THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT AT KAMPALA

{Coram: Buteera, DCJ, Bamugemereire, Kibeedi, Mulyagonja & Mugenyi, JJCC}

CONSTITUTIONAL PETITION NO. 23 OF 2015

1. LEGAL BRAINS TRUST (LBT) LTD
2. SIMON KAGGWA-NJALA ::::::::::::::: **PETITIONERS**
3. SULAIMAN KAKAIRE

VERSUS

ATTORNEY GENERAL::**RESPONDENT**

JUDGMENT OF IRENE MULYAGONJA, JCC

This petition was brought under Article 137 (3) of the Constitution of the Republic of Uganda 1995. The petitioners alleged that rule 153(2) of the Rules of Procedure of the Parliament of Uganda, 2012, now rule 165 (2) of the Rules of Procedure of the 11th Parliament, is inconsistent with and/or in contravention of Articles 8A (1), 79 (3), 29 (1) (a), 38 (1), 41 (1) and 43 (2) (c) of the Constitution of the Republic of Uganda.

The grounds of the petition were that:

a) The promotion of transparency and accountability in all organs of the state by providing the public with timely, accessible and accurate information is demonstrably not among the purposes of the impugned rule, and to that extent the impugned rule contravenes Article 8A (1) of the Constitution;

b) The impugned rule impinges on the practice of democratic governance in the country as it denies the public and the press an opportunity to observe scrutinise and participate in this crucial decision-making process of Parliament contrary to Article 79 (3) of the Constitution;

c) The impugned rule demonstrably has the effect of prohibiting the press and public from accessing the proceedings of the Appointments Committee, and thus hinders the exercise and enjoyment of freedom of expression, including freedom of the press and other media contrary to Article 29 (1) (a) of the Constitution;

d) The impugned rule conceals the process through which high-ranking public officials are sought, vetted and approved, and thus disempowers the public from effectively knowing about, scrutinising and participating in the appointment of individuals who will make decisions affecting their rights contrary to Article 38 (1) of the Constitution;

e) By failing to restrict the application of the impugned rule to only those situations where the Appointments Committee has made a judicious finding that publicity of its proceedings may prejudice the State security or sovereignty of the State and the right to privacy of a given person, the impugned rule disproportionately abridges the citizen's right to access information in the possession of the State, and is therefore inconsistent with Article 41 (1) of the Constitution;

f) By failing to ensure that proceedings of the Appointments Committee of Parliament are generally open to the public and the press, and only held behind closed doors in exceptional circumstances permitted by the Constitution, the impugned rule is unacceptable

and demonstrably unjustifiable in a free and democratic society, and is therefore inconsistent with Article 43 (2) (c) of the Constitution.

The petitioners prayed for the following remedies:

(a) A declaration that rule 165 (2) of the Rules of Procedure of the Parliament of Uganda, 2021, is inconsistent with and in contravention of the aforementioned Articles of the Constitution and is to that extent null and void; and

(b) Orders for redress in the following terms:

i. An order directing Parliament and/or the Parliamentary Commission to grant the petitioners access to any and all transcripts of the proceedings of the Appointments Committee that were conducted by the 9th Parliament since the coming into force of the impugned rule,

ii. An order directing Parliament and/or the Parliamentary Commission to grant the petitioners access to any and all audio, video and audio-visual recordings of the proceedings of the Appointments Committee that have been conducted by the 9th Parliament since the coming into force of the impugned rule,

iii. A permanent injunction barring Parliament from enforcing the impugned rule or similar rules and regulations which disproportionately conceal proceedings of the Appointments Committee; and

iv. An order directing the respondent to pay the costs of the petition.

The petition was supported by the affidavit of Simon Kaggwa Njala, a journalist by training and a veteran broadcaster employed by NBS Television and *Akaboozi ku Bbiri* (a Luganda FM radio station) deposed on

Ikon.

31st July 2015. It was further supported by the affirmation of Sulaiman Kakaire, a Staff Reporter at The Observer Newspaper, affirmed on the same date. The two deponents, also the 2nd and 3rd petitioners, respectively, averred that they are media consultants in the 1st petitioner's 'Open Government' Research and Advocacy Programme. That in addition, the 2nd petitioner is a veteran broadcaster who hosts and produces a series of interactive political talk shows which command a combined audience of not less than four million viewers and listeners daily on weekdays. The 3rd petitioner averred that he is the winner of the prestigious David Astor Journalism Award for having consistently demonstrated competence and professionalism in reporting about the proceedings of the Eighth and Ninth Parliaments. It is on the basis of the said credentials that they sought to have the impugned rule declared unconstitutional and nullified.

The respondent opposed the petition in his answer filed on 1st September 2015 in which it was stated that the petition is bad in law, frivolous, prolix and raises no question as to the interpretation of the Constitution. That in fact, the impugned rule was for the purpose of promoting transparency and accountability in all organs of the State by providing to the public timely, accessible and accurate information. That therefore, the impugned rule does not contravene Article 8A (1) of the Constitution or any of the stated provisions of the Constitution. The respondent concluded that the petitioners are not entitled to any of the declarations and orders sought and the petition should be dismissed with costs. The respondent's answer was supported by the affidavit of Mr. Richard Adrole sworn on 28th August 2015, in which the contents of the answer were repeated.

Representation

When the matter came up for hearing on 6th June 2022, the petitioners were represented by Mr. Isaac Ssemakadde, learned counsel. The

respondent was represented by Ms. Claire Kukunda, Senior State Attorney, in the Attorney General's Chambers.

At the hearing, court observed that the Rules of Procedure of the 9th Parliament which contained the impugned rule were no longer in force. Counsel for the petitioners then applied to amend the petition by substituting rule 153 (2) of the Rules of Procedure of Parliament of Parliament, 2012 with rule 165 (2) of the Rules of Procedure of the 11th Parliament, Statutory Instrument No. 30 of 2021, and his application was granted. This judgment therefore addresses the questions that were stated in respect of rule 165 (2) of the Rules of the 11th Parliament.

The matter next came up for hearing on 14th June, 2023 after a reconstitution of the panel of judges, some of those that sat on the previous panel having been elevated to the Supreme Court. The representation from the Attorney General's chambers was as before but Mr. Geoffrey Turyamusiima appeared for the petitioners, holding the brief for Mr. Isaac Ssemakadde. Counsel for both parties prayed that the legal arguments that were earlier filed in court be adopted as their final arguments in the matter and their prayers were granted. The petition was thus disposed of on the basis of written arguments.

Before I go on to consider the written arguments presented by the respondent in respect of the substantive issues raised in the petition, I must address the question or objection raised by the respondent as to whether there is any question in the petition as to the interpretation of the Constitution. This is a vital issue that must be resolved in order to properly clothe this court with jurisdiction, should it be found that there are indeed questions or a question to be addressed by the court.

Respondent's Preliminary Objections

In the respondent's submissions filed on 30th June 2022, Ms. Kukunda contended that the petition and the supporting affidavits made blanket allegations of violation of the provisions of the Constitution without disclosing or illustrating the need for interpretation of the said provisions. She relied on **Ismail Serugo v Kampala City Council & The Attorney General; Supreme Court Constitutional Appeal No. 2 of 1998,** where it was held that for the Constitutional Court to be clothed with jurisdiction, the petition must show on the face of it that the interpretation of the Constitution is required. She further relied on the decision in **Constitutional Petition No. 2 of 1999; Charles Kabagambe v Uganda Electricity Board**, on the juristic scope for the invocation of the jurisdiction of this court.

Counsel for the respondent further submitted that in principle, a party seeking relief through a constitutional petition on the basis of violation of the Constitution, constitutional rights and fundamental freedoms must plead with a higher degree of precision. That to this end, they must show the constitutional or fundamental freedoms violated, the manner of violation, the provision of the Constitution in question or violated, and the jurisdictional basis for the litigation. She relied on **Anarita Karimi Njeru v Attorney General (No. 1) [1979] KLR** relied on by that court in **Dr. Japheth Ododa Odiga v The Vice Chancellor University of Nairobi & 2 Others; C. P/491/2016**. She asserted that the petitioners failed to meet the standard of precision required in such petitions and prayed that for the two reasons above, the petition ought to be dismissed.

The petitioners responded in submissions in rejoinder filed on 27th July 2022 in which Mr. Ssemakadde urged court to overrule the respondent's

objections. He submitted that the reliance on excerpts from **Ismail Serugo v KCCA** (supra) and **Charles Kabagambe v UEB** (supra) was out of context and invalid and ought to be rejected by this court. He invited court to instead consider the decision in **Centre for Health v Attorney General, Supreme Court Constitutional Appeal No. 1 of 2013** on this point, and Article 137 (4) of the Constitution.

Counsel for the petitioners further argued that the petition and supporting affidavits disclosed, with sufficient precision and clarity, the provisions of the Constitution that were violated by the respondent and the manner of the violation and thus passed the threshold of the test in Article 137(1) and (3)(a) of the Constitution. He relied on the decision in **Tororo Cement v Frokina, SCCA No. 2 of 2001**, rule 23 of the Constitutional Court (Petitions and References) Rules, S1 91/2005 and Order 6 rule 4 of the Civil Procedure Rules, and submitted that the respondent suffered no prejudice since he was able to not only understand the petitioners' case but also to respond to the same.

Resolution of the Preliminary Objections

On the basis of the submissions above, I will now address the objections, but of necessity, starting with whether there is a question as to the interpretation of the Constitution raised in the petition. If this issue is decided in the positive, it is my view that the question as to the precision of the pleadings becomes merely procedural or moot and demands no answer from this court, in view of the provisions of Article 126 (2) (e) of the Constitution which requires court to dispense substantive justice without undue regard to technicalities.

Article 137 of the Constitution under which this petition was brought provides, in the relevant parts, as follows:

137. Questions as to the interpretation of the Constitution.

(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

(2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.

(3) A person who alleges that—

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may—

a) grant an order of redress; or

(b) refer the matter to the High Court to investigate and determine the appropriate redress.

(5) ...

The petitioners in this case brought this petition under Article 137 (3) of the Constitution. They contend that rule 165 (2) of the Rules of Procedure of Parliament, formerly rule 153 (2) of the Rules of Procedure of the 9th Parliament and 162 (2) of the Rules of Procedure of the 10th Parliament is inconsistent with or in contravention of Articles 8A (1), 79 (3), 29 (1) (a), 38 (1), 41(1) and 43 (2) (c) of the Constitution, and they claimed several reliefs to remedy the alleged inconsistency.

Counsel for the respondent urged court to rely on the decision of the Supreme Court in **Ismail Serugo** (supra) about the interpretation of the Constitution on the jurisdiction of this court as a Constitutional Court,

while counsel for the petitioner commended to us the later decision in **Centre for Health & Others v Attorney General** (supra) on the same point.

In **Ismail Serugo** (supra) the court was divided on the interpretation of Article 137 which provides for the jurisdiction of this Court. Kanyeihamba, JSC agreed with Wambuzi, CJ, Karokora and Kikonyogo, JJSC on the interpretation of the provision that was rendered in **Attorney General v David Tinyefuza, Constitutional Appeal No. 001 of 1997,** when he opined that:

> *"... as far as the case of General D. Tinyefunza v. Attorney-General Constitutional, Appeal No.1 of 1997 [Unreported] is concerned. There is a number of facets to the decision of the Supreme Court in that case. Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, [Wambuzi, C.J., Tsekooko J.S.C., Karokora J.S.C., and Kanyeihamba J.S.C], is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition. It is therefore erroneous for any petition to rely solely on the provisions of Article 50 or any other Article of the Constitution without reference to the provisions of Article 137 which is the sole Article that breathes life in the jurisdiction of the Court of Appeal as a Constitutional Court."*

In the same case Wambuzi, CJ explains the jurisdiction of this court succinctly in the following passage at page 24 of his opinion:

> *"In my view, jurisdiction of the Constitutional Court is limited in Article 137 (1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances, I would hold that unless the question before*

the Constitutional Court depends for its determination on the interpretation of the Constitution or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction."

While exploring the same question in **Centre for Health and Human Rights & Others v Attorney General** (supra), which counsel for the petitioner commended to this court, Kisaakye, JSC, at page 11 of her opinion found and held that:

"Apart from making allegations about the acts and/or omissions of the government and healthcare workers, as indicated above, the petitioners also cited the various provisions of the Constitution which they alleged the various acts and/or omissions which they were complaining about were inconsistent with or in contravention of. These included Articles 8A, 20 (1) and (2), 22 (1) & (2), 24, 33 (2) & (3), 34 (1), 44 (a), 287 and 45 of the Constitution. These articles were cited in paragraph 10 of the petition.

It is clearly evident from the above pleadings that the appellant specified the acts and omissions of the government and its workers in the health sector which they alleged were inconsistent with and/or in contravention of the Constitution. The appellant's also cited the particular provisions of the Constitution which the said acts and omissions of the respondent and its workers were alleged to be contravening. The appellant's also prayed in the petition to the constitutional court for specific declarations to the effect that those acts and omissions contravened the Constitution and also for redress.

All these averments, in my view give rise to competent questions for the constitutional court to hear, interpret and determine, with a view to establishing whether the petitioners' allegations had been proved to warrant the Constitutional Court to issue the declarations sought by the petitioners and to grant the petitioners redress or to refer the matter to the High Court with the appropriate directions, in accordance with the dictates of Article 137 (4).

It is therefore my finding that the Constitutional Court erred in striking out the appellant's petition partially on the ground and holding that there were no competent questions set out in the petition that required interpretation of the Constitution by the court."

Okello, Tsekooko and Tumwesigye JJSC, without any reference to the earlier decisions of the court on the matter agreed with Kisaakye, JSC's opinion. Kitumba, JSC, relying on the minority decision of the court in **Ismail Serugo** (supra) held that Article 137 of the Constitution has been interpreted to mean that when the petitioner alleges anything done by anybody or authority or any person to be inconsistent with or in contravention of the provisions of the Constitution, the Constitutional Court has the jurisdiction to hear and determine the petition.

Katureebe, CJ, at page 12 of his separate opinion was of the same view when he observed and held that:

> *"From the above Article, (137) it is clear that any person who alleges that the government or any person or authority has done or omitted to do anything that is inconsistent with or in contravention of the Constitution, may petition the Constitutional Court for declarations, and for redress where appropriate.*
>
> *The Constitutional Court it is not only authorised to hear such petitions; it is equally obliged to resolve the issue.*
>
> *The above article emphasises that the Constitutional Court's doors should remain wide open for the people of Uganda to have access to it at all times for interpretation of the Constitution and declarations and redress where appropriate. This position was the decision of the Constitutional Court in* ***Uganda Association of Women Lawyers & 5 Others v Attorney General, Constitutional Petition No. 2 of 2003*** *(the judgment of S. G Engwau, JA) at page 3.*
>
> *Therefore, there is no article of the Constitution that is ring fenced from interpretation by the Constitutional Court. All acts of Parliament or other laws and things done under the authority of any law and all acts or omissions by any person or authority (which includes acts and omissions of the executive in relation to rights under the Constitution) if brought before the Constitutional Court for interpretation as to whether they are inconsistent with or in contravention of the Constitution become justiciable under Article 137 of the Constitution.*

Contrary to the opinion above, hitherto, the Supreme Court in **Attorney General v. Tinyefuza** (supra) expressed various opinions of the judges, agreeing with the opinion of Kanyeihamba, JSC, at page 25 of his judgment, that:

> *"The marginal note to Article 137 states that it is an Article which deals with questions relating to the interpretation of the Constitution. In my opinion, there is a big difference between applying and enforcing the provisions of the Constitution and interpreting it. Whereas any court of law and tribunals with the competent jurisdiction may be moved by litigants in ordinary suits, applications or motions to hear complaints and determine the rights and freedoms enshrined in the Constitution and other laws, under Article 137, only the Court of Appeal sitting as the Constitutional Court may be petitioned to interpret the Constitution with a right of appeal to this Court as the appellate court of last resort."*

Kanyeihamba, JSC concluded that because this court is also the Court of Appeal with many competing interests, it could not have been the intention of the framers of the Constitution that it should be saddled with each and every matter that relates to the Constitution, as follows:

> *"... the Court of Appeal should not be put in a position of deciding whether or not to abandon appeals involving death sentences, treason and gross violation of other human rights originating from the High Court and entering the Court of Appeal by way of ordinary procedures in order first to resolve trivial matters arising from allegations that they were inconsistent with provisions of the Constitution under Article 137 (3) and (7)."*

It is this same principle, which was espoused by the majority in **Ismail Serugo** (supra), that has been the bedrock of the decisions of this court on that point for over 15 years. Clearly the Supreme Court in **Centre for Health and Human Rights & Others** departed from its rendition of the jurisdiction of this court in **Tinyefuza's case** and the majority decision in **Ismail Serugo** (supra). However, contrary to Article 132 (4) of the

Constitution, the Supreme Court did not state that it departed from its previous decisions on the interpretation of Article 137 rendered in those two land mark cases, or that they were thereby reversed; and that going forward, the decision in **Centre for Health, Human Rights & Development** (supra) would apply.

I observed that even after the decision in **Centre for Health, Human Rights & Others** (supra), this court has continued to apply the dicta in **Tinyefuza** and **Serugo** (supra) as the source of the meaning/interpretation of the various clauses in Article 137 of the Constitution. I would therefore choose and will apply the decision on that point in **Attorney General v Tinyefuza** (supra) as it was affirmed by the majority in **Ismail Serugo** (supra) and as it has since been applied in myriad decisions of this court.

The petitioners' question is whether rule 165 (2) of the Rules of Procedure of the 11th Parliament, and the same rule which was applied in the 9th and 10th Parliaments, is inconsistent with Articles 8A (1), 79 (3), 29 (1) (a), 38 (1), 41(1) and 43 (2) (c) of the Constitution. The question(s), in my view, falls squarely under clause 3 (a) of Article 137 of the Constitution. I say so because the Rules of Procedure of Parliament are made under authority of the Constitution pursuant to Article 94 thereof. They are published as a Statutory Instrument, the current Rules being SI No 30 of 2021, gazetted on 14th May 2021. They thus become law and may result in the interpretation of the Constitution.

The petitioners further seek declarations and reliefs within the terms of Article 137 of the Constitution. In conclusion, this court has the jurisdiction to entertain the petition. I therefore need not entertain the

second limb of the objection and would overrule it as a mere technicality and I hereby do so.

Petitioners' Submissions

Mr. Ssemakadde, for the petitioners submitted that there were two issues for determination by the court as follows: i) Whether the impugned rule is inconsistent with or in contravention of Articles 8A (1), 79(3), 29(1)(a), 38(1), 41(1) and 43(2)(c) of the Constitution, and ii) what are the appropriate reliefs available to the parties.

Counsel referred to the principles in **R v Big M Drug Mart Ltd [1986] LRC (Const) 322**, relied upon in **Paul K. Ssemwogerere & Others v Attorney General, Constitutional Appeal 2 of 2002;** and **R v Oakes, 1986 CanLII 46 (SCC), [1986]1 SCR 103**, referred to in **Charles Onyango Obbo & Andrew Mujuni Mwenda v Attorney General, Constitutional Appeal No. 01 of 2002,** as tests to be applied to determine whether they pass constitutional muster.

Mr Semakadde further contended that rule 165 (2) fails the **Big M Drug Mart** test. He urged court to rely on the principles in that case to find the impugned rule unconstitutional for reasons that the limitations on constitutional rights mentioned in the affidavits in support of the petition were largely not challenged by the respondent. He submitted that the evidence to support the petition was adduced by the 2nd and 3rd petitioners who are consultants with the 1st petitioner's Open Government Research and Advocacy Programme. That in the same capacity, they observed the effect of the impugned rule which is out of step with parliamentary conduct in other modern democracies and has kept the people of Uganda in the

dark about the vetting process of the Executive's nominees for high state offices, including the Judiciary.

He further submitted that the rule results in the dismantling of the checks and balances entrenched by the Constitution and the assumption to important offices by people with questionable credentials, like judges. That the effect of the impugned rule has left the petitioners with a *very strong apprehension* that the rights, values and principles enshrined in the Articles of the Constitution singled out by the petitioners have been violated.

With regard to Article 8A (1) which provides that Uganda shall be governed based on principles of national interest and common good enshrined in the National Objectives and Directive Principles of State Policy, counsel for the petitioners urged court to find that unqualified secrecy of the proceedings of the Appointments Committee is inimical to democracy, accountability and other principles encapsulated in paragraphs I (i), II (i), VII, XXVI, XXVIII (i) (b), XXIX (f) and (g). He further submitted that the proceedings before the Appointments Committee are pivotal to how Ugandans shall be governed. Further that the stated principles are not only binding on Parliament and its Committees but they underscore the active participation of the press and the public in the proceedings of Parliament and its Committee unless their exclusion is according to fundamental principles in the Constitution.

Turning to Article 79 (3) of the Constitution, he submitted that it enjoins Parliament to promote democratic governance of Uganda. He added that the rule making provisions limit Parliament's law making or rule making authority in Articles 79 (1), 90 (2) and 97 of the Constitution. He referred

to various treaties to which Uganda is signatory that emphasise the obligation to observe democratic principles in governance, such as the Vienna Declaration and Programme of Action and the Universal Declaration of Democracy adopted by the Inter-Parliamentary Union, of which Uganda is a member.

Counsel further submitted that Parliament is enjoined to protect the Constitution in Article 79 (3) thereof. That this is related to Article 20 (2) which enjoins Parliament to respect, uphold and promote the rights and freedoms in Chapter 4 of the Constitution, including Articles 29 (1) (a), 38 (1) and 41 (1) thereof. He asserted that the respondent's adoption of rule 165 (2) violated the rights enshrined in the stated Articles of the Constitution, jointly and severally, either directly or by infection.

He went on to refer to the decision of the Supreme Court in **Charles Onyango Obbo v Attorney General** (supra) and submitted that freedom to seek, receive and impart information in whatever form is an inalienable human right and an indispensable component of democracy. Further that everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination. He concluded that the adoption of the impugned rule violated the rights in Article 29 (1) (a), 41 (1) and 38 (1) of the Constitution.

Counsel for the petitioners further submitted that the impugned rule fails the test in **R v Oakes [1986] 1 SCR 103,** which was approved by the Supreme Court in **Onyango Obbo v Attorney General** (supra)**.** Counsel further submitted that whereas, subject to Article 43 of the Constitution the triad of rights under consideration in this petition may be limited for a legitimate aim that passes the *Oakes test,* the limiting measures sought to

be imposed and the means devised or proposed to achieve them must not be arbitrary, unfair or based on irrational considerations. They must be informed by evidence, revised regularly to conform to universally acceptable practice and must not impair the rights in question or other interconnected rights disproportionately. He urged court to find that the impugned rule is demonstrably unconstitutional.

Respondent's Submissions

Counsel for the respondent asserted that rule 165 (2) of the Rules of Procedure of Parliament does not contravene Articles 8A (1), 79(3), 29(1) (a), 38(1), 41(1) and 43(2)(c) of the Constitution.

In response to the assertion that the National Objectives as cited by the petitioners are violated by the impugned rule, counsel submitted that the petitioners did not show the particular manner in which the rule violated these objectives. Further, that an act cannot violate Article 8A of the Constitution unless one states that it breached a specific principle or objective in the National Objectives and Directive Principles of State Policy and that none of the objectives cited by the petitioners has been violated by the respondent. That therefore, Article 8A has not been contravened.

With regard to Article 79 (3), which provides that Parliament shall protect the Constitution and promote democratic governance, Ms. Kukunda submitted that Article 90 (1) empowers Parliament to appoint committees that are necessary for the discharge of its functions, as well as prescribe the rules of procedure for the committees. That this is fortified by Article 94 (1) of the Constitution. That the Appointments Committee derives its mandate from Articles 2, 38 and 90 (1) of the Constitution. She reminded court of the principle espoused in **Paul K. Ssemwogere v Attorney**

General, Constitutional Appeal No. 001 of 2002, at page 70, that the Constitution has to be read as an integrated whole with no one provision destroying the other, but each sustaining the other; the rule of harmony, completeness and exhaustiveness and the paramountcy of the Constitution. She then submitted that the power vested in Parliament to appoint committees and prescribe their procedure is not extinguished by Article 79 (3); rather, under this authority, Parliament enacted its Rules of Procedure in line with the duty to protect the Constitution.

Ms Kukunda went on to submit that before the Rules of Procedure are enacted, they are tabled before Parliament and deliberated upon by the entire Parliament with representatives from all over the country. That therefore the procedure of the closed Committee of Appointments was agreed to by the whole of Parliament. Further that if the procedure was contrary to provisions of the Constitution, Parliament would not have passed the rule.

Counsel went on to submit that the petitioners did not demonstrate how the closed sessions of the Committee of Appointments relate to Parliament's alleged failure to protect the Constitution and promote democratic government. She invited us to apply the rule of harmony to resolve this issue.

Ms Kukunda went on to acknowledge that freedom of expression is a core tenet in democracy but that in the instant case, the impugned rule does not in any way, shape or form violate one's right to express themselves. That the argument relating to freedom of expression was misplaced and should be disregarded by court. Further, that Parliament which is the supreme representative body of the people and the legislative organ of the

land exercised its duty in line with the constitutional principles of good governance when it enacted the impugned provision.

With regard to the assertion by the petitioners that the impugned provision contravenes Article 29 (1) (a) of the Constitution, Ms. Kukunda reiterated that it does not. That the functions of the Appointments Committee point to the rationale behind the closed proceedings. She referred to rule 167 (1) and (2) in the Rules of the 11th Parliament and submitted that according to these rules, it is only fair that the proceeding be closed. She singled out rule 167 (1) which requires the Committee to interview candidates nominated by the President and submitted that the closed proceedings protect them when they have divulged personal information to the Committee. She relied on the definition of *'personal data'* in the Data Protection and Privacy Act, 2019 and the opinion of the court in **United States Department of Justice v Reporters Committee for Freedom of the Press, 489 U. S 749 (1989),** at Page 24, on what reasonably constitutes an unwarranted invasion of personal privacy.

In response to the submission for the petitioners that the impugned rule fails the test in **Charles Onyango Obbo v Attorney General Constitutional Petition No. 15 of 1997**, counsel laid down the components of the test espoused in that case and then submitted that the impugned rule passes the test. Counsel then submitted that the rights to freedom of speech and expression enshrined in Article 29(1)(a) of the Constitution are not absolute rights; they are subject to limitation under Article 43 of the Constitution. Further, that the right to privacy is enshrined in Article 27 (2) of the Constitution and it too, should be protected. That therefore, the right to the privacy of candidates appearing

before the Committee should be protected and the impugned rule protects them in line with the Constitution.

With regard to the contention that the impugned rule violates or contravenes Article 38 (1) of the Constitution, counsel for the respondent submitted that rule 151 of the Rules of Procedure of Parliament, 2012, now rule 163 of the Rules of 2021, provided for the composition of the Appointments Committee. That the rule shows that the Committee has different members and all political parties are well represented. That it is through these members that citizens of Uganda participate in the affairs of Government in accordance with Article 38 (1) of the Constitution. Further that in participatory democracy, citizens' interests and needs should be the focus of every political decision-making process and the Appointments Committee decisions are not of a political nature so that the citizens need to be concerned with them.

She went on to submit that there are a number of checks and balances that are put in place before an individual is sent to the Committee on Appointments. For instance, for judges they are sent to the President for appointment on the recommendation of the Judicial Service Commission, as it is provided for in Article 142 of the Constitution. That it is therefore farfetched to assume that the Appointments Committee requires the involvement of the public to ensure that there is no malpractice in appointments.

She further explained that where a citizen questions the fitness of a candidate to appear before the Appointments Committee, for example on the basis of academic qualifications, there are steps that can be taken to challenge the same under the Access to Information Act. She concluded

her submissions on Article 38 (1) with the assertion that Members of Parliament that sit in the Committees, including the Appointments Committee represent the views of the people. That therefore the impugned rule does not contravene Article 38 (1) of the Constitution.

As to whether the impugned rule contravenes Article 41 (1) of the Constitution, counsel for the respondent submitted that Article 41(1) of the Constitution gives protection of another's right to privacy as a qualification to the right to access information. That therefore the right to access information is not absolute. And that under Article 41 (1) Parliament was given the power to enact law to prescribe classes of information referred to in that provision. That it is by virtue of this provision that Parliament enacted the Access to Information Act, 2005. Counsel then submitted that the impugned rule falls under the exceptions provided for under section 5 (1) of the Act, which includes the right to privacy of any person. Further, that the impugned rule falls under the exceptions provided for in Article 43 (1) of the Constitution because the protection of the information about individuals appearing before the Appointments Committee is demonstrably justifiable in a free and democratic society. She referred to the decision in **Zachary Olum & Others v Attorney General; Constitutional Petition No. 99 of 1999** to support the notion that the restrictions placed on access to information flow from the Constitution and they protect the interests of others.

Finally, Ms Kukunda responded to the appellants' submission that the impugned rule is not covered by Article 43(2) (c) of the Constitution. She referred to the decision in **Charles Onyango Obbo v Attorney General** (supra) to submit that the impugned rule meets the standard for the limitation of the said rights, as it was explained by the Supreme Court in

that case. Further that the law is very clear and not arbitrary; the provision is reasonable and its objective to protect the right to privacy of the nominees is legitimate and therefore does not contravene Article 43 (2) (e) of the Constitution.

She concluded that the petitioners are not entitled to any of the remedies and orders sought and prayed that the petition be dismissed with costs to the respondent.

Petitioner's Rejoinder

In rejoinder to the submission on substantive issues raised in the petition, counsel reiterated and clarified his submission that the participation of the public and the press in the proceedings of the Appointments Committee is one of the checks and balances provided for in the Constitution. That it should be supported through provision of adequate resources such as Rules of Parliament that promote greater participation of the public and press for effective functioning.

Counsel for the petitioners referred to the Human Rights Committee General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service, and the South African case of **Doctors for Life International v The Speaker of the National Assembly and Others [2006] ZACC 11; 2006 (12) BCLR 1399 (CC)** and submitted that the flawed proposition of the respondent on participation by the public depicts the respondent's failure to appreciate participatory democracy and the nature of the constitutional obligation imposed on the Legislature to facilitate public involvement. Further that the petitioners' brief dated 6th June 2022 ably shows that international law or treaty norms were flouted when the respondent adopted the impugned rule.

Counsel for the petitioners further asserted that the respondent's submissions depict its failure to appreciate the requisite weighing and balancing of competing rights and interests to ensure due compliance with the Constitution. That the impugned rule fails to strike the appropriate balance between the two sets of competing rights and/or interests, and is therefore unconstitutional and invalid.

The petitioners also urged court to reject the respondent's references to legislation and decisions on the right to privacy. They invited court to reject the allegedly misguided references to the Data Protection and Privacy Act, the Access to Information Act and the case of **Department of Justice v Reporters Committee for Freedom of the Press** (supra). He relied on the decision of the South African Constitutional Court in **Bernstein v Bester, Constitutional Court Case No 23/1995, [1996] ZACC 2; 1996 (4) BCCR 499**, wherein court conducted a survey of global standards on the nature and core content of the right to privacy and urged this court to make similar findings with regard to the inquisitorial power of the Appointments Committee that: i) the exercise thereof makes an important inroad upon the right of the individual to the tranquil enjoyment of his or her piece of mind and such privacy as the law allows him or her; and ii) having aspects of one's private life exposed is a foreseeable risk inherent in such proceedings which any interested nominee must tolerate as they embark on a journey of life into public office.

The petitioners, relying on the conclusion of the court in **Bernstein** (supra) submitted further that it follows that the individual nominee's interest in full protection of his or her privacy must yield to the requirements of the community's interest in an open investigation by the Legislature of their suitability to serve in a high office of State. Counsel for the petitioners

accordingly urged this court to find that the respondent's invocation of a blanket 'right of privacy' as the purported justification of the impugned rule is fallacious and invalid.

The petitioners further urged this court to find that the respondent's half-hearted invocation of a blanket 'national security' exemption in justifying the impugned rule in their submissions is also fallacious, vacuous and invalid. They reiterated their prayers.

Analysis and determination

I have carefully considered the submissions of counsel for both parties and they inform the mode of analysis of the limited facts provided by the petitioners in this case and the law. But before I carry out an analysis of the issues that have been proposed for determination by this court, it is pertinent to clarify that though the petition was filed during the pendency of the 9th Parliament it was not disposed of at that time and the rules of that Parliament ceased to apply. I will therefore not be referring to the Rules of the 9th Parliament because the petitioners confirmed to court that the intendment of the petition is still valid under the current Rules of Procedure of Parliament (SI 30 of 2021). Given that clarification, the court made a decision to dispose of the petition on the basis of the Rules of the 11th Parliament.

It is important at the onset to set out rule 165 of SI 30 of 2021 as a whole because any interpretation of a provision in a statute or other legal instrument must be carried out within the context of provisions related to it. Rule 165 of the Rules of Procedure of the 11th Parliament provides as follows:

165. Meetings of Committee on Appointments

(1) Meetings of the Committee on Appointments shall be convened by the Speaker and in his or her absence, the Deputy Speaker.

(2) The Proceedings of the Committee on Appointments shall be closed.

In order to truly understand the purpose of the petitioners' quest for the open forum that would result if rule 165 (2) is declared unconstitutional or contrary to the stated provisions of the Constitution and therefore suspended, it is also necessary that we understand the functions of Parliament's Standing Committee on Appointments. The source of the functions is rule 167 of the Rules of Procedure which provides as follows:

167. Functions of Committee on Appointments

(1) The Committee on Appointments shall be responsible for approving, on behalf of Parliament, the appointment of persons nominated for appointment by the President under the Constitution, or any other appointment required to be approved by Parliament under any law.

(2) The Committee on Appointments shall also deal with any question which arises under clause (4) of article 113 of the Constitution as to whether or not any office is an office of profit or emolument, the holding of which is likely to compromise the office of a Minister or a public officer.

The petitioners did not give specific examples of appointments in respect of which Parliament has in the past withheld information about proceedings before the Appointments Committee, which is sometimes referred to in this judgment as *"the Committee."* The only office in respect of which the petitioners indicated that they had misgivings about appointments made following interaction with candidates proposed or appointed by His Excellency President of Uganda was that of a judicial officer. In paragraph 6 of his affidavit accompanying the petition, Simon

Kaggwa-Njala from his perspective as a journalist, states that the fact that the proceedings of the Committee are closed is *particularly troublesome when people of doubtful credentials assume offices in institutions such as the judiciary where office bearers are not subject to periodic renewal of mandate by the appointing authority, and are thus practically assured of lifetime tenure."*

The other overtly verifiable office that can be used in the analysis is that which is stated in clause (2) of rule 167 of the Rules of Procedure which provides for the functions of the Committee on Appointments; the office of a cabinet Minister. In that regard, Simon Kaggwa-Njala states in paragraph 8 of his affidavit that, it would be useful to open up the proceeding of the Committee for purpose of accountability of some officers since many of the members of the 9th Parliament were eligible for and interested in re-election. That the order sought will enable electors to scrutinize the hitherto secret record of Parliament and empirically assess the role of their respective representatives to Parliament so as to make an informed decision on whether to re-elect or reject them at the ballot.

The offices that fall under rule 167 (2) of the Rules of Procedure are myriad. However, the analysis here will draw examples from the two that have been identified from the facts and the law cited in this petition. I will analyse the impugned provision as against each of the provisions of the Constitution that the petitioners allege to have been contravened by it. But of necessity, though Article 8A of the Constitution is placed at the forefront of the petitioner's complaints in this petition, it is my view that the analysis here cannot begin with or even include it because it provides as follows:

8A. National interest

(1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

(2) *Parliament shall make relevant laws for purposes of giving full effect to clause (1) of this article.*

{Emphasis added}

From clause (2) above it is presupposed that since the Constitution has been in existence and under implementation for the last 18 years, Parliament has enacted a good amount of legislation that gives effect to clause 1. Litigation over the National Objectives and Directive Principles of State Policy, in my view, would only become necessary where Parliament has failed or delayed to enact legislation that actuates the stated principles. But where such legislation exists, it is sufficient to litigate over it, even without recourse to the Principles.

However, counsel for the petitioners offered submissions on several provisions of the National Objectives and Directive Principles of State Policy that preface the provisions of the Constitution, as having been contravened by the impugned rule, viz: paragraphs I(i), II (i), VIII, XXVI, XXVIII (i) (b) and XXIX (f) and (g). As stated above, I am fully aware that the said Objectives can be justiciable since they are brought into the Constitution by Article 8A thereof. However, with regard to the interpretation of the Constitution, paragraph I (i) of the Objectives provides for the implementation thereof in the following terms:

> **(i) The following objectives and principles *shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution* or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.**

{Emphasis added}

From reading this one paragraph of the Objectives relied upon by counsel for the petitioners in his arguments, I understood the principles stated in

the Objectives and Principles of State Policy to be a guide in our interpretation of the grand norm. This reinforces my earlier opinion that they need not be called into one's aid unless the provisions of the Constitution or any other law are lacking in a material particular that is laid down in the Objectives and Principles of State Policy. Having said so, there is no doubt in my mind that there are adequate provisions within the body of the Constitution that address the rights that the petitioners alleged to have been violated by the impugned provision.

It is those constitutional provisions that I will address in the analysis, starting with Articles 29 (1) (a) and 41 of the Constitution, which are of particular interest to the 1st petitioners represented by two prominent pressmen, also petitioners.

Whether rule 165 (2) of the Rules of Procedure of Parliament contravenes Articles 29 (1) (a) and 41 of the Constitution

In order to facilitate the analysis and an understanding of the decision, it is important to lay down Articles 29 (1) (a) and 41 of the Constitution; they provide as follows:

> **29. Protection of freedom of conscience, expression, movement, religion, assembly and association**
>
> **(1) Every person shall have the right to—**
>
> **a) freedom of speech and expression which shall include freedom of the press and other media;**
>
> **41. Right of access to information**
>
> **(1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.**

(2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

The petitioners' main grievance does not seem to me to be about the governance of this nation; rather, it appears to be about their own rights to express themselves as members of the press as well as to access information that will facilitate that right. The benefits of opening up the proceedings of the Committee were explained in paragraphs 6, 7, 8 and 9 of the affidavit of Simon Kaggwa-Njala accompanying the petition.

In paragraph 6, he states that according to his viewers and listeners, and colleagues in the newsroom, both in Uganda and abroad, the banning of publicity over proceedings of the Appointments Committee dismantled the system of checks and balances entrenched in the Constitution which are necessary for the growth of democracy. That it also leads to the appointments to high office of persons with doubtful credentials, such as judicial officers who are not subject to periodic renewal of their terms of office but are practically *'assured of lifetime tenure.'*

The statement in paragraph 6, in my opinion, is not wholly correct. First and foremost, it is not the role of the Committee to establish the qualifications that are required for one to be appointed as a judicial officer. The qualifications are provided for in Article 143 of the Constitution and there is no secret about them. In addition, they are not assessed by the Committee on Appointments but by the Judicial Service Commission (JSC) established under Article 146 of the Constitution.

The criteria to be considered by the JSC on appointing a judicial officer are not a secret, either. They are provided for in the Judicial Service

Commission Regulations, SI 87 of 2005, in which regulation 11 thereof provides as follows:

> **11. Matters to be considered on appointment**
>
> **(1) In the performance of its functions in connection with the appointment of judicial officers and members of tribunals, the Commission shall have regard to the maintenance of the high standard of independence, propriety, integrity, impartiality, equality, competence and diligence required of a judicial officer and shall take into account the qualification, merit and experience of a candidate.**
>
> **(2) In the case of appointment of judicial officers already in service, the Commission shall take into account all the qualities specified in sub regulation (1) before seniority.**

Apart from appointing officers based on the criteria above, the JSC may and does consult outside its members pursuant to rule 12 of the JSC Regulations which provides as follows:

> **12. Consultation and selection boards**
>
> **In the performance of its functions in connection with the appointment of judicial officers, the Commission may—**
>
> **(a) consult with any other organisation, department or person; or**
> **(b) seek the advice of a selection board appointed by the Commission which may appoint to it members of the Commission and other persons who are not members of the Commission.**

The time frame for such consultations may be the longest in the process of appointment. The Commission also receives complaints and submissions about the suitability of candidates during the process because positions to be filled are advertised, pursuant to rule 13 of the JSC Regulations. Suffice it to add that the role of the JSC in the appointment of judicial officers cannot be overemphasised. It was the subject of the contestations that were raised when the President tried to

re-appoint a retired Chief Justice as Chief Justice. This court in **Constitutional Petition No. 39 of 2013, Gerald Kafureeka Karuhanga v Attorney General**, at page 40 of the lead judgment, emphasised the role of the JSC as follows:

> *"The independence of judges is given vigorous protection by means of detailed and specific provisions regulating their appointment. The Chief Justice is at the pinnacle of the judiciary and thus the protection of his or her independence is critical.*
>
> *The Article establishing the Judicial Service Commission spells out its significant role in the separation of powers and protection of judicial independence. The nature of this role cannot be down played just because the "phrase" advice is found in the Articles spelling out* ***the tripartite process."***

In that tripartite process, where the executive, the JSC which has, among others judges as its members, as well as lawyers and other citizens, and the Legislature, participate in the identification or appointment process. It is only after determining that a candidate is suitable that the JSC recommends them to the President for appointment. He then decides, on the basis of his executive authority, whether to appoint the persons recommended or not to. As it was held in **Karuhanga** (supra) the President cannot lawfully recommend a person for appointment to the JSC; it is only the reverse that is sanctioned by law. And when all is said and done, the Parliamentary Select Committee on Appointments only approves appointments as it is mandated to do under rule 167 (1) of the Rules of Procedure of Parliament. The Committee has hitherto not found any candidate for appointments as a judicial officer unfit to hold the office because all the vetting and assessment has already been concluded by JSC by the time they go to Parliament for approval. Opening up the process before the Committee would, in my view, make no difference whatsoever to the decision of the JSC about the suitability of the candidate.

Further to that, it was neither factually nor legally correct to state that judicial officers are assured of their tenure in office *'practically for life'* because their tenure is provided for by Article 144 of the Constitution as: 60 years for any judicial officer that decides of their own volition to retire on attaining that age; 65 years for the Principle Judge; 70 years for the justices of the Court of Appeal and the Supreme Court; in each case, subject to Article 128 (7) of the Constitution, on attaining such other age as may be prescribed by Parliament by law. It is my view therefore that opening up of the proceedings before the Committee would have no effect at all on the imperatives in Article 144 of the Constitution, either.

In both of the petitioners' assertions above therefore, it cannot be said that the right to freedom of speech and expression, the press and other media is limited by the Committee proceedings on appointment being closed for there would be nothing for the press and other media to publish in the process of approving appointment of a judicial officer. The manner in which the press may access the information before the JSC is prescribed by law. It will be dealt with later on in this judgment.

Turning to the appointment of a Minister in the Government of Uganda, the only other office subject to approval by the Appointments Commitee, intimated in this petition by implication from the laws referred to, is provided for by Articles 113 of the Constitution, the whole of which provides as follows:

> **113. Cabinet Ministers**
>
> **(1) Cabinet Ministers shall be appointed by the President with the approval of Parliament *from among members of Parliament or persons qualified to be elected members of Parliament*.**
>
> **(2) The total number of Cabinet Ministers shall not exceed twenty-one except with the approval of Parliament.**

(3) A Cabinet Minister shall have responsibility for such functions of Government as the President may, from time to time, assign to him or her.

(4) A Minister shall not hold any office of profit or emolument likely to compromise his or her office.

{Emphasis added}

The provision is reviewed together with the related Article 144 of the Constitution which provides for the appointment of 'other ministers.

Of Members of Parliament that are subjected to approval by the Committee, Mr Kaggwa-Njala asserted in paragraph 8 and 9 of his affidavit accompanying the petition as follows:

> *"8. Secondly, an order compelling Parliament and/or the Parliamentary Commission to divulge the proceedings of the Appointments Committee that have been conducted by ... Parliament since the coming into force of the impugned rule will also serve the important transparency and accountability function. Since many of the members of ... Parliament are eligible for and interested in re-election, the order sought will enable the electors to scrutinize the hitherto secret record of Parliament and empirically assess the role of their respective representatives to ... Parliament so as to make an informed decision on whether to re-elect or reject them at the ballot."*

This statement, again in my opinion, is neither factually nor legally correct. Transparency or accountability by a Member of Parliament that has been appointed by the President to become a Cabinet Minister under Article 113 or as *"other minister"* under Article 114 of the Constitution is not assessed by the Committee before he/she assumes office. The functions of the Committee under rule 167 (2), which I will again reproduce for clarity of the analysis, is couched in the following terms:

(2) The Committee on Appointments shall also deal with any question which arises under clause (4) of article 113 of the Constitution as to *whether or not any office is an office of profit or emolument, the*

holding of which is likely to compromise the office of a Minister or a public officer.

{Emphasis added}

It is my view that the role of the Committee under this rule is limited to inquiring into whether the candidate, if appointed may continue to hold any other office that they held before appointment by the President in which they earned either profits or emoluments that would compromise their office as a Minister. The Committee may also, as it is intimated under rule 169 of the Rules of Procedure, look into the other qualifications of the candidate *"that are prescribed by law to hold the office."*

This assessment is meant to establish the possibility of falling afoul of the requirements for transparency and accountability. That the Member appointed has complied with the principles is determined by his conduct before his appointment as a Minister or as a Member of Parliament. The proceedings before the Committee therefore may show that he does not hold an office of emolument or profit that would compromise his work as a Minister. What happens after that can only be assessed by his conduct during the pendency of his term as a Minister. It is therefore conduct after they are appointed that would influence the vote and it is to be found in the records of the Ministry that the particular candidate is assigned and the proceedings of Parliament and its Committees after he is approved, not the proceedings of the Committee on Appointments. It is therefore my opinion that the reasons advanced in paragraph 8 of the Affidavit of Simon Kaggwa-Njala would not influence the decision of this court to make the declarations and orders sought in this petition.

Further to that, it is common knowledge in this jurisdiction that ordinarily, appointments or announcements of appointments to the office of Cabinet

Minister or other Minister include the designated portfolio for each candidate, as it was shown in **Constitutional Petition No. 38 of 2012, Hon. Lt. (Rtd) Kamba Saleh Moses Wilson v Attorney General.** It was in evidence in that petition that the petitioner had been appointed the *Minister of State for Bunyoro Affairs* but the Committee did not approve his appointment. The petitioner complained that instead of approving the appointment, the Committee went on to vet him to determine whether he was suitable for the appointment or not. That the Committee then found that he was not suitable, but he contended that this was contrary to Articles 98 (1) and (2), 99, 111 and 114 of the Constitution. In that regard, the court analysed the constitutional provisions *vis-à-vis* the Rules of Procedure of Parliament and made its observations and finding at page 22 of the judgment as follows:

> *"The procedure of Parliament in approving appointments for Cabinet Ministers and other Ministers is provided for under Articles 113 and 114 of the Constitution and the Rules of Procedure of Parliament. These provisions vest in Parliament the mandate to approve nominations for appointment to positions of Cabinet Minister or other Ministers.*
>
> *Under Article 94 of the Constitution, Parliament may, subject to the provisions of the Constitution, make rules to regulate its own procedure, including the procedure of committees appointed under Article 90 of the Constitution. Parliament under rules 146 (1) (f) and 155 of its Rules of Procedure delegates the function of approving persons nominated by the President for Appointment to be approved by Parliament. (sic)* ***The Committee is required to report to the full House, through its chairperson, any appointments approved and such a report is not subject to debate.***
>
> *Under Rule 159 the speaker shall communicate to the President in writing within three working days after the decision of the Committee on any person nominated by the President for appointment. The President under Rule 160 may appeal to the House if the nominee is not approved by the Committee. The Committee on Appointments may by resolution of at least one third of its members refer a particular nomination to the decision of the House. The decision of the House shall be communicated to the President.*

Ikar.

Therefore, under Rules 158 and 159 of the Rules of Procedure of Parliament the Committee of Parliament is answerable to Parliament and the President in the case of approval or non-approval of any one appointed by the President but whose appointment has to be approved by Parliament."

{Emphasis added}

As it was in the Rules of Procedure of the 9th Parliament, the Committee is still required to present its report to Parliament pursuant to rule 170 of the Rules of the 11th Parliament. The rule still provides that the Chairperson of the Committee shall report to the House any appointment approved by the Committee, except that the report shall not be subject to debate. In addition, the same Rules provide in rule 219 as follows:

219. Minutes of Proceedings to accompany Committee reports

The minutes of the proceedings of a Committee shall together with a report of the Committee be laid on Table by the Chairperson, Deputy Chairperson or a Member of the Committee nominated by the Committee, when reporting to the House.

Once a Report of a Committee is presented to Parliament or the Committee of the Whole House, unless the Speaker has decided so, as they may under rule 23 of the Rules, the proceedings are public. Rule 23, in part, provides as follows:

23. Sittings of the House to be public

(1) Subject to these Rules, the sittings of the House or of its Committees shall be public.

(2) The Speaker may, with the approval of the House and having regard to national security, order the House to move into closed sitting.

(3) When the House is in closed sitting no stranger shall be permitted to be present in the chamber, side lobbies or galleries.

(4) The Speaker may cause the proceedings and decisions of a closed sitting to be recorded or issued in such manner as he or she thinks proper.

(5) ...

The presentation of the report of the Committee on Appointments, in my view, cannot be done in a closed sitting because the matters discussed are not of a security nature. The petitioner in **Saleh Kamba** (supra) complained that the Committee did not provide him with the result, or their decision after he appeared before it. The court found, at page 20 of the judgment, that:

> *"We find that the petitioner's complaint that he was never informed of the decision of the Appointments Committee of Parliament and the reasons thereof not to have any validity. This is so because as a Member of Parliament the petitioner must have known the decision of the Committee and the reasons for the decision, when the Appointments Committee made its report to the full House of Parliament of which the petitioner is a member, and also when the Committee communicated its decision to H.E. The President."*

However, the petitioners have shown that they want more than what is contained in the Report of the Committee presented to Parliament in proceedings that are open to the public. They desire to look into the closed proceedings of the Committee and establish how the decisions are arrived at, including the detailed interaction between the candidates and the Committee. It has also been shown in the affidavits filed to accompany the petition that their intention is to publish the proceedings or parts thereof for all who care to see, hear or read them to do so. It is my view that in the absence of the opportunity to observe and hear the proceedings of the Committee in real time, access to the proceedings is made possible by rules

226 and 227 of the Rules of Procedure of Parliament which provide for the preservation of the proceedings of Parliament as follows:

> **226. Minutes**
>
> **The Clerk shall keep the minutes of the proceedings of the House, which shall record the attendance of Members at each sitting and all decisions taken by the House.**
>
> **227. Records**
>
> **(1) The Clerk shall—**
>
> **(a) be responsible for making entries and records of Business approved or passed in the House;**
>
> **(b) have custody of all records and other documents belonging or presented to the House; and**
>
> **(c) keep secret all matters required by the House to be treated as secret and not discuss them before they are officially published.**
>
> **(2) The records kept under this rule shall be open to the inspection of Members under such arrangements as the Speaker may direct.**

Much as the records are indicated to be open for inspection by Members of Parliament only under arrangements directed by the Speaker, this court in **Saleh Kamba's case** (supra) held that Parliament is not excluded from the application of the Access to Information Act. In similar vein, the JSC falls among the bodies named in section 2 (1) of the Act. I have no reason for departing from that decision because sections 5 and 6 of the Act ensure the right to access to information as follows:

> **5. Right of access**
>
> **(1) Every citizen has a right of access to information and records in the possession of the State or any public body, except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.**
>
> **(2) For the avoidance of doubt, information and records to which a person is entitled to have access under this Act shall be accurate and up-to-date so far as is practicable.**

6. Access to information and records

A person's right of access is, subject to this Act, not affected by—

(a) any reason the person gives for requesting access; or

(b) the information officer's belief as to what the person's reasons are for requesting access.

I would therefore find that the enactment and enforcement of rule 165 (2) of the Rules of Procedure of Parliament and its equivalent in the Rules of the 9th and 10th Parliaments did not constrain the petitioners' freedom to access information about the proceedings of the Committee on Appointments. The impugned rule therefore cannot be said to have contravened the petitioners' rights that are guaranteed by Article 41 of the Constitution.

Further to that, because the petitioners have an avenue through which they can gain access to the contents of the said proceedings as is demonstrated above, their rights to discuss, write about or publish them, of course subject to the provisions of the Press and Journalists Act of 1995 as amended by the Press and Journalists (Amendment of Fourth Schedule) Instrument, 2014, SI 15 of 2014, have not been infringed by the enactment and implementation of the impugned rule. I would therefore find that rule 165 (2) of the Rules of Procedure of Parliament of the 11th Parliament is not in contravention of Article 29 (1) (a) of the Constitution, either.

Whether rule 165 (2) of the Rules of Procedure of Parliament contravenes Article 79 (3) of the Constitution

The petitioners contend that rule 165 (2) of the Rules of Procedure of Parliament impinges on the practice of democratic governance in the country as it denies the public and the press an opportunity to observe, scrutinise and participate in a crucial decision-making process of

Parliament contrary to Article 79 (3) of the Constitution. The facts to support this contention were stated in paragraphs 5 and 9 of the affidavit of Mr Kaggwa-Njala.

In paragraph 5 he states that as a result of the implementation of the impugned rule the people of Uganda have been denied the opportunity to see for themselves how Parliament vets the credentials and suitability of the Executive's nominees to High Office in the public service. That the continuation of secrecy in the performance of this important parliamentary function is not in the public interest because it does not contribute to a better Uganda where rights are respected, laws valued and all citizens have confidence in public institutions.

In paragraph 9 Mr Kaggwa-Njala goes on to state that the publicity order sought in this petition will grant the press and other media access to the hitherto secret records of Parliament from which a substantial volume of priceless local media content shall be generated for consumption by the Ugandan public. That this will revive citizens' interest in constitutionalism, democracy and governance.

Article 79 (3) which the petitioners allege to have been contravened by the impugned rule provides that *"Parliament shall protect this Constitution and promote the democratic governance of Uganda."* It is therefore implied that by enacting and implementing rule 165 (2) of the Rules of Procedure, Parliament abdicated its responsibility to protect the Constitution as well as to promote democratic governance. I will now have recourse to the democratic principles as they are stated in the National Objectives and Directive Principles of State Policy to help me explain the meaning of Article 79 (3), after which it will be established whether rule 165 of

Parliament's Rules of Produce contravenes the democratic principles that we aspire to achieve in the Constitution.

Paragraph II of the Objectives falls under the part that provides for "Political Objectives." It lays down the democratic principles as follows:

II Democratic principles

(i) ***The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.***

(ii) **All the people of Uganda shall have access to leadership positions at all levels, subject to the Constitution.**

(iii) **The State shall be guided by the principle of decentralisation and devolution of governmental functions and powers to the people at appropriate levels where they can best manage and direct their own affairs.**

(iv) ***The composition of Government shall be broadly representative of the national character and social diversity of the country.***

(v) **All political and civic associations aspiring to manage and direct public affairs shall conform to democratic principles in their internal organisations and practice.**

(vi) **Civic organisations shall retain their autonomy in pursuit of their declared objectives.**

{Emphasis added}

Pursuant to clause (iv) above, the Constitution creates three arms of the State: the Executive, Legislature and Judiciary. It is these three that must be representative of the 'national character'. There is no doubt that the Legislature represents the national character for it was fashioned to do so in Chapter 6 of the Constitution. Each constituency established has a representative of the citizens to Parliament elected by them by universal adult sufferance. Therefore, when a role is assigned to Parliament by the Constitution or any other law, it has been assigned to the representatives of the citizens elected by them in an election were they are all, at the legal

age of 18, entitled to vote and chose their representatives. It therefore cannot be said that when the duly elected Members of Parliament approve the appointments of public officials appointed by the President to high office, citizens are left out because they are represented by a person of their own choice.

Counsel for the petitioners challenged the interpretation above which was advanced by counsel for the respondent by referring court to the decision of the South African Constitutional Court in **Doctors for Life International v The Speaker of the National Assembly & Others** (supra), where it was observed (Ngcobo, J, at para 230) that:

> *"True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the sidelines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy a going into a deep sleep after elections, only to be kissed back to short spells of life every five years."*

I reviewed the decision of the Court in **Doctors for Life** carefully. I established that though Ngcobo, J, with whom the majority of the court agreed, made the observation above about participatory democracy under the Constitution of South Africa, the matter related to the enactment of several pieces of legislation, some of which had been concluded and others then still pending approval by the President. In relation to the law making

processes by the Parliament of Uganda, the provision applies in that it is also the position in this jurisdiction that citizens must have direct participation in the enactment of laws granted to them by the Legislature. Similar to the RSA, that is granted to them by requesting for written submissions, as well as public hearings whether in Parliament or in the constituencies.

However, I am of the view that the facts in **Doctors for Life** can be distinguished from those in this case because it applied to the law making process, not the process of appointments to high office by the Executive. Nonetheless, an important point was made which applies to the mandate of Parliament, generally. It was held that Parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as it is reasonable to do so. This duty will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of laws that will govern them. Finally, that in determining whether Parliament has acted reasonably, the court will have regard to a number of factors including the nature of the legislation, and what Parliament itself has assessed as being the appropriate method of facilitating public involvement in a particular case.

I think the decision of the Supreme Court of South Africa in **Doctors for Life** is instructive on the role of Parliament in facilitating participation of citizens or the public in it proceedings and I will apply it to the circumstances of this case. On that basis, I find that it was not correct for the petitioners to allege that citizens do not participate in the approval of the persons appointed by the President under the Constitution because in Uganda, Parliament has ordained that they shall participate through their

elected representatives who are clothed with the mandate to make decisions on their behalf.

It is also important to point out that the process of approval of presidential appointees by Parliament is not done in secret, as the petitioners would have this court believe. The Rules of Procedure of Parliament provide for the process after nominations are received by the Speaker in detail as it is shown in rule 168 as follows:

> **168. Submission of names to the Committee on Appointments**
>
> **(1) The names of persons nominated for appointment shall be communicated in writing to the Committee on Appointments through the Speaker.**
>
> ***(2) The Chairperson of the Committee on Appointments shall communicate to Members of the House, the names of persons submitted for approval and the date of sitting of the Committee to consider them.***
>
> **(3) Every decision of the Committee on Appointments shall be by open vote.**
>
> **(4) ...**
>
> **(5) ...**
>
> **(7) The Committee on Appointments may summon a person whose name has been submitted for approval to appear before it.**
>
> **(8) A person whose name has been submitted to the Committee on Appointments for approval, shall be given an opportunity to answer before the Committee to any adverse statements made against him or her and shall be availed all necessary documents for that purpose.**

Clause (2) above is crucial for the participation of citizens in the processes of the Appointments Committee. It is activated by rule 23 which provides that the proceedings of Parliament shall be public. In this digital error where media presence abounds, rules 230 and 231 of the Rules of Procedure of the 11th Parliament further provide as follows:

230. Electronic Coverage of Parliamentary Proceedings

(1) Parliamentary proceedings may be broadcast by electronic media having due regard to the dignity of the House.

(2) Television coverage of the proceedings of the House shall be regulated by the rules set out in Appendix G of these Rules.

231. Broadcasting

(1) *The proceedings of the House shall be available for broadcast on radio and television during all hours of sitting except under circumstances determined otherwise by the House and as directed by the Speaker.*

(2) Broadcast of the proceedings of the House shall maintain such standards of fairness as may be adopted by the House.

The Rules of the 9th and 10th Parliaments had similar provisions. The publication of the list of candidates to appear before the Committee is therefore public, for as long as the press is mindful to publish it as widely as possible by all forms of media available to it. Nonetheless, this court takes judicial notice of the fact that the National Broadcasting Houses, print, audio and video, broadcast proceedings of Parliament in real time. And after publication, it is implied by clauses 7 and 8 of rule 168 that any citizen may participate in the process by submitting their adverse concerns about any candidate nominated by the President to the Committee. The citizens may also move a petition through their representative in Parliament, as it is provided for in rule 30 of the Rules of Procedure of Parliament.

Rule 30 (4) provides that in presenting a Petition, a Member shall confine himself or herself to a statement of the parties from whom it comes, the number of signatures attached to each of the material allegations and the requests contained in it. Under rule 5, the Petition ***shall*** be laid on the Table without question put and may be ordered to be printed or, if relating

to a matter other than a Bill before a Committee, may be referred to a Committee by the Speaker. In this case, it would be the Committee on Appointments which is in charge of approval of candidates.

The application of these provisions has been demonstrated in respect of previous appointments and this court takes judicial notice of some of those instances. The open website of the Parliament of Uganda[1] shows that in September 2016, the Speaker of Parliament halted the approval of members of the Judicial Service Commission. The Muslim community had petitioned the Speaker, then Rebecca Kadaga, to do so because none among the members appointed was a Muslim. The Committee's business in that regard was halted for one month for the petition to be considered by the Committee on Equal Opportunities. It is also shown that in January 2014, Muslim Members of Parliament (MPs) petitioned the Speaker about discrimination in the appointment of judges. They cited the appointment of six (6) judges with no Muslims included. Prior to that in 2013, Muslim MPs petitioned the Speaker to halt the vetting of 28 judges that had been appointed by the President.

It is therefore not unknown for citizens, through their representatives in Parliament, to participate in the process of appointments by raising issues that are of concern to them. And once concern is raised it is publicised on the floor of Parliament which enables the press to gain access to the information. It is through such efforts that citizens participate in the appointment of Presidential appointees to high office and therefore in the governance of Uganda in that regard.

[1] https://www.parliament.go.ug/

The examples above show that the enactment of rule 165 (2) making the Appointments Committee proceedings closed does not prevent citizens' participation in the process confirming persons appointed by the President. Citizens may participate through their duly elected Members of Parliament who on their behalf raise concerns about the President's appointees. In conclusion therefore, I would find that rule 165 (2) of the Rules of Procedure of Parliament does not contravene Article 79 (3) of the Constitution.

Whether rule 165 (2) of Parliament's Rules of Procedure falls within the limitations allowed by Article 43 (2) (c) of the Constitution.

In relation to Article 43 (2) (c) counsel for the petitioners argued that the impugned rule fails the tests in **R v Oakes** (supra) whose construction was based on the analysis in **R v. The Big M Drug Mart Ltd** (supra). The former, popularly referred to as *"the Oakes test"* related to the construction of section 1 of the Canadian Charter of Rights, as reflected in the Constitution Act of 1982, which guaranteed the rights and freedoms set out in the Constitution. Section 1 thereof states that the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The provision is similar to the limitation of rights in the Bill of Rights in the Constitution of Uganda which provides as follows:

> **43. General limitation on fundamental and other human rights and freedoms**
>
> **(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, *no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.***
>
> **(2) Public interest under this article shall not permit—**

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

{Emphasis added}

Within the context of clause (1) above, the arguments in favour and against of maintaining rule 165 (2) in the Rules of Procedure of Parliament are diametrically opposed to each other. While the petitioners argue that it is within the public interest to scrap the rule and open up the proceedings for the public to hear and/or view in real time, the respondent argues that holding the proceedings in a closed environment protects the right to privacy of the candidates.

It has already been established that though the proceedings are held behind closed doors, the Report of the Committee must be laid on the Table, though it shall not be debated, as other reports are. It has also been established that Parliament enacted the Access to Information Act, by which persons who desire to get the record of those proceedings may demand that they be provided to them. Access is in whatever form requested that can be availed by a body, including electronic formats, as it is provided for by section 20 of the Act.

In order to justify the limitation imposed by the impugned rule, counsel for the respondent advanced the argument that the closed sessions are required in order to protect the privacy of the candidates for whom approval is sought. She referred to the Data Protection and Privacy Act, 2019 and relied upon its definition of *"personal data"* in section 2 thereof. Counsel for the petitioners argued that the definition in the Data

Protection and Privacy Act does not apply to the information that is sought to be disclosed in this case and this court should ignore it. It then becomes necessary to establish the kind of information that Parliament sought to protect by laying down the rule that the proceedings of the Committee on Appointments shall be closed.

I am of the view that the information sought from candidates flows from rules 167 (2), 168 (7) and (8) and 169 (1) of the Rules of Procedure of Parliament. It is those three rules that I will interrogate in order to understand whether it is justifiable to protect the privacy of candidates appearing before the Committee for approval.

Rule 169 (1) is straight forward. It provides that approval by the Committee shall not be withheld unless the Committee is satisfied on evidence that the person nominated does not possess qualifications as prescribed by law to hold that office. Counsel for the petitioners' down played the importance of withholding information that comes before the Committee during its interaction with candidates because he reasoned that only academic qualifications are discussed or interrogated. However, this is not so; there is more to the interaction with the Committee than that, as is shown below.

Rule 167 (2) provides that the Committee on Appointments shall also deal with any question which arises under clause (4) of Article 113 of the Constitution as to whether or not any office is an office of profit or emolument, the holding of which is likely to compromise the office of a Minister or a public officer. Candidates under Article 113 (4) are definitely the target of this rule because it provides that a Minister shall not hold any office of profit or emolument likely to compromise his or her office (as

Minister). Rule 167 (2) extends this to apply to *"a public officer"* appointed by the President who appears before the Committee for approval.

According to Article 257 (x) of the Constitution, *"public officer"* means a person holding or acting in any public office. Apart from Cabinet Ministers and other Ministers appointed under Articles 113 and 114 of the Constitution, there are about 32 other categories of public officers that are appointed by the President with the approval of Parliament. They include the Attorneys General and members of commissions and heads of other bodies or authorities established by the Constitution, and permanent secretaries. The principle that they should hold no offices that compromises their constitutional office flows from Article 223 of the Constitution.

Article 223 provides that Parliament shall by law establish a Leadership Code of Conduct which shall require specified officers to declare their incomes, assets and liabilities from time to time and how they acquired or incurred them, as the case may be, and prohibit conduct that is likely to compromise the honesty, impartiality and integrity of specified officers; lead to corruption in public affairs; or which is detrimental to the public good or welfare or good governance. The Code of Conduct was established by enactment of the Leadership Code in 1992, which was repealed and replaced by the Leadership Code Act, 2002.

It is my opinion that it is towards upholding the tenets in this Code of Conduct that Parliament decided that before approval of any appointment by the President they would inquire into this particular aspect of a candidate's life/activities before doing so. And in so doing, rule 168 (8) provides that a person whose name has been submitted to the Committee

on Appointments for approval, shall be given an opportunity to answer before the Committee to any *adverse statements* made against him or her and shall be availed all necessary documents for that purpose. It is the information that flows from such interaction, the documents provided and the explanations of candidates that the petitioners are interested in gaining access to. Mr Kaggwa-Njala described the desired information in his affidavit as *"a substantial volume of priceless local media content generated for the consumption of Ugandans."*

Having found so, I now revert to the test that must be applied to determine whether the protections in rule 165 (2) are justified or not. The Supreme Court of Uganda in **Charles Onyango Obbo & Andrew Mujuni Mwenda v Attorney General, Constitutional Appeal No. 003 of 2003**, discussed the implications of the test in **R v. Oakes** (supra). The court then accepted the summary of the principles in that case, which related to a provision that is similar to Article 43 (2) of the Constitution of Uganda. The court adopted the summary of three (3) principles in that case as they were laid down by the Supreme Court of Zimbabwe in **Mark Gova & Another v Minister of Home Affairs & Another, SC 36/2000: Civil Application No 156/99,** as follows:

i. *The legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;*
ii. *The measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations;*
iii. *The means used to impair the right or freedom must be no more than necessary to accomplish the objective.*

With regard to the first criterion above, there are two rights that are in conflict with each other in this case: the right to privacy advanced by the Attorney General, pitted against the right to freedom of expression and the press advanced by the petitioners. Both are protected in Chapter Four of the Constitution. The dilemma in this petition is whether one of them should be preferred in its enforcement over the other.

In order to resolve the conflict, we must return to the principle of constitutional interpretation that the entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. {See **P. K. Ssemwogere & Another v Attorney General Constitution Appeal No 1 of 2002** (SC) and the **Attorney General of Tanzania v. Rev Christopher Mtikila (2010) EA 13**}.

Black's Law Dictionary, 9th Edition, West, defines *"privacy"* as "The condition or state of being free from public attention to intrusion into or interference with one's acts and decisions. The word *"privacy"* is not defined in the Constitution but *Toriqul Islam* in his article on the subject[2] starts from the commonly held perspective expressed therein that, *"Privacy is an elusive and poorly defined conception."* After exploring a body of literature on the subject he comes up with a summary of definitions relating to different aspects of the concept as follows:

> *"Privacy is a sweeping concept. Thus, over centuries, scholars from various disciplines aimed at defining privacy in diverse ways. Among all definitions, probably the simplest and most discussed legal definition of privacy is- 'the right to be let alone'. Arguably, in the digital age, this typical definition of*

[2] A Brief Introduction to the Right to Privacy – An International Legal Perspective, 2021, https://papers.ssrn.com/

privacy cannot ensure the desired protection unless associated with control over information. Hence, many other authors used to define privacy in terms of information control. The modern construction of privacy can be summarized by the following six headings: (1) the right to be let alone; (2) limited access; (3) secrecy; (4) control of personal information; (5) personhood, and (6) intimacy.

From the above discussion, it has become explicit that the underlying meaning of the term 'privacy' is not generally unified, rather varies in diverse features, scopes, nature, culture, custom, moral value, etc. Although there are disagreements among scholars about the meaning of privacy, certain things are common in almost all discourses. All privacy-related discourses acknowledge - privacy is an intrinsic human right that facilitates individuals to exile outsiders from their intimate zones; uplifts the dignity of human beings, along with their other constitutional guarantees. (The) Australian Privacy Charter, for instance, states that 'privacy is such a value that underpins human dignity and other key values, such as the freedom of association, freedom of speech, etc."

Yanisky-Ravid & Lahav analysed the conflict between the rights to privacy and freedom of expression and the press in their paper published in 2017.[3] They came to the conclusion that there are two different schools of thought on the subject, based on the attitudes of rights activists in Continental Europe and the United States of America as follows:

"A different attitude with respect to privacy rights is reflected by European Law. Evidently, Continental Europeans and Americans perceive privacy quite differently. In fact, there is a significant conflict between the European personal dignity approach to privacy, which emphasizes a right to one's image, name, and reputation and a right to control one's public image and shield against unwanted public exposure, versus the liberal U.S. approach, emphasizing personal liberty (as it pertains to state control), and focusing on freedom of speech and freedom of expression. The 'prime enemy' of the Continental conception is the media, whereas the media is the liberal

[3] Shlomit Yanisky-Ravid and Ben Zion Lahav; Public Interest vs. Private Lives - Affording Public Figures Privacy, in the Digital Era: The Three Principles Filtering Model; University of Pennsylvania Journal of Constitutional Law, Vol. 19, No. 5, 2017. Retrieved from https://papers.ssrn.com/sol3/papers.cfm on 9/08/2023

Americans' most important tool for ensuring free expression. 'To people accustomed to the [Continental attitude toward privacy], American law seems to tolerate relentless and brutal violations of privacy' in many aspects of life. Europe, in addition to many countries around the world, recognizes privacy as a firmly rooted fundamental right."

Counsel for the petitioners challenged the position taken by Parliament to have closed proceedings of the Appointments Committee for the reason that the principles of constitutional democracy impose the highest degree of *"tolerance, broadmindedness and pluralism."* He charged that if candidates for high office appointed by the President cannot withstand public scrutiny and criticism of their personal or professional lives, even to the degree that may be considered by others as *"shocking, disturbing or offensive,"* then they should not have any role to play in public life, which is characterised by ever growing calls for enhanced transparency and accountability. He relied on the South African decision in **Bernstein v Bester, Constitutional Court Case No 23/1995.**

In that case, the main issue at hand on a reference was whether sections 417 and 418 of the Companies Act were inconsistent with the right to privacy guaranteed under section 13 of the Constitution of the Republic of South Africa. The court found that given the facts of the case it was difficult to imagine violation of one's right to privacy. The right to privacy, the Court opined, was restricted by the right of the community and limited by the rights of others. If a person was being questioned under the stated provisions, then they must have some legal relationship with the company. The existence of a legal relationship, led to a duty to help the liquidator understand the affairs that led to it being wound up. Thus, the Court held that in the public sphere of business, a person's right to privacy was limited.

I am of the view that privacy in the context of a company in liquidation is not the equivalent of privacy in the circumstances of an appointment to high office in Uganda. In the latter, the appointee has to satisfy certain criteria that have been set and which Parliament has mandated the Committee to identify. It is therefore distinguishable from the financial state of a public company in liquidation which was the subject of the proceedings in **Bernstein** (supra).

However, I accept the submission of counsel for the petitioners that the need for accountability and transparency in the appointment process is necessary for the enhancement of democracy. But even then, the rival needs of democracy, accountability, freedom of expression and the press on the one hand, and an individual's privacy on the other, have to be weighed within the relevant context. **Yanisky-Ravid & Lahav** (supra) further observed that the conflict between the right of the public to have access to information, on the one hand, and individual privacy rights on the other has been magnified in the digital age by the intensive use of the Internet. Its usage has emerged as a primary source of information for a tremendous number of people who interact daily on a massive scale through a variety of social media platforms. They include wall posts, tweets, hash-tags, photo tagging, and the ability to share pictures, videos, and music.

It has already been established that pursuant to rule 231 of the Rules of Procedure of Parliament, open proceedings of Parliament and its Committees are broadcast, on most occasions in real time both on radio and television, and other media. A televised broadcast inevitably and invariably results in further publication by media houses and private individuals in the various forms of media identified in the preceding

IKM.

paragraph. That may be useful for information's sake but the unlimited sharing of personal information has been found to have a multitude of consequences and dangers to the individual whose information is publicized which can be summarised as: *reputational damage, embarrassment or humiliation*, emotional distress, identity theft or *fraud, financial loss*, physical harm, intimidation, discrimination and feelings of disempowerment.[4]

The impacts of the publication of a candidates' personal information result from the fact that publication of such information may not be just about the plain facts disclosed; it could include the subjective opinions of the publishers that are not based on the facts. The information disclosed about candidates' earnings or offices of profit, as well as questioned qualifications, have the potential to attract salacious comments both from the press and consumers of 'news'. This would not be only from the general public but also from political or potential political opponents, especially for the office of Cabinet Minister and 'other minister' whose candidates are not taken through any known selection process prior to appearing before the Committee. The salacious and subjective comments in the press may have a deleterious effect on the candidate's reputation and future career prospects either as a politician and parliamentarian, or even as a public officer.

The right to privacy as set out in the International Covenant on Civil and Political Rights (ICCPR), to which Uganda is a party, includes the protection of the right to reputation. Article 17 thereof provides as follows:

[4] Office of the Victoria Information Commissioner; https://ovic.vic.gov.au/privacy/resources-for-organisations

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his *honour and reputation*.

2. Everyone has the right to the protection of the law against such interference or attacks.

Paragraph 11 of CCPR General Comment No. 16 on Article 17 ICCPR, adopted at the 32nd Session of the Human Rights Committee on 8th April 1988, imposes the following obligations on States parties:

11. Article 17 affords protection to *personal honour and reputation and States are under an obligation to provide adequate legislation to the end.* Provisions must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible. States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law and how this protection is achieved according to their legal system.

{Emphasis added}

To that end, Parliament enacted the Data Protection and Privacy Act, 2019, which is stated to be:

An Act to protect the privacy of the individual and of personal data by regulating the collection and processing of personal information; to provide for the rights of the persons whose data is collected and the obligations of data collectors, data processors and data controllers; to regulate the use or disclosure of personal information; and for related matters.

Section 2 of the Act defines the word *"data"* thus:

"data" means information which —

(a) is processed by means of equipment operating automatically in response to instructions given for that purpose;

(b) is recorded with the intention that it should be processed by means of such equipment;

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system; or

***(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record*;**

{Emphasis added}

It has been established that the proceedings of Parliament and its Committees are recorded, both audio and video and they are transcribed into a written record. They form part of a filing system in the office of the Clerk (rules 226, 227 and 228). They are accessible to Members and others according to designated rules put in place by the Speaker, and procedures laid down in the Access to Information Act. Pursuant to the definition above therefore, I find that the proceedings before the Committee contain data and fall within the ambit of the Data Protection & Privacy Act.

To support the submission that personal information is protected from disclosure under the Data Protection and Privacy Act, counsel for the respondent referred court to the decision in **Department of Justice v Reporters Comm. for Free Press** (supra). In that case, the Supreme Court of the United States rejected a request by a CBS News correspondent and the Reporters Committee for Freedom of the Press under the Freedom of Information Act. They had requested the Federal Bureau of Investigation to produce the criminal identification records of a person, whom the Pennsylvania Crime Commission had identified as a member of a private business that was dominated by persons in crime. The majority overruled the appellate court, relying chiefly on the need to protect individual privacy. Noting how carefully Congress had limited such information on a number of occasions, court

believed that individual privacy interests were substantial. The court held that disclosure of the contents of criminal identification records to a third party could reasonably be expected to constitute an unwarranted invasion of "personal privacy" within the meaning of the Freedom of Information Act.

Much as the information that the petitioners wish to have disclosed rarely relates to crime, I am persuaded that the ratio in that case reflects the intendment of Parliament when it sought to limit access to information disclosed during interactions of candidates with the Committee on Appointments. That the legislative objective for which the limitation in rule 165 (2) of the Rules of Procedure of Parliament was designed to promote, the right to privacy of the appointees, is sufficiently important to warrant overriding the right to immediate access to information and to freedom of expression and speech. I would therefore find that the measures put in place are rationally connected to the objective and not arbitrary, unfair or based on irrational considerations. The measures therefore meet the second criterion in the *Oakes test.*

The third criterion in the Oakes test is that the means used to impair the right or freedom must be no more than necessary to accomplish the objective, which has already been established as protecting the right to privacy of the candidates that appear before the Committee.

In that regard, it is clear that although Article 41 (1) of the Constitution guarantees the right of access to information in the possession of the state, except that which is likely to prejudice the security of the state or interfere with the right to privacy of any person, Article 41 (2) goes on to provide that Parliament shall make laws prescribing the classes of information referred to in clause (1) thereof and the procedure for obtaining access to

that information. It has already been established that the right to access to information that is garnered by the Committee on Appointments is not entirely restricted. Its release is restricted in as far as it protects other persons' rights to privacy.

In conclusion, though the conflict within the amalgam of rights in contest for protection in this petition is palpable, the conflict is resolved by Article 41 (2) of the Constitution. Much as the information obtained by the Committee is not available in real time, or at the speed that the press and media desire to have and publish it, it can be availed through the procedures that have been provided for by Parliament in the Access to Information Act. It is also available through the Report of the Committee which is presented to Parliament soon after the interaction with presidential appointees.

I would therefore find that the right to access to information and the freedom of expression and of the press and media is not impaired in any way beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided for in the Constitution. The impugned rule therefore falls within the ambit of Article 43 (2) (c) of the Constitution.

Remedies

The petitioners prayed for a declaration that the impugned provision contravenes their rights guaranteed by the Constitution. They further prayed for orders to direct Parliament to grant them access to any and all transcripts of the proceedings of the Appointments Committee conducted by the 9th Parliament. That would now extend to the 10th and the 11th

Parliament thus far. They also prayed for an order that access be granted to them of all the video and audio recordings of the Committee.

However, it is evident that the petitioners did not demonstrate that they failed to get those proceeding using the means provided for in the Access to Information Act, enacted pursuant to Article 41 (2) of the Constitution. In the absence of evidence that Parliament failed, refused or neglected to provide them with the information as requested, as well as evidence that they sought to challenge either of those circumstances before court, as is provided for in sections 37 and 38 of the Access to Information Act, I am of the view that the petitioners did not exhaust the remedies provided for by law. Their petition to this court to grant the orders prayed for is therefore premature.

With regard to the prayer that court issues an injunction to stop Parliament from continuing to implement the impugned rule, the order is uncalled for because the reasons for which they sought the order have not been made out to persuade this court to issue it. There being no infringement of any of the rights alleged, the rule should continue to operate.

In conclusion, this petition fails and I would dismiss it with the following declarations and orders:

(i) Rule 165 (2) of the Rules of Procedure of the 11th Parliament is not inconsistent with or in contravention of Articles 8A, 29 (1) (a), and 38 (1) of the Constitution.

(ii) The limitation to access to information, expression and of the press and media imposed by rule 165 (2) of the Rules of Procedure of Parliament is acceptable and demonstrably justifiable in a free and

democratic society within the ambit of Article 43 (2) (c) of the Constitution.

(iii) Each party shall bear their own costs.

Dated at Kampala this 12th day of September 2023.

Irene Mulyagonja

JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 023 OF 2015

1. LEGAL BRAINS TRUST (LBT)
2. SIMON KAGGWA- NJALA
3. SULAIMAN KAKAIRE .....PETITIONERS

VERSUS

ATTORNEY GENERAL ..... RESPONDENTS

[*CORAM: Buteera, DCJ; Bamugemereire, Kibeedi, Mulyagonja & Mugenyi, JJCC*]

JUDGMENT OF MR. JUSTICE RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the Judgment prepared by my learned sister, the Hon. Lady Justice Irene Mulyagonja.

I agree with her findings and reasoning and have nothing useful to add.

Since all the members of the Panel agree with the lead judgment of the Hon. Lady Justice Mulyagonja, JCC, it is, therefore, the unanimous decision of this Court that this Petition fails. It is hereby dismissed with no order as to costs.

Dated at Kampala this ....12th.... day of ....September.... 2023

Richard Buteera
Deputy Chief Justice

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

{Coram: Buteera, DCJ, Bamugemereire, Kibeedi, Mulyagonja & Mugenyi, JJCC}

CONSTITUTIONAL PETITION NO 23 OF 2015

1. LEGAL BRAINS TRUST (LBT) LTD
2. SIMON KAGGWA-NJALA ::::::::::::::: **PETITIONERS**
3. SULAIMAN KAKAIRE

VERSUS

ATTORNEY GENERAL:::RESPONDENT

JUDGMENT OF CATHERINE BAMUGEMEREIRE JCC

I have had the privilege of reading, in draft, the Judgment prepared by my learned sister Mulyagonja JCC. I agree with the declarations that:

a) Rule 165 (2) of the Rules of Procedure of the 11th Parliament is not inconsistent with or in contravention of Articles 8A, 29 (1) (a), and 38 (1) of the Constitution.

b) The limitation to access to information, expression and of the press and media imposed by rule 165 (2) of the Rules of Procedure of Parliament is acceptable and demonstrably justifiable in a free and democratic society within the ambit of Article 43 (2) (c) of the Constitution.

I would dismiss the petition and make no order as to costs.

12.09.2023

Catherine Bamugemereire
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Buteera, DCJ, Bamugemereire, Kibeedi, Mulyagonja & Mugenyi, JJCC)

CONSTITUTIONAL PETITION NO 23 OF 2015

1. **LEGAL BRAINS TRUST (LBT) LTD**
2. **SIMON KAGGWA-NJALA**
3. **SULAIMAN KAKAIRE**

::::::::::::::: PETITIONERS

VERSUS

ATTORNEY GENERAL::RESPONDENT

<u>JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JCC</u>

I have had the benefit of reading in draft the Judgment prepared by my learned Sister, Mulyagonja, JCC.

I concur with the orders proposed based on the analysis and conclusions she has made.

Delivered and dated at Kampala this ..12th.. day ...September...... 20.......

Muzamiru Kibeedi

Muzamiru Mutangula Kibeedi
JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Buteera, DCJ; Bamugemereire, Kibeedi, Mulyagonja & Mugenyi, JJCC)

CONSTITUTIONAL PETITION NO. 23 OF 2015

1. LEGAL BRAINS TRUST (LBT) LTD
2. SIMON KAGGWA-NJALA
3. SULAIMAN KAKAIRE ..... PETITIONERS

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF MONICA K. MUGENYI, JCC

I have had the benefit of reading in draft the lead Judgment of my sister, Hon. Lady Justice Irene Mulyagonja, JCC in this matter. I agree with the decision arrived at, the reasons therefor and the orders therein, and have nothing useful to add.

Dated and delivered at Kampala this ....12th **day of** ....September....., **2023.**

Monica K. Mugenyi
Justice of the Constitutional Court