of these paragraphs are denied on account of what is set out above.

Ad Para 78

120. The content of this paragraph is denied on account of what is set out above.

Ad Para 79 – 81

LPM RM

121. The content of these paragraphs is denied on account of what is set out above.

Ad Para 82

122. The content of this paragraph is denied on account of what is set out above. The excluded submissions are not discounted in terms of their repetitious substantive input.

Ad Para 83 – 84

123. The content of this paragraph is admitted on account of what is set out above. Afriforum's obsession with the correct "reflection" of public opinion as a statistical exercise is an exercise in futility. It is of no consequence.

Ad Para 85

124. The respondents have no knowledge of the content of this paragraph and deny same.

Ad Para 86 – 88

125. The content of these paragraphs is denied on account of what is set out above.

LPM RM.

Ad Para 89

126. The respondents have no knowledge of the content of this paragraph and deny same.

Ad Para 90 – 100

127. The content of these paragraphs is denied on account of what is set out above.

WHEREFORE I pray that the application is dismissed with punitive costs.

DEPONENT

L.F.M. RM.

I CERTIFY that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit which was signed and sworn to, before me, at ....Cape Town.....on this the ..22.... day of ....November 2018.... , the Regulations contained in Government Notice No R 1258 dated 21 July 1972 (as amended) and Government Notice No R 4648 dated 19 August 1977 (as amended) having been complied with.

SUID-AFRIKAANSE POLISIEDIENS
UNIT COMMANDER
RONDEBOSCH STATIC PROTECTION
PSS: WESTERN CAPE
2018 -11- 22
EENHEIDSBEVELVOERDER
RONDEBOSCH STATIESE BEWAKING
PSS: WES-KAAP
SOUTH AFRICAN POLICE SERVICE

COMMISSIONER OF OATHS