



# REFLECTIONS: THE IEC COMMISSIONER APPOINTMENT PROCESS 2018

## INTRODUCTION

*The second term of office for Vice Chairperson, Terry Tselane and the first term of office for Reverend Bongani Finca and Judge Thami Makhanya came to an end this year as Independent Electoral Commissioners. This resulted in three vacancies arising at the Independent Electoral Commission (IEC). The vacancies needed to be filled with urgency as 2019 elections are looming. It is with this urgency that the search for new Commissioners began in March this year.*

## APPOINTMENT PROCESS BY LEGISLATION

The Electoral Commission Act<sup>1</sup> states that there should be five Commissioners. One Commissioner shall be a judge.<sup>2</sup> In order to become a Commissioner, a person must be a South African citizen and should not have a high party-political profile.<sup>3</sup> When there is a vacancy for a Commissioner that needs to be filled, a notice is published that calls for nominations of potential candidates. A panel headed by the Chief Justice, and consisting of a representative of the Human Rights Commission, a representative of the Commission for Gender Equality and the Public Protector compiles a shortlist from the nominations received. The panel interviews the shortlisted candidates and sends a list of no fewer than eight recommended candidates to the Portfolio Committee of Home Affairs in Parliament. This Committee considers the candidates and nominates, based on the number of vacancies at the time, the candidate/s to sit as a Commissioner/s. A report is submitted to the National Assembly which debates and votes on the candidate/s that should be recommended to the President. The President then appoints the Commissioner if he/she approves.<sup>4</sup>

## THE PANEL PROCEEDINGS

On the 11th of March 2018, the Office of the Chief Justice made a public call for nominations for the position of IEC Commissioner. The Office of the Chief Justice received 119 nominations. A panel consisting of Chief Justice Mogoeng Mogoeng,

Public Protector Busisiwe Mkhwebane, Deputy Chairperson of the Commission for Gender Equality Tamara Mathebula and Human Rights Commissioner Angie Makwetla met to shortlist candidates and 26 candidates were shortlisted.

Interviews were held on the 25th and 26th of June 2018 at the Office of the Chief Justice in Midrand, Johannesburg. Three shortlisted candidates withdrew their nominations prior to the interview date, leaving 23 candidates to interview. The themes most prevalent in the discussions with the candidates during the interviews were issues plaguing the IEC. These issues included cyber security, the voter's roll and voter outreach. The candidates were also given an opportunity to provide solutions for the issues affecting the IEC. Additionally, candidates were grilled about any allegations of maladministration, misconduct and mismanagement that were attached to their names.

At the end of the process, the panel deliberated and recommended 8 candidates to the Portfolio Committee of Home Affairs in Parliament ('the Committee'). The 8 candidates recommended were Rev Bongani Finca (Current IEC Commissioner), Maletlatsa Ledingwane (Attorney), Nomonde Mapetla (Chief Executive Officer), Dr Nomsa Masuku (Deputy CEO of Corporate Services at the IEC), Mosotho Simon Moepya (Former Chief Electoral Officer at the IEC) Bernadette Muthien (Commissioner for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic



Communities) , Liepollo Pheko (Managing Director and Academic) and Judge Dhayanithie Pillay (Kwazulu-Natal High Court Judge).

## **PORTFOLIO COMMITTEE OF HOME AFFAIRS DELIBERATIONS**

The report was referred to the Committee on the 11th of July 2018 and they held their first meeting on 15 August 2018. At the Committee meeting, the consensus was that members of Parliament (MPs) on the Committee, needed to get their political party mandates as to which candidates to nominate. Once they had received mandates from their political parties' they could nominate individuals for the position. The Economic Freedom Fighters (EFF) was the only party which expressed that they were ready to nominate on the day. However, nominations did not take place and the next meeting, where nominations would take place, was scheduled for the following week.

On 21 August 2018, the Committee met and the Chairperson of the Committee, Paul Chauke, indicated that they would not be making nominations that day. The Chairperson reasoned that there was a need to give the public an opportunity to make comments on the recommended candidates. Parliamentarians expressed their frustration at this as MPs stated that they were ready to proceed with nominations. Some MPs disclosed that they felt the only reason they were not proceeding is because the African National Congress (ANC) was not ready to nominate, and highlighted the waste of expenditure and of their time as some had to fly in for this meeting. Nonetheless, the meeting was postponed to the following week and 3 days were provided for the public to comment on the candidates. The Committee met on the morning of 28 August 2018. The meeting agenda consisted of a briefing by the Department of Home Affairs on the Immigration Amendment Bill and the amendments to the Civil Union Bill. The National Assembly sitting was starting in the afternoon and when it was time to deliberate on the IEC candidates, there was very little time left to do so.

The Content Advisor for the Portfolio Committee of Home Affairs, Mr Adam Salmon gave a summary of public considerations. The Committee had received 32 submissions. Thereafter, political parties submitted their nominations.

The Inkata Freedom Party (IFP) was not present but the Chairperson read out their nominations. The IFP submitted Mr Mosotho Simon Moepya, Rev Bongani Blessing Finca and Judge Dhayanithie Pillay.

Mr Hoosen for the Democratic Alliance (DA) submitted Dr. Nomsa Masuku, Bernadette Muthien and Judge Dhayanithie Pillay.

Ms Mkhali for the EFF submitted Rev Bongani Finca, Judge Dhayanithie Pillay and Ms Liepollo Pheko.

Mr Gumede for the ANC submitted Judge Dhayanithie Pillay, Dr Nomsa Masuku and Mr Mosotho Simon Moepya.

Thus, the three nominated candidates for the positions were Judge Dhayanithie Pillay, Mr Mosotho Simon Moepya and Dr Nomsa Masuku.

Ms Mkhali of the EFF objected to the nomination of Mr Mosotho Simon Moepya. The reason for this was that he had been implicated in a leasing scandal that resulted in the resignation of former IEC Chairperson Advocate Pansy Tlakula. In a report entitled, *Inappropriate Moves*, the Public Protector found that Tlakula had contravened procurement laws and had a conflict of interest in entering into a leasing contract for new IEC headquarters. The tender process for the leasing contract was found to be irregular and the conflict of interest was because Tlakula was business partners with a shareholder in the company that was awarded the tender. In investigating this leasing scandal, the Public Protector stated that Mr Moepya, in his capacity as IEC Chief Electoral Officer at the time, did not provide minutes of meetings and a budget that was required by the Public Protector for its report. The Public Protector recommended that disciplinary action should be taken against him for this.<sup>5</sup> Additionally, there were allegations of Mr Moepya paying for Tlakula's legal costs without proper authorisation when she was taken to court by political parties over the scandal.<sup>6</sup> Mkhali highlighted that Moepya did not challenge these allegations in a court of law and had never cleared his name.

In response, Mr Gumede of the ANC read page 3 of the report submitted by the panel led by the Chief Justice. The panel indicated that Moepya had provided them with a detailed response to the allegations, which he refuted by deposing to an



affidavit. Moepya had given them proof of his communication to the Public Protector in a bid to correct the Public Protector's finding. They were aware that the Public Protector had acknowledged receipt of this communication. The panel was fully satisfied that Moepya had fully cooperated with the Public Protector by providing all the documents required by it. Furthermore, the panel had disclosed that the Public Protector had apologised to him for how he had been treated.

Mr Hoosen of the DA proposed that their report should show a consensus on the candidates nominated for the position. He asserted the fact that IEC Commissioners should be impartial and should be respected by all political parties. He objected to Moepya's nomination for the same reason as Mkhali. He stated that the public perception of Moepya based on public submissions was that he was not suitable. He appealed for a compromise and for the nomination of someone they were all happy with such as Rev Bongani Finca.

The resolution was that the three names recommended would stay as is. Further debate could be had in Parliament. Therefore, the report was adopted and forwarded to the National Assembly.<sup>7</sup>

### **NATIONAL ASSEMBLY VOTE**

On 4 September 2018, the National Assembly debated the report by the Committee.

During the debate, the DA made it clear that the party supported the nomination of Dr Masuku and Judge Pillay but not of Mr Moepya. They asserted that the IEC needed Commissioners of integrity and that public confidence was important for such an institution. The reason they were against Moepya's nomination is because of the allegations levelled against him.

The EFF stated that they welcomed the nomination of Judge Pillay. They were unhappy about the nomination of Moepya and alleged that the ANC is always putting people with dark clouds over their heads and of dubious character into positions of power. They stated that political patronage was at work and that it undermined the foundation of our democracy.

The ANC, IFP, National Freedom Party (NFP) and

African Peoples' Convention (APC) extended their support of all nominees.

These deliberations culminated in the nominations of Mr Mosotho Moepya, Dr Nomsa Masuku and Judge Dhayanithie Pillay being approved. 204 voted in favour and 62 voted against.<sup>8</sup>

### **APPOINTMENT PROCESS REFORM**

This IEC Commissioner appointment process proved to be transparent, largely owing to the efforts by My Vote Counts (MVC) and Council for the Advancement of the South African Constitution (CASAC). The Office of the Chief Justice also ensured that the public was made aware of each development throughout the process. However, there is room for improvement.

119 applications were submitted for this position. However, the public was not made aware of who these people were or how the panel arrived at 26 shortlisted candidates. One judge was shortlisted for the position and legislation prescribes that one of the Commissioners shall be a judge.<sup>9</sup> Therefore, it was almost by default that Judge Pillay would be nominated and appointed. Access to this information would allow us to know if she was the only judge that applied and if so we would be able to investigate, for future purposes, why judges are not putting themselves forward for this position.

MVC and CASAC assembled researchers that looked into each shortlisted candidates' profile. This research led to a report that was submitted to the panel ahead of the interview process. Each profile consisted of the candidates' educational qualifications, work experience, business interests, directorships, political affiliations and any adverse records or allegations against them.<sup>10</sup>

It was evident during the interviews that the panel was engaging the report in conducting the interviews. This reveals that the process was open to public participation. However, there should be room for this when the panel is compiling the shortlist. The panel, led by the Office of the Chief Justice would benefit greatly from assistance in compiling the shortlist in the form of researchers or recruitment consultants. This would lessen the workload of the panel. Furthermore, it would allow whoever is contracted to assist with the shortlisting to conduct thorough research and investigation on applicants



that the panel may not have the capacity to do.

This is best modelled by the United Kingdom. The appointment process of Electoral Commissioners in the UK allows for the appointment of recruitment consultants. The recruitment consultants produce a report on applicants that is forwarded to the panel. They are involved in preliminary interviews with candidates and based on this report, the panel shortlists candidates and interviews them.<sup>11</sup>

## LEGISLATIVE AMENDMENTS

It is unfortunate that when the process goes to parliament, politics takes over. MPs do not make decisions based on anything other than a mandate from their party as to who should be nominated. The IEC is an institution that forms the bedrock of this democracy. Its impartiality, independence and public perception must be protected. A Commissioner should be someone that appeals to all political parties and holds the confidence of the public. Should this not be the case, the IEC and the elections they administer will always have a cloud of suspicion hanging over them.

In this case, the DA and the EFF opposed the nomination of Moepya. There were eight good candidates recommended by the panel to Parliament. A compromise could have been reached by nominating another candidate that all political parties were in favour of. This took place in 2011 when Advocate Tlakula, Terry Tselane and Raenette Taljaard were unanimously nominated.<sup>12</sup> This happened again in 2016 when Janet Love was unanimously nominated as an Electoral Commissioner by all political parties.<sup>13</sup>

Currently, in order for nominated candidates to be sent to the President for approval, an absolute majority of the National Assembly needs to vote for them.<sup>14</sup> Mmusi Maimane has stated that the DA believes IEC Commissioner nominees should have the votes of 60% of its members in the National Assembly before being sent to the President for approval. This is how the Public Protector and the Auditor-General are appointed.<sup>15</sup>

Furthermore, the Act states that in order to be a Commissioner you should not have a high party-political profile.<sup>16</sup> This means that legislation does not forbid Commissioners' from being members of political parties. However, they cannot hold

prominent positions in them. During the interview process, a few shortlisted candidates revealed that they were card carrying members of political parties.

It is one thing to have a political preference to which everyone is entitled. It is another thing to be a card-carrying member. It is difficult to imagine that a member of a political party would not have some bias towards their party in administering elections. It is for this reason that the requirement that Commissioners should not have a 'high party-political profile', should be considered more closely and clarified.

The *Political Parties, Elections and Referendums*<sup>17</sup> Act in the UK dictates that a person cannot be a Commissioner if they:

- are an officer or employee of a registered political party.
- hold or at any time in the last five years, held office of a registered party.
- are a member of a political party.
- have or at any time in the last five years held an elective office.
- have in the last five years been registered in the Commission for recordable donations to a political party.
- have in the last five years been named as a participant in the Commission register of recordable transactions in regards to political parties.

Applicants are expected to disclose this information, together with any information in regards to business/financial interests that result in a conflict of interest with the Commission.

## CONCLUSION

No appointment process is perfect. However, where there are opportunities for improvement, these should be made to allow for greater transparency and accountability. The new IEC Commissioners have a mammoth task ahead of them. It will require them, in exercising their duties, to be above reproach and to conduct their affairs without any prejudice to any political party. The stability of our democracy lies with them and it is every citizens' responsibility to ensure that they deliver successfully on their constitutional mandate.

*Written by Farai Savanhu*



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- <sup>2</sup> Section 6 (1) of the Act.
- <sup>3</sup> Section 6 (2) of the Act.
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- <sup>5</sup> Public Protector Report Inappropriate Moves August 2013, available at: <http://www.pprotect.org/?q=content/investigation-reports>
- <sup>6</sup> Bongani Nkosi Decision to authorise R500k legal bills comes back to haunt ex-IEC boss The Star, available at: <https://www.iol.co.za/the-star/decision-to-authorise-r500k-legal-bill-comes-back-to-haunt-ex-iec-boss-16391501>
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- <sup>15</sup> Mmusi Maimane A truly independent IEC is democracy's last line of defence Daily Maverick, available here: <https://www.dailymaverick.co.za/opinionista/2015-08-30-a-truly-independent-iec-is-democracys-last-line-of-defence/>
- <sup>16</sup> Section 6 (2) (b) of the Act.
- <sup>17</sup> Section 4 Political Parties, Elections and Referendums Act 2000.

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