

**NATIONAL COUNCIL OF PROVINCES
CO-ORDINATION, CO-OPERATION,
AND CONSULTATION WORKSHOP**

28 - 29 August 2023



**Effect of Constitutional Court
Judgments on Public Participation**

Constitutional obligations

- Sections 59 and 72 of the Constitution -National Assembly / National Council of Provinces must—
 - “(a) facilitate public involvement in the legislative and other processes of the Assembly / Council and its committees; and..”.
- Both Houses: –cannot rely on what the other did. Nor can the NCOP rely on what Legislatures did, NCOP however must ensure that sufficient processes at Provinces– LAMOSA (see below).
- Provincial Legislatures: Section 118(1) of the Constitution requires that legislature must—
 - “(a) facilitate public involvement in the legislative and other processes of the legislature and its committees;”

Case Law on facilitation of public involvement – general principles

- *Doctors for Life International v Speaker of the National Assembly CCT [2006] ZACC 11 (Doctors for life)*
 - Re various pieces of health legislation had been passed.
- *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others [2016] ZACC 22 (LAMOSA)*
 - Re Restitution of Lands Rights Amendment Act
- *Mogale and Others v Speaker of the National Assembly and Others [2023] ZACC 14 (Mogale)*
 - Most recent judgment
 - Re Traditional and Khoi- San Leadership Act.

General principles provided by courts (1):

- There are at least two aspects of the duty to facilitate public involvement:
 - (a) the duty to provide meaningful opportunities for public participation in the law-making process; and
 - (b) the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.

General principles provided by courts (2):

- Parliament has the discretion to decide on appropriate measures in each case, provided they must be reasonable.
- **Factors to determine if public involvement was reasonable:**
 1. What Parliament deemed necessary in the circumstances
 2. Standing rules/models/framework will provide a guiding measure to what is required.
 3. The nature and impact of the legislation under consideration
 - To determine how extensive facilitation has to be.
 4. Time concerns (urgency), efficiency and cost
 - May be considered but “saving of money and time in itself does not justify inadequate opportunities for public involvement.”

General principles provided by courts (3):

- **LAMOS**A paragraph 81:

“Where the NCOP has decided that public hearings should take place at the Provincial Legislatures, in truth these hearings are part of the NCOP process. This is so notwithstanding the fact that Provincial Legislatures have their own distinct obligation to facilitate public participation and are separate from and not mere appendages of the NCOP. Thus in this context any shortcomings in the processes of the Provincial Legislatures fall to be imputed to the NCOP.” (Our emphasis)

- Confirmed in Mogale – see next slide

General principles provided by courts (3 - Continued):

- **Mogale.** The Court added:
 - The NCOP plays an important role as a “linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests.”
 - If the NCOP relies on legislatures, must satisfy itself that the legislatures hold public hearings that meet the constitutional standard.

Specific acts / omissions criticised (1)

In **Mogale**, the court considered the Public Participation Framework and the Practical Guide for Members of Parliament and Provincial Legislatures and made these findings:

- Requirement: Pre-hearing workshops on a Bill
 - Finding: NA did not conduct pre-hearing education in several provinces, and no pre-hearings education in the Eastern Cape, KwaZulu-Natal or the Western Cape; and
 - Finding: In some hearings the Bill was misrepresented as providing only for the recognition of the Khoi-San people with no indication of the consequences for other traditional communities.

Specific acts / omissions criticised (2)

- Requirement: Summaries of the Bill to be translated into at least three languages spoken in a particular province
 - Findings: either no or not enough copies of the Bill; not in a language that the local community could understand.
- Requirement: Invitations to be sent at least five weeks before public hearings
 - Findings: not properly advertised and thus no submissions were received.
- Requirement: Provincial legislatures to give at least seven days' notice of a hearing
 - Findings: Insufficient notice given ahead of hearings – interested parties insufficient time to prepare for hearings.

Specific acts / omissions criticised (3)

Other criticisms:

- Inaccessibility to some venues + no transport to attend hearings in some provinces.
- Many translation concerns at public hearings.
- Certain groups prioritised and others prevented from speaking at all.
- Written submissions were not sufficiently considered by the Select Committee or some provincial legislatures
- Reports and records on public hearings were inadequate and
- Some negative comments were not recorded.

Amendments during deliberations (1)

Facilitation of public involvement is not finalized simply because the initial process is done:

Truworths v Minister of Trade and Industry [2018] JOL 39718 (WCC)

- This case dealt with regulations, but the same principle applies to primary legislation.
- Paragraph 43:
 - The Minister is not obliged to re-advertise for comment.
 - However, where the Minister changes the draft regulations in a material respect, calling for further comment would under certain circumstances be advisable.

The principle of material amendments having to be advertised again was confirmed in the recent judgment - **South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others [2023] ZACC 18**

Amendments during deliberations (2)

South African Veterinary Association v Speaker of the National Assembly and Others [2018] ZACC 49

- Concerned an amendment during deliberations that added the requirement that veterinarians also be licensed to compound and dispense medicines.
- Found to be an extension of the subject of the Bill - the Committee ought to have sought the NA's permission and again called for comments.
- *“Section 59(1)(a) requires that public involvement be facilitated at all stages of the NA's processes. -....”* (Own emphasis – this applies to the NCOP as well)

THE END