

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

CASE NO: 21367/2018

In the matter between:

**AFRIFORM NPC**

Applicant

and

**THE CHAIRPERSON OF THE JOINT CONSTITUTIONAL  
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

---

**SUPPLEMENTARY ANSWERING AFFIDAVIT**

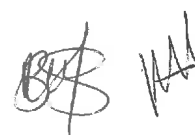
---

I, the undersigned,

MATHOLE MOTSHEKGA

do hereby make oath and say that:

1. I am an adult male advocate, member of Parliament, and 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 stated herein fall, unless the context indicates otherwise, within my personal knowledge and are both true and correct.
3. I am duly authorised to depose to this answering affidavit on behalf of the respondents. Although I was not one of the two chairpersons of the JCRC when Part A of this matter was heard, the supporting affidavits annexed hereto confirm the facts set out hereunder.
4. I have read the supplementary founding affidavit deposed to by Mr Carl Martin Kriel as well as the affidavits in support of the application for condonation. For the reasons set out hereunder, neither Part B of this application nor the application for co--+ndonation enjoys any prospects of success.

*ZNS M*

## EVENTS SINCE PART A OF THIS APPLICATION WAS DISMISSED

5. In order to avoid prolixity in these proceedings, I do not repeat the averments made by the respondents in the answering affidavit filed of record in Part A of these proceedings.
6. In particular, and as amplified by the respondents' heads of argument also filed with respect to Part A, the application must fail because the relief sought is moot. Further Legal argument in this regard will be addressed to the Court at the hearing of this matter.
7. The mootness of this application is no better demonstrated when regard is had to the fact that -
  - 7.1. On 4 December 2018, and following Part A being dismissed by this Court on 30 November 2018, the National Assembly adopted the JCRC's Report ("**the Report**") that is the subject of these proceedings.

BWS MLL

- 7.2. On 5 December 2018, the National Council of Provinces ("**the NCOP**") also adopted the Report.
- 7.3. On 6 December 2018, the National Assembly agreed to establish a specific *ad hoc* committee to consider the possible amendment of section 25 of the Constitution. This *ad hoc* committee would consider the Report as one source of information as part of its mandate to consider the possible amendment. In consequence, the *ad hoc* committee had its own agenda and program which catered for, *inter alia*, the calling of expert witnesses, receiving new submissions and so on.
- 7.4. As the Court will note, and as canvassed in the answering affidavit filed in respect of Part A, the *ad hoc* committee referred to above is not cited in these proceedings.
- 7.5. On 21 February 2019, the National Assembly adopted a resolution to dissolve Parliament in anticipation of

BMS MAA

the 2019 general elections that were held on 8 May 2019.

7.6. The new Parliament (i.e. this sixth democratic Parliament) was convened on 22 May 2019 and has sat as the duly constituted legislative authority of the Republic of South Africa.

7.7. Given that all unfinished work of a previous Parliament comes to an end with the expiration of that Parliament's term of office, the new Parliament has to vote in favour of reviving that work otherwise that work will either lapse or will have to be started afresh.

7.8. On 25 July 2019, the National Assembly voted in favour of reviving the *ad hoc* committee. Since its revival, the *ad hoc* committee has sought to discharge its mandate by performing the activities referred to above. For the sake of completeness and transparency, I advise the Court that I have since

ANB 1/11/19

been elected as the Chairperson of this *ad hoc* committee as well.

- 7.9. On 13 December 2019, Parliament published the draft Constitution Eighteenth Amendment Bill ("the Bill"), the purpose of which is to commence a process that will allow the *ad hoc* committee to initiate and introduce legislation amending section 25 of the Constitution that will explicitly permit for expropriation of land without compensation. Comments on this Bill are to be submitted by no later than 16:00 on 31 January 2020.
8. At the time of deposing to this affidavit these processes, which importantly fall under the auspices of a different Parliamentary committee to the JCRC, and which furthermore has moved far beyond the content of the Report is still ongoing.
9. Although those processes are ongoing, it demonstrates that the applicant's relief is moot because –

BMS WAA

- 9.1. Parliament has already adopted the Report;
  - 9.2. the *ad hoc* committee has considered the Report, among other things; and
  - 9.3. the *ad hoc* committee has published the Bill.
10. In other words, the process of potentially amending section 25 of the Constitution has moved far beyond the factual matrix underlying this application and in so doing renders the relief sought by the applicant of no consequence.
11. On this basis alone, the application ought to be dismissed.

#### **THE APPLICANT'S IMPROPERLY SOUGHT RELIEF**

12. The applicant seems to have changed tack in Part B of these proceedings. In essence, it seeks to impeach the procurement process followed by Parliament in the appointment of service provider that undertook the data processing of comments received by the public and which was relied upon by the JCRC for the purposes of the Report.

BMS/ML

13. The applicant goes one step further by suggesting that even if the procurement process followed was lawful, the service provider's conduct, and which was ultimately relied on by the JCRC, is unlawful given that their conduct fell outside Parliament's terms of reference.
  
14. I am advised that this attempt by the applicant to attack the credibility of the Report by seeking to set aside the appointment of service provider and/or their conduct whilst rendering services in that capacity is incompetent for the following reasons:
  - 14.1. First, it is relief not sought by the applicant in the notice of motion in respect of Part B;
  
  - 14.2. Second, the applicant has failed to amend its notice of motion to this effect;
  
  - 14.3. Third, even if the applicant were correct in either respect, which is denied, the unlawful appointment or conduct of a service provider need not necessarily

ANSW



lead to the steps taken by that service provider being declared unlawful.

15. Further legal argument will be addressed to the Court in this regard at the hearing of this matter.

16. Furthermore, and with respect to the substance of the applicant's averments, these are without merit.

16.1. First, the applicant does not go so far so as to directly challenge the appointment of the service provider. Instead the applicant seeks that the Court infer that the appointment was unlawful by, for example, questioning the service provider's track record in providing such services. I am advised that in the absence of more, and certainly in the absence of a direct attack upon the lawfulness of the appointment of service provider, the applicant's averments in this regard fall to be rejected.

815 MW

- 16.2. Second, Parliament ratified the conduct of the service provider by adopting the draft report which, in effect, were a manifestation of the service provider's recommendations regarding data processing (i.e. how to deal with duplicate submissions created by the applicant for its supporters). Nothing unlawful can stem from Parliament ratifying the service provider's conduct in circumstances where that conduct was incidental to the service provider's ability to render the services and is unrelated to their appointment. In other words, by ratifying what is a reasonable suggestion as to how to handle duplicate submissions, Parliament did not, for example, unlawfully amend the conditions of appointment to suit an individual service provider.
- 16.3. Further Legal argument in this regard will be addressed to the Court at the hearing of this matter.

BUSVA

## **CONDONATION**

17. It is common cause that the supplementary founding affidavit is filed woefully out of time.
18. Should the Court refuse the application for condonation which, with respect, it should, the merits of Part B of this application cannot be heard.
19. The respondents oppose the application for condonation as set out hereunder but shall abide by the Court's decision in this regard.

## **AD SERIATIM**

20. In the sections below, I shall only deal with specific paragraphs of the supplementary founding affidavit and the application for condonation. To the extent that I fail to deal with any particular paragraph it should be taken as denied.

## **AD SUPPLEMENTARY FOUNDING AFFIDAVIT**

### **AD PARAGRAPH 5**

*BUSWAL*

21. Save to admit that the production of the record has taken a long period of time, the remainder hereof is denied for the reasons set out above.
22. I point out that the deponent refers to the amendment of section 35 of the Constitution. I assume this is a typographical error and ought to refer to section 25.

**AD PARAGRAPH 6.1**

23. The contents hereof are admitted to the extent that the averments herein accurately reflect the contents of the document annexed as annexure "A".

**AD PARAGRAPH 6.2**

24. Save to admit that the applicant's duplicate submissions were excluded as being invalid, the contents hereof are denied.
25. The applicant seeks to suggest that the terms of reference for the service provider's appointment limited its role to

BUS WAD

providing only "auxiliary services". Notwithstanding that these auxiliary services are never defined by the applicant, there is no evidence to suggest that such auxiliary services limited the service provider from excluding duplicate submissions as being invalid in the same way that the service provider excluded incomplete or irrelevant submissions as being invalid.

26. If anything, this is the purpose of appointing a service provider that could assist the JCRC in data processing.
27. In any event, as conceded by the applicant, the JCRC ratified the exclusion of duplicate submissions in circumstances where the Report was adopted. This renders the applicant's dwelling on the terms of reference of the service provider and what it was or was not permitted to do to these proceedings irrelevant.
28. The fact of the matter is that the JCRC clothed the service provider's conduct with legality when the JCRC, in the

BUS VAA

exercise of its discretion, agreed that duplicate submissions ought to be excluded as invalid.

29. Moreover, no illegality can attach to such a decision where the reasoning for rejecting those duplicate submissions and the impact of excluding those submissions is squarely dealt with in the Report itself and where Parliament would, in any event, not be bound by the numbers in favour of or against land expropriation as reflected in the submissions made to the JCRC. This is dealt with in the answering affidavit filed in Part A and I request that they be read as though specifically incorporated herein.
30. This applies with equal strength to the applicant's unfounded accusation that "*the [JCRC] nullified the participation of the affected citizens in the parliamentary process ...*". What the applicant failed to appreciate in part A, and still does not appreciate in Part B, is that the right of public participation is not absolute to the extent that invalid or improper attempts



at public participation can legitimately not form part of the process.

**AD PARAGRAPH 6.3**

31. The contents hereof are denied. In particular, the Court's attention is drawn to the limited basis upon which an ongoing parliamentary process may be impeached while it is unfolding.

**AD PARAGRAPHS 7 and 8**

32. The contents hereof are denied.

**AD APPLICATION FOR CONDONATION**

**AD PARAGRAPHS 17 - 22**

33. I have no knowledge of the contents of these paragraphs and they are accordingly denied.

34. In particular, I would highlight that the applicant's explanation for the late filing of its supplementary founding

*BUS VLS*

affidavit is blamed on a breakdown of communication between the applicant's correspondent attorney and his secretary in that the duly and properly served record was indeed received by the correspondent attorney and, through his and/or his office's negligence, failed to transmit the record to the applicant.

35. In the circumstances, it is remarkable that the applicant, despite being in wilful default of this Court's Rules, seeks to blame its delay in part on the conduct of the respondents. If anything, the poor explanation advanced by the applicant as to why it ought to be granted condonation perfectly demonstrates why the application for condonation ought to be dismissed.

**WHEREFORE I pray that the relief sought by the applicant in Part B of these proceedings, together with the application for condonation be dismissed, and that the costs of Parts A and B be granted to the respondents.**

BNS/AA



M. Motsheng

Deponent

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at on this <sup>18th</sup> day of ~~NOVEMBER 2019~~ <sup>February 2020</sup>, and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, having been complied with.

13/02/20  
[Signature]

SOUTH AFRICAN REPUBLIC  
7132325-0 B  
R. J. J. J. J.  
COMMISSIONER OF OATHS  
FEDERAL GOVERNMENT  
SOUTH AFRICAN REPUBLIC