



MEMORANDUM

[FOR APPROVAL]

**TO: Adv. M E PHINDELA
SECRETARY TO THE NCOP**

**FROM: B NONYANE / S BOWERS / V MNANA
PROCEDURAL SERVICES**

DATE: 01 AUGUST 2016

**RE: LAND ACCESS MOVEMENT OF SOUTH AFRICA V CHAIRPERSON OF THE
NCOP AND OTHERS**

1. Background

1.1 The Constitutional Court on 28 July 2016 handed down a judgement in a matter concerning the obligation on Parliament to facilitate public participation in its legislative process, and its effect on the validity of the Restitution of Land Rights Amendment Act, 2014 (Act 15 of 2014) "Amendment Act". This Amendment Act amended the Restitution of Land Rights Act, 1994 (Act 22 of 1994) "Restitution Act" which was enacted to give effect to the constitutional imperative of restitution of land.

1.2 The Restitution Act main object was the restitution of land rights and equitable redress. It also set the deadline for the lodging of claims to 31 December 1998. Subsequent to identifying a number of challenges with the impact of the Restitution Act, Parliament passed the Amendment Act in 2014.

The Amendment Act aimed to re-open the window for the lodgement of land claims.

2. Legal Issue

2.1 The applicants challenged the constitutionality of the Amendment Act on two grounds:

- i. The Amendment Act is invalid for failure by the National Council of Provinces and some or all of the Provincial Legislatures to facilitate adequate public participation as required by sections 72(1)(a) and 118(1)(a) of the Constitution;
Section 72(1) (a) of the Constitution imposes an obligation on the NCOP to facilitate a consultative process with the public during law making. Section 118 imposes a separate but parallel obligation on the Provincial Legislatures to facilitate public participation.
- ii. Alternatively, the applicants seek the constitutional court to declare that section 6(1)(g) as impermissibly vague and thus fails to protect adequately the interest of existing claimants, (*which required the Commission on Restitution of Land Rights “to ensure that priority is given”*) added to the Restitution Act by the Amendment Act to be unconstitutional and invalid.

2.2 The court looked at the procedure that was followed when the Amendment Act was processed by the NCOP. It noted that the provinces had less than one calendar month to process fully a complex piece of legislation with profound social, economic and legal consequences for the public.

3. Analysis of the issue

3.1 Whether Parliament has met the obligation of facilitating public participation?

3.1.1 The standard used by the court in determining whether Parliament has met its obligation of facilitating public participation is one of “reasonableness”. The reasonableness of Parliament’s conduct depends on the peculiar circumstances and facts at issue.

3.1.2 The court looked at the following issues to determine whether the NCOP had acted reasonably in facilitating the involvement of the public in its process of enacting the Amendment Act.

- i. The nature and importance of the Amendment Act
 - *The reopening of the land claims process is of paramount importance and public interest. It was crucial that there be reasonable public participation in the legislative process that resulted in the enactment of the Amendment Act*
- ii. The self-imposed time line.
 - *No cogent reason was given by the NCOP that the Bill was urgent.*

- *Given the gravity of the legislation and the thoroughgoing public participation process that it warranted, the truncated timeline was unreasonable. The court found that it was simply impossible for the NCOP and by extension the Provincial Legislatures to afford the public a meaningful opportunity to participate.*
 - *The adoption of the timeline was a classic breach of what was held in Doctors for Life, that is “the timetable must be subordinate to the rights guaranteed in the Constitution, and not the rights to the timetable”.*
 - *The NCOP cannot act perfunctorily when it is drawing a timetable that includes allowing the public to participate in the legislative process.*
- iii. Mandates of Provincial Legislatures at the NCOP; and
- *The court highlighted the shortcomings in the manner in which the NCOP dealt with and considered the negotiating and final mandates of Provincial Legislatures.*
 - *The court held that the views and opinions expressed by the public at the provincial hearings did not filter through for proper consideration when mandates were being decided upon. This deprived the process of the potential to achieve its purpose.*
- iv. Public Participation at Provincial Legislatures
- *The efforts made by the Provincial Legislatures were flawed and did not pass constitutional muster.*
 - *Only two Provincial Legislatures (KwaZulu-Natal and Western Cape) voiced their concerns about the timeline set by the NCOP.*
 - *Provincial Legislatures are not appendages of the NCOP. They are constitutionally created entities with their own separate existence and powers. They too have a duty to play their part properly in affording the public an opportunity to participate in the legislative process.*
 - *If a timeline received from the NCOP makes it impossible for them to perform this function well, nothing precludes them from telling the NCOP as much.*
 - *Accepting the timeline as they did the court held that the seven Provincial Legislatures acted unreasonably.*

4. Conclusion

The court found that the NCOP public participation process was unreasonable and thus constitutionally invalid. Failure by one of the Houses of Parliament to comply with a constitutional obligation amounts to failure by Parliament. The deficient conduct of the NCOP in facilitating public participation in passing the Bill tainted the entire legislative process and is a lapse by Parliament as a whole.

5. Principle to be derived from the judgment

The principle to be derived from this judgment is that it is important that the NCOP and all provinces agree on common processes for public participation. Further, that the legislative cycle programme is shared and agreed by all provinces.

6. Proposed Practice Notes

- Timelines
 - The six week cycle is not enough for complex bills.
 - The complexity of a Bill with profound social, economic and legal consequences for the public needs to be afforded a reasonable timeline.
 - Council Rule 240(3) to be used more effectively in complex bills by Select Committees
- Public hearings
 - Advertisement should be published 2 weeks before the public hearing;
 - The mode of notification should be accessible to all interested and affected communities;
 - Translation of Bills to be in all languages spoken in the area where the public hearings are taking place;
 - NCOP should conduct public hearings jointly with the Provincial Legislatures (*The court highlighted the fact that the Select Committee members had no personal knowledge of what had transpired at the hearings conducted by Provincial Legislatures*);
 - Reports of public hearings from Provinces should be shared with Select Committee for the NCOP to get a uniform understanding of public concerns across the country.
- Areas to be visited
 - Research to be done on all areas that will mostly be affected by the legislation.
 - Where a Bill affects all communities, we must identify sites in each district municipality to ensure a wider reach of communities.