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25 August 2021

TO: The Speaker of Parliament

Ms Nosiviwe Noluthando Mapisa-Nqakula

National Assembly

Parliament of South Africa

PER EMAIL: speaker@parliament.gov.za

Dear Ms Mapisa-Nqakula,

Formal Complaint: The Committee for Women, Youth, Children, and Persons with Disabilities' interference with the independence of the Commission for Gender Equality

1. We act on behalf of Mx Busisiwe Deyi ("our client/ Mx Deyi/They"), who has instructed us to make a formal complaint against the Committee for Women, Youth, Children, and Persons with Disabilities ("Portfolio Committee").
2. The Centre for Applied Legal Studies ("CAL S") is a public interest law organisation based at the Wits School of Law. CAL S is also a law clinic registered with the Legal Practice Council.

3. CALS practices human rights law and social justice work with a specific focus on five intersecting programme areas: Business & Human Rights; Civil & Political Justice; Environmental Justice; Gender Justice and Home, Land & Rural Democracy.
4. Our Civil & Political Justice programme advances civil and political rights, such as the right to protest, the right to freedom of expression, the rights of the arrested and detained, and the right to access to information. In addition to this rights-based work, the Programme aims to protect and promote the systems and institutions of South Africa's constitutional democracy. This includes working to strengthen Chapter Nine institutions, supporting the transformation of the judiciary, and engaging with Parliament.
5. Our client is a part-time commissioner at the Commission for Gender Equality ("CGE"). They allege that there have been numerous instances of overreach and interference with the independence of the CGE by the Portfolio Committee. Mx Deyi would like the Speaker to intervene in solving this problem.
6. We detail below the events that led to this complaint, the legal framework we rely upon, and our suggested way forward.
7. Mx Deyi alleges that the Portfolio committee has interfered in the appointment of staff members of the CGE in cases/complaints/reports of the CGE and has created an environment within the CGE wherein commissioners are of the view that they have to consult the Portfolio Committee before they can make decisions.

The Portfolio Committee's overreach in the appointment of staff members of the CGE

8. Our client is concerned that the hiring processes of the CGE have become subject to the control, review and approval of the Committee Chairperson. The Portfolio Committee, primarily led by its Chairperson, has commented upon and at times instructed the CGE to make particular decisions in discharging its administrative functions.
9. Indeed, the Portfolio Committee's Chairperson has gone as far as setting dates as to when staff appointments must be done and requiring feedback on the progress of said

appointments. The setting dates and enquiring on the progress of appointments are outside the scope of the Chairperson's powers. The Chairperson's conduct goes against the CGE's constitutional mandate to function independently and contravenes provisions of the CGE Act, as we will show below.

10. In a meeting between the Portfolio Committee and the CGE, the issue of delayed employment of personal assistants was raised by Commissioner Mazibuko. The issue of hiring PAs for both Commissioner Mazibuko and Botha had been an ongoing internal issue within the CGE due to multiple reasons such as:
 - a. the lack of a reasonable accommodation policy,
 - b. slow hiring processes, and
 - c. lack of prioritisation.

11. However, once this matter was raised before the Portfolio Committee, the Portfolio Committee Chairperson took it upon herself to inquire about the employment processes regularly and even set a timeline and deadline within which she required the hiring process to be finalised. The Chairperson's conduct was ultra vires as it went beyond her oversight duties by encroaching on the CGE's administrative responsibilities.

12. In a CGE appearance before the Portfolio Committee on 20 October 2020, the Chairperson of the Portfolio Committee, Ms Ndaba, set two weeks within which the CGE must hire the PAs as per the Committee's instruction (see <https://pmg.org.za/committee-meeting/31231/>). Moreover, Ms Ndaba required updates on every *little detail* of the process.

13. What became apparent was that Ms Ndaba was of the view that CGE was a "government structure", as clearly illustrated by the exchange between Ms Mathebula from the CGE and Ms Ndaba below:

"The Chairperson interrupted CGE Chairperson Mathebula, saying the Chairperson of CGE ensnared the Commissioners. CGE referred the matter on the thirty first, when CGE knew the Commissioners were coming to the Portfolio Committee. CGE must accept where it faltered; it must learn to correct itself and apologise if it misrepresented facts. CGE did not track the

resolutions taken by the Portfolio Committee. CGE does things when it knows it is coming to the Portfolio Committee. This is not right. CGE is a government structure. The Chairperson and Deputy Chairperson lacked leadership, the resolutions taken at the Portfolio Committee must be implemented. Chairperson of CGE, Ms Mathebula, owes the Committee an apology." (See: <https://pmgorg.za/committee-meeting/31231/>)

14. Our client asserts that Ms Ndaba categorisation of the CGE as a government structure is flawed as it misconstrues the nature of CGE. The CGE is an independent statutory body established in terms of section 17 of the Constitution to promote respect for gender equality and the protection, development, and attainment of gender equality. Despite the overreach by the Portfolio Committee's Chairperson, the Chairperson of the CGE complied with the Portfolio Committee's demand for information pertaining to recruitment processes.
15. To this end, the Office of the Chairperson of the CGE drafted various letters to the Portfolio Committee detailing each part of the processes the CGE had undertaken due to the initial enquiry into the matter by the Portfolio Committee (and the Chairperson of the Committee). The correspondence to the Portfolio Committee's Chairperson included the contracts of both Personal Assistants.
16. As an example of this interference, on 1 November 2020, the Portfolio Committee's Chairperson sent a letter to the Chairperson of the CGE requesting that the CGE provide a comprehensive report on the appointment of PA to Commissioners and CEO with supporting documentation. Additionally, she asked the CGE to indicate which Commissioners were involved in remunerated work outside the CGE, whether this has been declared and whether the requisite approval was obtained.
17. Recently the Portfolio Committee (through its Chairperson) has made several enquiries and instructions on the employment of senior management. Below is a brief run-down of the Parliamentary meetings within which Portfolio Committee members and the Chairperson have made such enquiries:

- a. 10 July 2020 – Committee Chairperson states that the Committee had written to the CGE enquiring when the contracts of senior managers were due to expire and what process would follow;
 - b. 1 July 2020 – Committee Chairperson disagrees with CGE’s decision to “take money from” (effectively-staying appointing for those posts) several senior appointments due to budget cuts;
 - c. 1 September 2020 – Committee Chairperson comments on the quality of the CGE spokesperson as “not good”;
 - d. 20 October 2020 – Committee Chairperson enquired about the total number of vacancies in the CGE. CGE was instructed not to appoint provincial and senior managers until the Portfolio Committee okayed the process;
 - e. 10 November 2020 – – After being informed of the Acting CEOs resignation, Portfolio Committee Chairperson stated that some senior officials’ contracts were also due to expire soon;
 - f. 10 November 2020 – Portfolio Committee Chairperson asked commissioner Rakolote whether he had been briefed to start working on job advertisements for senior posts. *(It is important to note that the existing Recruitment Policy only permits Commissioner involvement in staff hiring at the behest/request of the CEO)*;
 - g. 2 December 2020 – Committee Chairperson enquires about senior manager interviews.
18. From the events mentioned above, it can be argued that where staffing issues are impacting the performance of a Chapter Nine institution, an oversight body (such as Parliament/the Committee) may enquire into and even set timelines as to when the necessary appointments must happen for the Chapter nine to perform its functions. This understanding is, in our view, supported by section 181(3) of the Constitution.
19. However, the obligation imposed by section 181(3) does not include the kind of intrusive interventionist approach taken by Ms Ndaba. Furthermore, justification for an intrusion in staffing decisions would only occur where the lack of staffing impacts an institution’s ability to perform its functions and deliver on its duties. It is important to

note that the Portfolio Committee did not allege that the CGE's staffing issues interfered with its ability to perform its functions. It is our client's submission that this conduct threatens and intrudes on the CGE's administrative independence.

Portfolio Committee members interference in cases and reports of the CGE

20. The constant interference in the internal affairs of the CGE by the Portfolio Committee has resulted in the CGE moving away from its internal policies, particularly concerning how it handles individual complaints.
21. Portfolio Committee Members often refer individual cases to the CGE. This occurs outside the parameters of CGE policies on the handling of legal opinions. Perhaps tellingly, the Portfolio Committee Chairperson has expressed intense disagreement with CGE's internal legal complaints handling manual/policy, insisting it must change.
22. This is evident from the exchange between the Portfolio Committee's Chairperson and Mx Deyi in the December 2020 appearance of the CGE before the Committee, wherein Portfolio Committee Members expressed their dissatisfaction with the "low numbers" of cases the CGE handled.
23. In this meeting, Mx Deyi sought to clarify that cases taken on by the CGE were assessed based on their potential ability to impact systemic and structural changes to gender inequality. This is due to multiple factors, but the dominant is that the CGE does not have the capacity and institutional mandate to take on all cases and complaints brought to it. Therefore, the CGE limits itself to only those cases that have a potential public interest impact.

24. The Portfolio Committee's Chairperson disregarded this explanation. She stated that the CGE's policy was unacceptable to them as "politicians" and that the CGE must review its stance. Below is a quote of her response;

*"You see, we are politicians. We are representing the interests of our people. These are two different things (the CGE's reasoning and the politician's mandate). You (CGE) must go back and review your decision...You are taking me back. It's us who said there must be a CGE and defended CGE...There was a review about whether we still needed the CGE or not. The Kader Asmal report said we must get rid of it. **It's us parliamentarians who said we need CGE...The other thing of the Constitution, we wrote the Constitution.**"*

25. It can be argued from the above exchange that the Chairperson of the Portfolio Committee was making it clear to our client that the existence of the CGE was as a result of politicians' desires, and therefore its existence was subject to the CGE's serving of that interest – which the current policy on case assessment did not serve.

26. Indeed, the referral of complaints by Portfolio Committee Members to the CGE had become so common-place and frequent that the then head of legal of the CGE drafted a "referral policy".

27. Lastly, there is an emerging practice of the CGE referring matters to the Portfolio Committee as the final administrative body. Consequently, the Portfolio Committee has usurped the CGE's independence and constitutional duties as its cases are subject to scrutiny from the Portfolio Committee.

28. Additionally, Mx Deyi believes that Portfolio Committee members have access to CGE reports that have not been finalised. Access to CGE reports by politicians threatens section 181(2) of the Constitution, which provides that chapter nine institutions must be impartial and exercise their powers and perform their functions without fear, favour or prejudice. In a CGE and Portfolio Committee meeting, a Portfolio Committee member “warned” the CGE about a report that involved the deputy minister and the Hawks.
29. In a Portfolio Committee Meeting on the 2 March 2021, Mr L Mphithi (DA) cautioned the CGE to be careful not to be seen as siding with those in power in the ██████████ ██████████ (David) *Masondo* (“Hawks matter”) that was before the CGE as a complaint. Additionally, he suggested that the CGE submit a spreadsheet of ongoing cases for the Committee to establish the types of complaints the CGE deals with and why certain cases were not being closed. Lastly, he added that the CGE does not respond quickly enough to complaints raised by the Committee members and that such tardiness was an indication of how the CGE responded to other complaints. The Chairperson of the CGE was shocked and informed the Portfolio Committee member that the report was in its preliminary stages and had not been made public or finalised as yet. (See: <https://pmg.org.za/committee-meeting/32413/>).
30. The interference in the day-to-day administrative duties of the CGE is not only concerning but unconstitutional.

31. The events and issues highlighted above have created a growing general presumption within the CGE (especially with its commissioners) that matters relating to specific administrative processes must be referred to the Committee before they are finalised. This presumption has created a perception within the CGE that the CGE is accountable to the Portfolio Committee for internal hiring/administrative processes.
32. We believe that the consistent inference from the Portfolio Committee (particularly its Chairperson) has created a presumption that the internal administrative processes of the CGE must be sent to Parliament for final approval. This presumption creates a perception that the Portfolio Committee is the highest decision-making authority in CGE matters.
33. Flowing from the irregularities that had transpired from the CEO recruitment, there were multiple reports instituted by the CGE on various matters. These legal opinions were presented before the plenary and, after deliberations, were then adopted. In adopting these reports, a new practice began to emerge – resolutions which included the stipulation that the report should be “*sent to parliament*”.
34. Below we set out the legal framework we rely upon in making this complaint to the Acting Speaker.

Legal Framework

Independence Of the CGE

35. Chapter 9 of the Constitution deals with state institutions supporting democracy. Section 181 of the Constitution deals with the establishment and governing principles

of chapter 9 institutions. Section 181 (1) establishes the Commission for Gender Equality.

36. Section 181(2) states that these institutions are independent and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour, or prejudice.
37. Section 181(3) provides that other organs of state must assist and protect these institutions to ensure the independence, impartiality, dignity, and effectiveness of these institutions.
38. Notably, section 181(4) provides that no person or organ of state may interfere with the functioning of these institutions. Further, section 181(5) provides that these institutions are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year. The manner and purpose of CGE's reporting to the National Assembly ought to be achieved in the context of both Section 181 and Section 10 of the Commission for Gender Equality Act ("the Act").¹
39. Section 10 specifically provides for the independence of the CGE. Section 10(1)(a) provides that the Commission shall be independent. Section 10(2) provides that no organ of state and no member or employee of an organ of state nor any other person shall interfere with, hinder or obstruct the Commission, any member thereof or a person appointed under section 6 (1) or 7 (1) or (5) in the performance of its, their functions.
40. Section 7 deals with staffing of the Commission. The section provides that the Commission shall, at its first meeting or soon thereafter in consultation with the Minister of Finance, appoint a Chief Executive Officer.
41. Section 7(3) provides that:

¹ Act 39 of 1996.

i) A document setting out the remuneration, allowances, and other conditions of employment determined by the Commission in terms of subsection (2) shall be tabled in Parliament within 14 days after such determination. If Parliament disapproves of any determination, such determination shall cease to be of force to the extent to which it is disapproved. If a determination ceases to be of force as contemplated in the paragraph above:

- a. anything done in terms of such determination up to the date on which such determination ceases to be of force shall be deemed to have been done validly; and
- b. any right, privilege, obligation, or liability acquired, accrued or incurred up to the said date under and by virtue of such determination shall lapse upon the said date.
- c. Section 16 of the Act provides that the Commission may, at any time, approach the President or Parliament with regard to any matter relating to the exercise of its powers or the performance of its functions.

42. The Constitutional Court had to deal with the independence of Chapter 9 institutions in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*.² The Court in this regard held —

“Like other Chapter Nine institutions, the office of the Public Protector was created to “strengthen constitutional democracy in the Republic”. To achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other sister institutions, to be impartial and to exercise the powers and functions vested in it without fear, favor, or prejudice. I hasten to say that this would not ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be ineffectual. Whether it is impartial or not would be irrelevant if the implementation of the decisions it takes is at the mercy of those against whom they are made. It is also doubtful whether the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, findings and remedial actions taken, would ever make any sense if the Public Protector’s powers or decisions were meant to be inconsequential. The constitutional safeguards in section 181 would also be meaningless if institutions

² 2016 (3) SA 580 (CC).

purportedly established to strengthen our constitutional democracy lacked even the remotest possibility to do so.”³

43. Further, the Court held —

“In appreciation of the high sensitivity and importance of its role, regard being had to the kind of complaints, institutions and personalities likely to be investigated, as with other Chapter Nine institutions, the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate.”⁴

OVERSIGHT POWERS

44. Parliament has published the oversight and accountability model.⁵ In terms of the model, the concept of oversight contains many aspects, including political, administrative, financial, ethical, legal, and strategic elements. The functions of oversight are:

- a. to detect and prevent abuse, arbitrary behaviour or illegal and unconstitutional conduct on the part of the government and public agencies. At the core of this function is the protection of the rights and liberties of citizens.
- b. to hold the government to account in respect of how the taxpayers’ money is used. It detects waste within the machinery of government and public agencies. Thus, it can improve the efficiency, economy, and effectiveness of government operations.
- c. to ensure that policies announced by the government and authorised by Parliament are actually delivered. This function includes monitoring the achievement of goals set by legislation and the government’s own programmes.
- d. to improve the transparency of government operations and enhance public trust in the government, which is itself a condition of effective policy delivery.

³ Id at para 49

⁴ Id at para 50.

⁵ Available from: <https://www.parliament.gov.za/storage/app/media/oversight-reports/ovac-model.pdf>.

45. It is significant to note that there is an argument to be made that where staffing or administrative issues are impacting the performance of a Chapter nine institution, an oversight body may enquire into and even set timelines as to when specific steps ought to be taken or appointments happen. However, this scenario would only occur where the lack of staffing and or administrative issues impacts an institution's ability to perform its functions and deliver on its duties.
46. Further to the above, this argument would need to survive the scope of section 181(3), which provides that other organs of state must assist and protect chapter nine institutions to ensure these institutions' independence, impartiality, dignity, and effectiveness.

POWERS OF THE SPEAKER

47. The Mandate of the Speaker is two-fold. It is constitutional and institutional. The Speaker is the leader of the National Assembly.
48. The National Assembly has authority to legislate on behalf of the state, including amending the Constitution, entering into bilateral agreements, treaties and signing international Human Rights Instruments. As a leader of the House, the Speaker must ensure that these processes are in accordance with Constitution. They also must ensure that the House oversees and monitors the performance of the executive arm for effective implementation of legislation already passed by the House.
49. The impartiality of the Speaker is one of the prime values the integrity of the South African Parliament is measured in terms of. The Speaker, therefore, has the responsibility of:
- a. Being the custodian of this integrity
 - b. Preserving parliamentary integrity
 - c. The decorum of the members of the House consequently.
 - d. Serving as the Executive Authority for the House.
 - e. Ensuring the smooth running of the House business and its committees.
 - f. Ensuring the development and management of the House programme

- g. Impartially presides over house meetings & maintaining order, and Chairpersons the strategic parliamentary Committee.

50. The Rules of the National Assembly sets out the general authority and responsibility of the Speaker. Rule 26 states that in exercising the Speaker's general authority and responsibility the Speaker must (amongst other duties):

- a. ensure that the National Assembly provides a national forum for public consideration of issues, passes legislation, and scrutinises and oversees executive action in accordance with section 42(3) of the Constitution;
- b. whenever possible, consult with relevant office-bearers and structures within Parliament to achieve the efficient and effective functioning of Parliament in a transparent and accountable manner.
- c. The Speaker is responsible for the strict observance of the rules of the House and must decide questions of order and practice in the House, such a ruling being final and binding as provided for in Rule 92.

Proposed way forward

51. As stated above, section 16 provides that the Commission may, at any time, approach the President or Parliament with regard to any matter relating to the exercise of its powers or the performance of its functions.

52. Our considered view is that the most appropriate relief at this juncture rests with Parliament, in particular with the Speaker of Parliament. The Speaker must reaffirm the principles of CGE's independence as a Chapter nine institution based on the constitutional principles of independence, impartiality and effectiveness of chapter nine institutions in terms of section 181(2), 181(3), & 181(4). Additionally, the Chairperson of the Portfolio Committee (Ms N Ndaba) and the Portfolio Committee must be addressed, in terms of National Assembly Rules, on their continued interference within the CGE. We request that the Acting Speaker expeditiously deal with these issues.



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53. We await a response from the Acting Speaker no later than **Friday, 10 September 2021**. Our client reserves all their rights.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Thandeka Kathi', is written in a cursive style.

Thandeka Kathi

Attorney: Centre for Applied Legal Studies

Per email: Thandeka.Kathi@wits.ac.za