

COMPETITION

No! It is NOT all about consent!

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"I believe that a guarantee of public access to government information is indispensable in the long run for any democratic society.... if officials make public only what they want citizens to know, then publicity becomes a sham and accountability meaningless." – Sissela Bok, 1982.

On 1 August 2025, the Constitutional Court delivered a significant judgment under the hand of Goosen AJ, in an application brought by Corruption Watch. The case revolved around Parliament's failure to facilitate reasonable public involvement in recommending persons to be appointed as members of the Commission for Gender Equality ("**CGE**"). The court was called upon to declare this failure, which was due to the inadequate provision of information about shortlisted candidates, as a breach of constitutional obligation.

But how did this come about? On 2 September 2022, the National Assembly's Portfolio Committee on Women, Youth and Persons with Disabilities ("**Portfolio Committee**") called for public comment on the suitability of the shortlisted candidates. 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 the 24 shortlisted candidates' names and a further link to additional information 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.

Corruption Watch duly requested that the CVs of the shortlisted candidates be made public, and as needed, redacted of personal information.

The Portfolio Committee, however, interpreted the Protection of Personal Information Act, 2013 ("**POPIA**") as imposing a "processing limitation" on the publication of the CVs. Therefore, it made a decision not to publish the CVs of the shortlisted candidates, believing that it was prohibited from doing so, absent consent from the candidates, by the provisions of POPIA. The National Assembly claimed that candidates had only given limited consent to the processing of their personal information to members of the Portfolio Committee.

This Court, in the case of *Doctors for Life*^[1], emphasized the crucial role of public participation in the legislative and other processes of Parliament. It upheld that the right to political participation, a fundamental human right, includes the right of members of the public to take part in the conduct of public affairs. The Court further stressed that public participation is not just a legal requirement, but a necessary condition for the complete and adequate exercise of democracy, as recognised in international law instruments.

Since *Doctors for Life*, this Court's jurisprudence on public involvement in the legislative and other processes of legislatures has expanded significantly.^[2]

Participating in a vacuum and without information is questionable.

However, in this case, it must be considered whether the provisions of POPIA do support the approach adopted by the Portfolio Committee.

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. However, the court's interpretation of POPIA is crucial here. Even though section 11 of POPIA provides for publication with the consent of the data subject, it also excludes the unlawfulness of the publication of the personal information in instances where it is required to fulfil a public law duty.

The judgment in the current instance found that the constitutional obligation to provide sufficient information to facilitate public involvement is a public law duty that entitles the Portfolio Committee to publish the personal information of the candidates. Why? If one has to consider whether the candidates were suitably qualified and had the necessary experience to meet the requirements for appointment as Commissioners to the CGE, personal information provided by the candidates in their CVs concerning the requirements stipulated in the Constitution and the CGE Act is relevant.

The first paragraph of the judgment reads –

"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"

Based on the facts, the court found that the National Assembly acted upon an interpretation of POPIA which was manifestly incorrect. It also took no steps to ensure compliance with its obligations within permissible exceptions provided by POPIA. This conduct was unreasonable.

What does all of this come to? When it comes to POPIA, society and more importantly legal advice, must move beyond an elementary interpretation of POPIA and consent paralysis.

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

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



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