

**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

**LEELAMBAL SUBRAYAN – NAIDOO**

Eighth Respondent

**LEONASHIA LEIGH-ANN VAN DER MERWE**

Ninth Respondent

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**FIFTH RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

**NTHABISENG SEPANYA-MOGALE**

do hereby state under oath as follows:

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- 1 I am an advocate and the Chairperson of the Commission for Gender Equality ("**the Commission**").
- 2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct.
- 3 Where I make legal submissions, I do so on the advice of my legal representatives which advice I accept as correct.

#### **THE PURPOSE OF THIS AFFIDAVIT**

- 4 In these proceedings, Corruption Watch impugns the public participation process followed by Parliament, prior to recommending persons to be appointed as members of the Commission by the President of the Republic of South Africa ("**the President**") on 1 March 2023, as unreasonable and constitutionally invalid. Corruption Watch also seeks a declarator that the President's appointment of the Commissioners following this Parliamentary process is invalid.
- 5 To remedy the constitutional invalidity of Parliament's processes and the President's appointments, Corruption Watch at Paragraph 3 of its Notice of Motion, seeks the relief that the recruitment process be commenced afresh and, that the order of constitutional invalidity be suspended for a period of 18 months, within which period Parliament will be expected to conduct the recruitment process ("**the Suspension Order**").

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- 6 I do not oppose Corruption Watch's application; however, I file this affidavit for the purpose of placing before this Honourable Court relevant material for consideration in making its decision and to put forward my views on why I do not support the Suspension Order.
  
- 7 My affidavit specifically highlights the impact of the Suspension Order on myself and the Commission itself. As a Chairperson of the Commission, I have a bird's eye view over the work of the Commission, its standing and reputation in the public's eyes as well as of its inner workings, the well-being of its staff and its programmes. This is material and relevant information to any decision that this Honourable Court may make. I strongly believe that the Commission will be negatively affected by the relief sought by Corruption Watch.
  
- 8 I do not intend to address all the allegations made in the founding and answering affidavits of the parties in this application. This is so mainly because I do not own the Parliamentary process that is being impugned and, as a result I cannot defend Parliament's decision. However, my failure to address specific allegations in the founding and answering affidavits should not be construed as an admission of their correctness.
  
- 6 My affidavit is structured as follows:
  - 6.1 I address my background prior to being a Commissioner and Chairperson of the Commission;
  
  - 6.2 The Work of the Commission since the Impugned Appointments;

MR [Signature]

- 6.3 The Appointment of Commissioners;
- 6.4 The Impact of an Order suspending the re-run of the recruitment process by Parliament; and
- 6.5 Finally, I address the adverse impact of an order setting aside my appointment and request this Honourable Court to exercise its powers under section 172 of the Constitution to grant me a just and equitable remedy of condoning any constitutional invalidity it may find in the actions and conduct of Parliament and the President by retaining me as the Chairperson of the Commission for Gender Equality.

#### **MY EXPERIENCE**

- 7 I am an advocate admitted in 2006 by the High Court of South Africa. In terms of my post school qualification, I obtained a B.A Social Work degree at the University of the Witwatersrand. I also obtained a Postgraduate Higher Diploma in this field from the same institution. I then worked in the social justice and human rights sector in various capacities including at the Truth & Reconciliation Commission ("**TRC**") and People Opposing Women Abuse ("**POWA**") amongst other entities, wherein I advocated for the rights of vulnerable persons generally and women in particular. During my tenure at POWA, the organisation was one of the most visible and impactful entities representing victims of gender based violence. In addition to the general impact, the organisation established a new shelter

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for abused women and their children in Gauteng. I was also an integral part of the expansion of the services of POWA by establishing three (3) additional offices in Sebokeng, Katlehong and Soweto.

- 8 It is following my role with POWA that I was nominated to receive training run jointly by Oxford and George Washington universities as part of their Human Rights Education programme. This training was for human rights activists across the globe who had done outstanding work on human rights advocacy and gender equality broadly.
- 9 After this programme, I suspended my career to go back to Wits and study for an LLB degree. Upon obtaining this qualification, I was nominated as an Africa-America Institute/ Ford Foundation Fellow, based on my work as a human rights activist and gender equality advocate. Through this opportunity I obtained my LLM degree in Human Rights and Constitutional Litigation at the same institution.
- 10 Over and above formal work I have done as a government employee, I have always undertaken community work to educate the public on their human rights as citizens of South Africa. My career and activism allowed me to participate in processes that brought about critical legislation such as the Promotion of National & Reconciliation Act, 34 of 1995, Domestic Violence Act, 116 of 1998, and its 2023 Amendment Act, Maintenance Act, 99 of 1998, Recognition of Customary Marriages Act, 120 of 1998 and ironically the establishment of the Commission itself and its legislation.

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These are just a few of the many legislation I have participated in bringing about and influencing.

- 11 Since my admission as an advocate, I ran a solid practice that was financially viable, had goodwill and reputation, with a particular focus on Family Law, Criminal Law, Labour Law and Civil Litigation amongst other areas.
- 12 I believe that based on my longstanding work as a gender equality advocate coupled with my formal training and experience as a legal practitioner, I am a suitable candidate to have been appointed as a Commissioner. Indeed, Corruption Watch does not contest my suitability to be appointed as Chairperson of the Commission.
- 13 Section 3 of the Commission for Gender Equality Act, 39 of 1996 ("**the CGE Act**") stipulates that a person to be appointed as a Commissioner shall have a record of commitment to the promotion of gender equality and have applicable knowledge OR experience with regards to matters connected to the mandate of the Commission. I meet all the requirements as my submission outlines.
- 14 On the 1<sup>st</sup> November 2017, I was appointed a part-time Commissioner of the Commission. This period came to an end on the 30 October 2022. I then applied for a second term as allowed by section 3(7) of the CGE Act.

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- 15 On 1 March 2023, I was appointed as the Chairperson of the Commission for the period of the 1<sup>st</sup> March 2023 to 28<sup>th</sup> February 2028, following the process that is now being impugned in this application.
- 16 As a direct result of my appointment as the Chairperson of the Commission, leading a critical Chapter 9 institution, set up by the Constitution to focus on a progressively realisable achievement of gender equality, I have suspended my advocates' practice to commit myself to contributing to the South African nation.
- 17 I understood the level and depth of commitment required from me, against the backdrop of the challenges faced by the Commission. I had a plan, in light of my experiences with the Commission and as a gender activist of many years, to work with the new cohort of Commissioners to fulfil the mandate of the Commission, boost the morale of the staff, create sustainable structures of governance and fortify the policy environment and significantly, alter the Commission's image and reputation. All these efforts were aimed at ensuring that the Commission addresses the gender challenges engulfing our country, chief amongst which is the dismantling of patriarchy.
- 18 It is for this reason that the challenge of the process by Corruption Watch left me cold, even as I understood its force as a democrat and human rights advocate, hence I am not challenging the declarators sought.
- 19 However, in light of Corruption Watch's own concern about the image and reputation of the Commission in the media and elsewhere, including the

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concerns about bad publicity, instability and in-fighting, the remedy that has the effect of resurfacing the tide of instability and bad publicity is ill-conceived, in my view. I am of the view that the remedy of commencing the process anew, will only serve to revert the Commission to the very position that Corruption Watch is complaining about in its papers – the instability and bad reputation.

### **THE WORK OF THE COMMISSION SINCE THE IMPUGNED APPOINTMENTS**

- 20 It is common knowledge that the bad publicity mentioned by Corruption Watch is a situation that has not occurred for over a year in the Commission. This is as a result of the commitment by the current Commissioners led by myself to put in place credible governance procedures and processes to rebuild the Commission.
- 21 In this regard, I highlight the fact that since the appointment of the new cohort of Commissioners in 2023, the Commission has created internal stability and rebuilt public trust and is pressing on with the business of its mandate as stipulated in the Constitution and the Commission for Gender Equality Act, 1996. Where the Commission appears in the news, it is to highlight its good work and positive news. There are no reports of in-fighting amongst Commissioners.
- 22 There is strong leadership of the institution by the newly appointed Commissioners and the staff morale has improved. These gains must be

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sustained and the order sought by Corruption Watch threatens these gains, in my view.


- 23 This threat must be understood against the backdrop of a Commission that by Corruption Watch's own account has been plagued by difficulties, since its inception. These difficulties include inadequate funding by government, resulting in limited opportunities to recruit and retain appropriately qualified staff in certain instances.
  
- 24 One of the challenges identified relating to the limited impact of the Commission within the South African public was the lack of a proper business model to inform and guide the direction of the organisation. To this end, the Commission undertook a process to develop and adopt a Business Model. This was following extensive consultation with staff on how to build the CGE that would be responsive, sustainable and impactful. The Business Model was adopted at the Plenary of 30 July 2024. The development of the Business Model was a direct response to the low staff morale expressed by the staff over the years. This is an area that had been neglected and thus contributed to the internal tensions as alluded to by Corruption Watch. The Business Model was adopted on the 30 July 2024.
  
- 25 Further evidence of the improvements within the Commission, is the latest Auditor General's report for the 2023/24 Financial Year. The organisation has been able to secure a clean audit. This is a positive outcome that has also seen a shift from a 48% performance outcome of 2022/23 to a current 90% performance outcome of 2023/24. This is as a result of many internal

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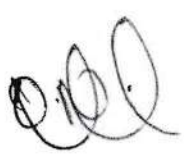
efforts including recruiting appropriately qualified professionals to lead and manage the organisation.

- 26 In addition, the organisation has adopted a Growth Strategy recommended by the Business Model. This strategy aims to attract more funding beyond the limited allocation by government. The strategy also aims to establish regional offices, a need that has been expressed by both the public and the CGE itself over the years. Currently we have only about 90 staff spread across the 9 offices we have nationally. We plan to increase the number of offices and staff to ensure a bigger reach and substantial impact.
- 27 Despite the limited number of employees, there is no doubt that the Commission has had a big impact and positive publicity, especially in the last 18 months. Some of those include:
- 27.1 Representing Caster Mokgadi Semenya in her matter against World Athletics following her ban to continue as an international athlete.
  - 27.2 Successfully challenging section 25 of the Basic Conditions of Employment Act 75 of 1997 in the matter of *Van Wyk and Others v Minister of Employment and Labour* 45 ILJ194 (GJ).
  - 27.3 Successfully challenged section 7(3)(a) of the Divorce Act in the case of *KG v Minister of Home Affairs and Others* 2024 (2) SA 1 (CC).

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- 27.4 Successfully challenged the issue of consent in rape matters in the matter of *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* 2024 (2) SACR 113 (SCA).
- 27.5 Undertaking oversight investigations on the Thuthuzela Care Centres, run by the National Prosecuting Authority(NPA). A comprehensive report was produced and submitted to Parliament for further attention and oversight.
- 27.6 Undertaking oversight investigations in 10 Correctional Service Centres across the country.
- 27.7 Undertaking oversight investigations in maternity facilities and hospitals in the Eastern Cape province.
- 27.8 Held Public Accountability Hearings for selected entities to account on their efforts to achieve gender equality. These entities include:
- 27.8.1 Progress Report on Gender Transformation Investigations in Technical and Vocational Education and Training (TVET) Colleges 2022. The following institutions were called:- Waterberg TVET College, Nkangala TVET College, Northern Cape Urban TVET College and Southwest Gauteng TVET College.
- 27.8.2 Progress Report on Gender Transformation Investigations in Technical and Vocational Education and Training (TVET) Colleges 2022;

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- 27.8.3 Transformation in the Public and Private Sector:-  
Department Of Forestry, Fisheries and The  
Environment; SanParks; Arcelor Mittal and Stauch  
Vorster Architects International (SVA).
- 27.8.4 Investigation into the State of Shelters in South Africa:  
Implementation of Recommendations. 2021/2022  
Follow-ups to assess the implementation of the findings  
and recommendations delineated in the Report on  
Consultative Hearings into the State of Shelters in  
South Africa 2019/2020:- Provincial Departments of  
Social Development: EC, NC, FS,GP, LP,WC, GP and  
NW.
- 27.8.5 Progress Report on Gender Transformation: Public and  
Private Sectors - Follow up
- 27.8.6 Forced Sterilization – National Department of Health
- 27.8.7 Progress on Gender Transformation at institutions of  
Higher Learning - University of Western Cape, Fort  
Hare, Sefako Makgatho and Walter Sisulu universities.
- 27.8.8 Progress on Gender Transformation:- Clover Pty (Ltd)  
Department of Small Business Development and  
Department of Water and Sanitation
- 27.8.9 Progress on Gender Transformation:- Local  
Government Fetakgomo Tubatse Local Municipality;

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City of Matlosana Local Municipality; Greater Taung Local Municipality and Collins Chabane Local Municipality.

27.8.10 Progress on Gender Transformation:- Mining Samancor Chrome Ltd; AngloGold Ashanti (Pty) Ltd; Wesizwe Platinum Ltd and Alexkor SOC Ltd

27.8.11 Correctional Services Hearings:- National Department of Corrections Service

28 As stipulated in our mandate, we have also undertaken research during this period. Reports in this regard have been finalised. The areas of research include:

28.1 Gender Inequality in Sport: Insight into the Women's National Soccer Team-Banyana (2024).

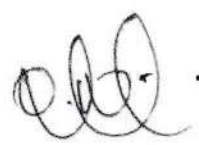
28.2 A Step in the right Direction? A review of the Implementation of CGE recommendations by African Rainbow Minerals (2024).

28.3 Royalty Without Crown: A review of the Implementation of the CGE recommendations relating to its 20216/14 Study on

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Assessing gender mainstreaming through House of Traditional and Khoi-San Leaders (2024).

- 28.4 Men, Masculinities, and gangs: Investigating the persistence of male gangs in selected provinces of South Africa (2024).
- 28.5 Drowning in the Shallow Water: Assessing Responses by the Department of Correctional Services to the CGE Recommendations on the Health and wellness of Women in Correctional Centres (2024).
- 28.6 Towards a Gender Based Violence Index for South Africa: an Overview and proposed way forward (2024).
- 28.7 Women in the South African Economy (2024).
- 28.8 Do Women reap what the Sow: Exploring the conditions of women working on Farms (2024).
- 28.9 Report on Sexual Harassment in institutions of higher learning(2024).

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28.10 Report on South Africa's compliance with the Beijing Platform for Action (2024).

28.11 Exploring barriers to women's access to communal land in selected provinces of South Africa (2024).

29 Below, I demonstrate the strategic developments aimed at fortifying the work of the Commission and benefit to the South African public, its governance structures and its public image. These include:

29.1 Establishment of Committees as stipulated by section 6 of the CGE Act;

29.2 Development of a Commissioners Workflow Chart. This Chart outlines Commissioners' Committee and Plenary meetings and timelines to submit reports and related requirements to account for their time;

29.3 Commissioners were deployed to provinces where they are expected to work from and provide strategic leadership and guidance to the secretariat;

29.4 An organisational Master calendar for Commissioners to account for their time as they undertake the Commission's work;

29.5 Initiated process to substantially amend the CGE.

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- 30 The new cohort of Commissioners has worked tirelessly to review and update the Commissioners' Handbook. This is the instrument that assists with the regulation of relations amongst Commissioners and between Commissioners and secretariat. It regulates Plenary as the highest decision-making body in the organisation and sanctions the conduct of Commissioners. This Handbook was adopted at the Plenary of 11 December 2023. The CGE is one a few, if not the only chapter 9 institution that has developed such an instrument to regulate the performance and role of Commissioners within the organisation. This Handbook is a direct response by Commissioners to rebuild the Commission and clarify fiduciary and administrative roles, a source of some of the tensions within the organisation.
- 31 In any event, at a pragmatic level, by the time the decision of this Honourable Court is handed down, the Commissioners would at least be slightly over the half-way mark of their appointments. There will thus in my view be no prejudice to Corruption Watch or to the public interest, because it would have laid the foundations for a reasonable process in accordance with the declarators sought in their Notice of Motion and at the same time the stability of the Commission would have been maintained.
- 32 The Commission is further working on a Growth Strategy aimed at ensuring that a bigger impact and footprint is achieved by the Commission, yet another process initiated by the current cohort of Commissioners.

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- 33 There is thus a legitimate concern by the Secretariat about the implications and impact of the relief that Corruption Watch seeks on the Commission as a whole and specifically, the current positive trajectory of the Commission. Although Corruption Watch states that all the work done by the Commission/Plenary to date stands, and is legitimate, the climate within the Commission will be affected, so will the morale of the staff. I know this from my experience in the Commission.
- 34 The Growth Strategy which includes a Funding and fundraising drive will have to be put on hold as no potential funder will want to fund an organization with such possible prospects that would result from Prayer 3 of the Notice of Motion.

#### **THE APPOINTMENT OF COMMISSIONERS**

- 35 In 2023 the Portfolio Committee on Women, Youth & Persons with Disabilities (DWYPD) started a process to recruit new Commissioners for the period 2024-2029. The process has been completed at National Assembly and is awaiting the President's appointment as stipulated in the Constitution and the CGE Act. This means the Commissioners have not yet been appointed and the Commission only has 5 commissioners as opposed to 11 as prescribed by section 3(1) of the CGE Act. The 5 Commissioners are the cohort whose appointment Corruption Watch is challenging. Should this application succeed, the Commission will be without leadership, a situation that will undermine section 181 of the Constitution.

MR [Signature]


- 36 As per the staggered recruitment method of Commissioners prescribed by Section 3(4)(a) of the CGE ACT, a different cohort of Commissioners was appointed in March 2023. The term of office of these Commissioners is 2023-2028. The Commission is now left with only five of these Commissioners.
- 37 Depending on the timelines Corruption Watch is relying on, 18 months to start a new process may be moot considering that we are nearly two years into our 5-year term. If the 18 months suggested period starts after the court has decided in its favour on the matter, this means that the said cohort of Commissioners will be well into their third year of the 5-year period.
- 38 Considering the sittings of Parliament, the matter will not necessarily receive priority attention due to prescribed recesses, oversight visits and other legislature work. Corruption Watch confirms this in the 18-month period they suggests, as it takes into consideration possible lapse of time as the process unfolds.
- 39 Lastly, the fact that new public representatives have taken office as part of the 7<sup>th</sup> Administration, the prayer by Corruption Watch to start the process anew may result in more complications than envisaged. The possibility of a new team to agree on how to overhaul and redo the recruitment process may open new and unexpected challenges than currently envisaged. A new process does not necessarily mean a process without problems. The current diversity of public representatives in Parliament may bring with it

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new and unimaginable tensions that may play themselves out in such processes. The standing Committee that interviewed us has only one member in the current committee, while only two members from the Committee returned to Parliament as part of the 7<sup>th</sup> Administration.

### **IMPACT OF THE SUSPENSION ORDER**

- 40 Apart from the obligation to bring the material information relevant to the suspension order sought by Corruption Watch on the Commission, from my personal experience as Chairperson of the Commission, I also do not support the order for its impact on my personal life.
- 41 I suspended my practice as a direct consequence of my appointment as the Chairperson of the Commission in 2023. I am not responsible for the decisions of Parliament and stand as a victim and casualty of the challenge to its processes by Corruption Watch. My practice has been dormant for a while and it will take time for me to rebuild it as those who normally briefed me have developed relationships with other advocates, owing to my unavailability. Indeed this will be the case after my 5- year term. The difference however is that at the end of my term as Chairperson is that I have already anticipated that eventuality and would have had a fixed time to plan ahead and there is more certainty.
- 42 In the event that I am not re-appointed in this new recruitment process, I stand to be adversely affected financially and to be without any income. I could lose my home and many other consequences occasioned by lack of financial security.

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- 43 I am advised that Section 172 of the Constitution provides that when dealing with a constitutional matter, the Court has the power to declare any law or conduct invalid, when it is inconsistent with the Constitution and to make any order that is just and equitable. This means that the Court may depart from the default legal position when it deals with a matter to which section 172 applies and if it is just and equitable to do so, on the circumstances of each case.
- 44 I respectfully submit that the facts that I have set out in this affidavit, relating to my personal circumstances as well as that of my personal experience as the Chairperson of the Commission, justify a departure from the default position of granting the remedy prayed for Corruption Watch and for this Court to exercise its powers of granting any other relief that is just and equitable. Considering the position of the Commission and my personal circumstances, I submit that it is just and equitable for this Honourable Court to retain the status quo for the benefit of stability of the Commission and the certainty of my position as the Chairperson.

**CONDONATION FOR THE LATE FILING OF THIS AFFIDAVIT**

- 45 This Honourable Court issued Directives that I should indicate my position in respect of this application on the 15<sup>th</sup> of August 2024 date and file any answering affidavit by the 2<sup>nd</sup> of September 2024.
- 46 My affidavit will be delivered on the 9<sup>th</sup> of September 2024, only five Court days after the due date set by this Honourable Court. Upon receipt of the

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Directives, the Commission engaged our legal representatives, including Counsel.

47 I decided after the consultations with the legal representatives, that there are no grounds to oppose the application by Corruption Watch. Upon further consultations it became evident that I had material and relevant evidence that I wanted to bring before this Honourable Court and to respectfully place my position on record that I do not support Prayer 3 of Corruption Watch's Notice of Motion. This required me to set out the factual material that is now before this Court, together with my other fellow Commissioners who also felt that it was prudent to apprise this Court of the developments within the Commission as well as the impact of the suspension Order to our personal lives. This material was not before the Court, notwithstanding its relevance and that it has a bearing on the outcome of this case.

48 Accordingly, and as soon as reasonably possible, my legal representatives, who are also representatives of the other four Commissioners began assisting with the drafting of our affidavits.

49 I am of the view that in light of the truncated times with which we were confronted to ponder and deliberate on this matter that attaches to our personal circumstances and that of the Commission itself, the delay is not unreasonable. This is particularly so because it is only a two-day delay. I did not act recklessly or intentionally in relation to the delay.

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- 50 Our legal representatives brought the slight delay to the attention of Corruption Watch who took no issue with the delay. I submit that there is therefore no prejudice to Corruption Watch by the slight delay in the delivery of this affidavit,
- 51 The issues raised in this application are critical for deliberative democracy and significant to our jurisprudence. This Honourable Court will benefit from the full version of events being placed before it.
- 52 It is therefore, in the interest of justice, I respectfully submit, that condonation be granted for the late filing of my answering affidavit.

**WHEREFORE** I pray that if it may please the above Honourable Court to grant me the relief of retaining my appointment, notwithstanding a finding that my appointment as a Commissioner is constitutionally invalid, if the Court so finds, under the just and equitable remedy provision in section 172 of the Constitution.

  
DEPONENT

MR. [Handwritten initials]

**SIGNED** and **SWORN** to before me at BRAAMFONTEIN on this 09<sup>th</sup> day of September 2024, the Deponent having acknowledged that she knows and understands the contents of this Affidavit; that she has no objection to taking the prescribed oath and that she considers the oath as binding on her conscience.



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**COMMISSIONER OF OATHS**

**NAME:** MOHALE RODNEY LEBEA

**TITLE:** ADVOCATE

**ADDRESS:** 11 KGALADI STREET  
PROTEA, SOWETO  
1818