CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 73/22

In the matter between:

CONSTANCE MOGALE	First Applicant
LAND ACCESS MOVEMENT OF SOUTH AFRICA	Second Applicant
MASHONA WETU DLAMINI	Third Applicant
VICTOR MODIMAKWANE	Fourth Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Third Respondent
SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE	Fourth Respondent
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Fifth Respondent
SPEAKER OF THE KWAZULU-NATAL PROVINCIAL LEGISLATURE	Sixth Respondent
SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE	Seventh Respondent
SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Eighth Respondent

SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE Ninth Respondent

SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE Tenth Respondent

SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE Eleventh Respondent

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Twelfth Respondent

CHAIRPERSON OF THE NATIONAL HOUSE OF TRADITIONAL LEADERS Thirteenth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Fourteenth Respondent

CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA Fifteenth Respondent

NATIONAL KHOI AND SAN COUNCIL Sixteenth Respondent

Neutral citation: *Mogale and Others v Speaker of the National Assembly and Others* [2023] ZACC 14

Coram: Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J

Judgment: Theron J (unanimous)

Heard on: 23 February 2023

Decided on: 30 May 2023

Summary: Traditional and Khoi-San Leadership Act 3 of 2019 — constitutionally invalid — sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution — National Assembly — National Council of Provinces and provincial legislatures

Public involvement — public hearings — reasonableness

ORDER

On application for direct access in terms of section 167(4)(e) of the Constitution:

1. It is declared that Parliament has failed to comply with its constitutional obligation to facilitate public involvement before passing the Traditional and Khoi-San Leadership Act 3 of 2019 (Act).
2. The Act was, as a consequence, adopted in a manner that is inconsistent with the Constitution and is therefore declared invalid.
3. The order declaring the Act invalid is suspended for a period of 24 months to enable Parliament to re-enact the statute in a manner that is consistent with the Constitution or to pass another statute in a manner that is consistent with the Constitution.
4. Those respondents that opposed the application are directed to pay the applicants' costs, including the costs of three counsel, in the following proportion:
    (a) The sixth, eleventh and twelfth respondents are directed to pay the costs occasioned by their respective opposition to the application.
    (b) The first and second respondents are to pay all remaining costs.

JUDGMENT

THERON J (Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ and Rogers J concurring):

Introduction

[1] This is an application in terms of section 167(4)(e)[1] of the Constitution for an order declaring that the National Assembly, the National Council of Provinces (NCOP) and the nine provincial legislatures have failed to fulfil their constitutional obligations to reasonably facilitate public involvement in the passing of the Traditional and Khoi-San Leadership Act[2] (TKLA). The applicants seek a declaration that the Act is unconstitutional and invalid, together with consequential relief.

[2] The Constitution's vision of democracy includes representative and participatory elements. In *August*, this Court said that the ability to participate in the electoral process through voting is "a badge of dignity and of personhood".[3] Similarly, when people – particularly the disempowered – participate in the making of laws that affect them, as is their constitutional entitlement, this enhances their dignity.[4] Before Parliament enacts legislation, it must take reasonable steps to facilitate public participation.[5]

[3] The importance of public participation in South Africa cannot be understated. Affected persons must be afforded the opportunity to meaningfully participate in the legislative process. Public participation acts as a safeguard to prevent the interests of the marginalised being ignored or misrepresented. The significance of public participation for the advancement of South Africa's democratic project is underscored

[1] Section 167(4)(e) provides: "Only the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation".

[2] 3 of 2019.

[3] *August v Electoral Commission* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at para 17.

[4] In *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at para 115, Ngcobo J wrote: "Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist".

[5] Section 59(1)(a) provides that "[t]he National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees". Section 72(1)(a) provides that "[t]he National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its committees". And section 118(1)(a) provides that "[a] provincial legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees".

by the colonial and apartheid governments' complete disregard of the views of the people in legislating their lives.

[4] Most contemporary democratic theorists view democracy as "government by discussion".[6] The Nobel economic sciences laureate, Amartya Sen, theorises an expansive notion of democracy to which public reasoning is central.[7] Under this model, democracy through the ballot is only the beginning. People must have access to information and the ability to speak freely about state conduct – in this case, law-making. Deliberative democracy is familiar to South Africans and, certainly, to the traditional communities affected by the TKLA. In *Doctors for Life*, this Court recognised the South African tradition of participatory democracy as practised through, for example, imbizo, lekgotla and bosberaad.[8] Former President Nelson Mandela, in his autobiography, reflected on witnessing deliberative democracy of this nature in local meetings when he was a child:

> "Everyone who wanted to speak did so. It was democracy in its purest form . . . everyone was heard: chief and subject, warrior and medicine man, shopkeeper and farmer, landowner and labourer . . . all . . . were free to voice their opinions and were equal in their value as citizens."[9]

Parties

[5] The first applicant is Ms Constance Mogale, the National Coordinator of the Alliance for Rural Democracy (ARD), a grouping of activist organisations and individuals who contest policy and legislation that threaten the land rights of citizens

[6] Sen *The Idea of Justice* (Belknap Press, Cambridge 2009) at 324.

[7] Id at 324-7.

[8] *Doctors for Life* above n 4 at para 101.

[9] Mandela *Long Walk to Freedom* (Macdonald Purnell, Randburg 1994) at 20 quoted in Sen above n 6 at 332. The original text reads, "all *men* were free to voice their opinions and were equal in their value as citizens" (emphasis added). President Mandela explains: "Women, I am afraid, were deemed second class citizens". I have omitted "men" from the quotation to retain the participatory spirit of the anecdote, while remaining faithful to the Constitution's vision of substantive equality.

living in the former Bantustans.[10] The second applicant is the Land Access Movement of South Africa (LAMOSA), an independent federation of community-based organisations advocating for land and agrarian rights, democracy and sustainable development. The third applicant is Mr Mashona Wetu Dlamini, an elder of the Umgungundlovu community and an iNduna of the iNkosana's Council, a body established in terms of customary law. The fourth applicant is Mr Victor Modimakwane, a member of the Bakgatla ba Kgafela community.

[6] The first respondent is the Speaker of the National Assembly. The second respondent is the Chairperson of the NCOP. I refer to the first and second respondents collectively as "Parliament". The third to eleventh respondents are the Speakers of the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Limpopo, North West, Northern Cape and Western Cape Provincial Legislatures. The twelfth respondent is the Minister of Cooperative Governance and Traditional Affairs (Minister), who is cited in her official capacity as the national executive authority responsible for the TKLA. The thirteenth respondent is the Chairperson of the National House of Traditional Leaders, who is cited because the TKLA affects the National House. The fourteenth respondent is the President of the Republic of South Africa. The fifteenth respondent is the Congress of Traditional Leaders of South Africa (CONTRALESA), a voluntary organisation of traditional leaders in South Africa. The sixteenth respondent is the National Khoi and San Council, a formal negotiating forum that engages with the state regarding the constitutional rights and other interests of the Khoi and San peoples.

[10] Bantustans, called "homelands" by the apartheid state, were ethnically defined, largely rural territories established to house South Africa's black population, including to control black people's presence in urban areas of "white South Africa". These territories, though designated for the black majority of the population, constituted a small percentage of South Africa's total land. Phillips "History of South Africa's Bantustans" *Oxford Research Encyclopaedias, African History* (27 July 2017), available at https://doi.org/10.1093/acrefore/9780190277734.013.80.

[7] Only Parliament, the KwaZulu-Natal Provincial Legislature, the Western Cape Provincial Legislature and the Minister oppose the application. I refer to these parties as the "respondents".

Background

[8] The TKLA purports to address the failings of the Traditional Leadership and Governance Framework Act[11] (TLGFA). The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, chaired by former President Kgalema Motlanthe, expressed concern that public submissions that it received indicated that the TLGFA and amendments to it[12] "[deny] people living in areas under traditional leaders several constitutional rights, distinguishing them from those living in the rest of the country who enjoy the full benefits of post-apartheid citizenship".[13]

[9] The Traditional and Khoi-San Leadership Bill (TKLB or Bill) was introduced in the National Assembly on 21 September 2015. According to the Department of Cooperative Governance and Traditional Affairs (COGTA), the TKLB was a product of public hearings focused on drafting the Bill's content.

[10] During January 2016, the National Assembly's Portfolio Committee on Cooperative Governance and Traditional Affairs (Portfolio Committee) invited submissions from stakeholders and began conducting public hearings the following month. Over the period from February 2016 to August 2017, meetings were held in the nine provinces. The ARD arranged to have monitors present at the public hearings. These monitors recorded many alleged deficiencies in the public participation process.

[11] 41 of 2003.

[12] At that stage, these were proposed amendments in the Traditional Leadership and Governance Framework Amendment Bill.

[13] High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (November 2017) (*High Level Panel Report*) at 39.

The Bill was passed by the National Assembly and referred to the NCOP on 7 November 2017.

[11] The NCOP initially intended to conduct its own hearings but later decided to defer the holding of hearings to the provincial legislatures. Between 10 April 2018 and 14 August 2018, the provincial legislatures conducted public hearings and adopted their negotiating mandates.[14] The applicants had monitors present at these hearings, where they recorded alleged deficiencies similar to those in the National Assembly process. On 4 December 2018, the NCOP Select Committee on Cooperative Governance and Traditional Affairs, Water and Sanitation and Human Settlements (Select Committee) met to cast votes according to the provinces' final mandates. The Select Committee voted to adopt an amended version of the TKLB and referred it to a plenary vote in the NCOP.[15] On 10 January 2019, the NCOP voted in favour of an amended version of the TKLB, which was referred back to the National Assembly. The TKLB, as amended by the NCOP, was adopted by the National Assembly on 26 February 2019.

[12] On 4 September 2019, before the TKLB was signed by the President, the applicants' attorneys wrote to the President requesting that the TKLB be referred back to Parliament, as recommended by the President's Expert Advisory Panel on Land Reform and Agriculture (Expert Advisory Panel). On 20 November 2019, the TKLB was signed into law by the President. The applicants' attorneys wrote to the President

[14] A negotiating mandate, as defined in the Mandating Procedures of Provinces Act 52 of 2008, is—

> "the conferral of authority by a committee designated by a provincial legislature on its provincial delegation to the NCOP of parameters for negotiation when the relevant NCOP select committee considers a Bill after tabling and before consideration of final mandates, and may include proposed amendments to the Bill."

[15] Delegates from KwaZulu-Natal, Limpopo and Mpumalanga were present at the meeting and cast votes in favour of the TKLB. No delegates from Free State and Gauteng were present, but these provinces transmitted their mandates, which were in favour of the TKLB, to their delegates. The Western Cape delegate was present and cast a vote against the TKLB. The Eastern Cape delegate was present and cast a vote in favour of the TKLB, but that province's final mandate referred to the wrong bill. The Northern Cape and North West delegates were present, but their final mandates referred to the incorrect bills. The Northern Cape indicated that it would send a new mandate. The North West delegate said that her province was "nowhere near" dealing with the TKLB, and the incorrect final mandate for the North West was not read.

on 10 April 2020 informing him of their instructions to challenge the constitutionality of the TKLA due to deficient public involvement in passing the Act. They also urged the President not to bring the TKLA into operation until the challenge was determined. The applicants' attorneys received no response. On 2 December 2020, the President published a notice determining that the TKLA would come into force on 1 April 2021. The applicants launched their application on 20 December 2021.

[13] The questions before this Court are:

(a) Does this Court have exclusive jurisdiction?
(b) Do the applicants have standing?
(c) What are the standards prescribed by law for public participation?
(d) Did Parliament and the provincial legislatures meet these standards?
(e) If not, what is the most appropriate remedy?

Jurisdiction

[14] Under section 167(4)(e) of the Constitution, this Court has exclusive jurisdiction to decide whether Parliament or the President has failed to fulfil a constitutional obligation. Parliament's alleged failure to reasonably facilitate public involvement implicates its constitutional obligations in terms of sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution.[16] This Court has the exclusive jurisdiction to decide that question.

[15] The Minister took the view that holding that this Court's exclusive jurisdiction is engaged in this application would inappropriately widen the scope of section 167(4)(e). She accepts that, in general, a challenge to the validity of a statute on the basis that there was inadequate public participation falls within section 167(4)(e). However, the Minister argues that the applicants are more

[16] *Doctors for Life* above n 4 at paras 28-30 and *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (*LAMOSA*) at paras 6-7.

concerned with the substance of the TKLA than with the alleged failure of the legislature to facilitate public participation. The Minister submits that this application is, in effect, a substantive constitutional challenge that required the applicants to make out a case for direct access.

[16] The Minister misconceives the nature of the matter. Although the founding affidavit reflects the applicants' disgruntlement with the content of the TKLA, the substance of the application is an attack on the adequacy of the public participation process in passing it. Complaints about the substance of the TKLA were raised for the purpose of indicating the nature of the issues at stake and, thus, the ambit of public participation that was reasonably required.

[17] The applicants concede that there is one issue that is not within the exclusive jurisdiction of this Court: whether the Select Committee had sufficient votes to adopt the TKLB (that is, the submission that Parliament did not comply with the manner and form requirements to pass the TKLB). However, they argue that it is in the interests of justice for this Court to hear that challenge directly because it is closely linked to the public participation challenge. This Court was not favoured with full argument on this aspect, which, in any event, is ancillary to the main issue of whether Parliament adequately facilitated public participation in passing the TKLB. Thus, its determination is not required in order to grant the relief sought in the notice of motion. For these reasons, and in light of the conclusions I make on the merits, I am of the view that this issue need not be decided by this Court.

Standing

[18] Generally, standing is a preliminary procedural question regarding whether the parties to the litigation are entitled to sue. The purpose of the inquiry is to determine whether a litigant has sufficient interest in the proceedings and is thus a proper party to present the matter in issue to a court for adjudication.

[19] In *Doctors for Life,* this Court reasoned that it will only consider an application that Parliament has failed to facilitate public involvement "where the applicant has sought and been denied an opportunity to be heard on the Bills and where the applicant has launched his or her application for relief in this Court as soon as practicable after the Bills have been promulgated".[17] In doing so, this Court sought to limit public participation challenges in order to "discourage opportunist reliance by those who cannot show any interest in the duty to facilitate public involvement on that duty".[18] The purpose of this restriction is to prevent parties who had no interest in draft legislation and made no attempt to make submissions to Parliament from later seeking to rely on a failure to facilitate public involvement to have the subsequently enacted legislation declared invalid. This restriction is not determinative of standing. A party either has an interest in the proceedings – which confers it with standing – or it does not. The restriction set out in *Doctors for Life* is analogous to considerations that engage this Court when deciding whether to grant leave to appeal. The *Doctors for Life* test involves a value judgment by the Court under the overriding standard of the interests of justice. Thus, even where there are delays in bringing public participation challenges, this Court considers whether it is in the interests of justice to non-suit applicants on that basis.

[20] The applicants bring this case in the public interest.[19] To the extent possible, the applicants, including the organisations and communities they represent, participated in the public hearings held by the National Assembly, the NCOP and provincial legislatures. They are not organisations or individuals who had or have no interest in the Bill or sat on their hands and failed to seek to participate in the process. This is not a case where an organisation has opportunistically raised a public participation challenge. The applicants who could participate in the process sought to

[17] *Doctors for Life* id at para 216.

[18] Id at para 219.

[19] The first applicant brings this application on her own behalf and on behalf of the ARD. The second applicant brings this application on its own behalf and on behalf of its members. The third applicant brings this application on his own behalf and on behalf of the Umgungundlovu community. The fourth applicant applies on his own behalf and in the public interest.

do so and were concerned throughout about the adequacy of the public participation. Allowing them to bring this challenge will not open the floodgates to opportunistic public participation challenges.

[21] The first, second and eleventh respondents contend that this Court should refuse to entertain the application as the applicants failed to bring the challenge as soon as practicably possible after the promulgation of the TKLA on 20 November 2019. This application was instituted in December 2021, just over two years after the Bill was passed by Parliament. In explaining the delay, the applicants record that they gave early notice of their intention to challenge the legislation: they informed the Portfolio Committee at the outset of its public hearing programme and wrote to the President before he signed the TKLB into law. The applicants also note that it took a significant amount of time to gather the information required to launch this application. Further, one of the applicants' junior counsel, who was responsible for drafting the papers, was unable to do so because his son was hospitalised with cancer. It would not be in the interests of justice to non-suit the applicants due to the unfortunate circumstances of their legal team.

[22] The respondents argue that the explanation provided for the delay is bare and that the delay caused them prejudice by having to answer factual allegations about matters that happened years ago, when the public participation process started in 2016. The applicants contend that Parliament should keep proper records of public participation and should not have to rely on the memory of officials to recreate its public participation process where the hearings were conducted less than five years before the application was launched. Parliament alleges that, as a result of the delay, records of the public participation process were unavailable. This argument cannot be countenanced. Although an applicant bringing a public participation challenge must launch the application "as soon as practicable after the Bills have been promulgated", a challenge cannot be brought before the President signs a bill into law.[20] The President

[20] *Doctors for Life* above n 4 at para 56.

signed the TKLB in November 2019, almost three years after the first public hearings were held in February 2016. Therefore, Parliament's submission that the challenge implicates records from a process that began in 2016 is of little assistance to them.

[23] In *Moutse,* more than two years had passed between the date that the statute in question was enacted and the date that the challenge was launched. In that case, one of the provincial legislatures contended that, due to the delay, records were unavailable. This Court held that while the delay was undesirable, it would not be in the interests of justice to non-suit the applicants on this ground.[21] This Court took into account that the respondents were alerted early on that the applicants intended to challenge the constitutional validity of the statute[22] and that, despite the delay, the respondents were able to provide evidence as to what occurred during the public participation process. It was also a consideration that the blame for the delay was attributed to the applicants' lawyers.[23] Moreover, it was practically possible to reverse the effect of the challenged law.[24] The applicants contend that these factors are present in this matter. I agree.

[24] The earliest that this challenge could have been brought was 20 November 2019, the date on which the President signed the Bill. This application was launched on 20 December 2021, just over two years after the President signed the TKLB, one year after the commencement date was announced and eight and a half months after the TKLA came into force.

[25] In my view, the delay is justifiable and should not prevent a determination of the merits. All of the factors that this Court recognised in *Moutse* as mitigating delay

[21] *Moutse Demarcation Forum v President of the Republic of South Africa* [2011] ZACC 27; 2011 (11) BCLR 1158 (CC) at para 28.

[22] Id.

[23] Id.

[24] Id at para 29.

are present here.[25] First, the applicants gave early notice of their intention to challenge the legislation. They notified the Portfolio Committee, prior to the commencement of its public hearing programme, that they would litigate if Parliament did not hold meaningful hearings. Before the Bill was signed, they wrote to the President asking him not to assent to the Bill because there had been insufficient public participation. The applicants wrote to the President again, once the Bill had been signed, to ask him to delay the date that the TKLA would come into force until after the challenge was determined. The applicants did not receive a response from the President to either letter.

[26] Secondly, the applicants are not only acting in their own interests, but on behalf of their organisations and in the public interest. The TKLA is legislation that directly impacts the lives of millions of South Africans. If the public is denied a meaningful chance to influence the content of that law, this Court should be hesitant to foreclose a challenge to the law merely because of a delay in bringing the complaint to this Court. This application is brought in the public interest and not for narrow individual interests.

[27] Thirdly, despite their complaints, Parliament and the two provincial legislatures that oppose the application have been able to put up significant evidence and argument to defend their positions. In light of the fact that the applicants gave Parliament early notice of their intention to bring this application, Parliament and the provincial legislatures were on notice that they should retain their records.

[28] In any event, Parliament should keep proper records of public participation. The earliest hearings occurred less than six years before the challenge was launched. The

[25] Id at paras 27-8. See also *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) at para 15 where this Court said:

> "It is desirable that a challenge to the constitutional validity of legislation – and constitutional amendments in particular – be brought timeously . . . . The delay is troublesome . . . . Yet, the delay has been explained by the applicants' legal representative, and though regrettable, it should not prevent the matter from being considered by this Court in the present instance . . . . The applicants furthermore do not represent individual interests, or the interests of the organisations only, but views widely held in the community of Merafong."

application was launched less than two years after the applicants indicated that they intended to challenge the legislation. Had Parliament complied with its duty to preserve its records, it would not have had to rely on the memory of officials to recreate its public participation process. Further, Parliament is statutorily obliged to keep proper records of public participation. In terms of the National Archives and Records Service of South Africa Act,[26] public bodies such as Parliament are obliged to retain records and may not destroy them except as provided for in the Act.[27] In terms of section 13(1), the National Archivist is charged with the proper management and care of public records in the custody of governmental bodies. In terms of section 13(2)(a), no public record under the control of a governmental body may be transferred to an archives repository, destroyed, erased or otherwise disposed of without the written authorisation of the National Archivist. During oral argument, counsel for Parliament conceded that Parliament bears the onus to prove that the process it adopted to facilitate public participation was reasonable. Little sympathy can be had for Parliament if it fails to discharge this onus on the basis that it had not kept sufficient records, particularly where it had a duty to do so.

[29] Fourthly, this Court takes into account that the application involved the collection of an immense amount of information. This is a challenge to two sets of public hearings, held by the National Assembly and by the provincial legislatures on behalf of the NCOP, that occurred in all nine provinces. The record includes detailed evidence of what occurred in a number of public hearings. This understandably took a long time to collect and prepare.

[26] 43 of 1996.

[27] The National Archives and Records Service of South Africa Act defines "governmental body" as "any legislative, executive, judicial or administrative organ of state (including a statutory body) at the national level of government". The Act thus applies to the processes of Parliament. Section 17 contains transitional provisions which make the terms of the Act applicable to such bodies at the provincial level until the provincial legislature has enacted its own archives legislation. Depending on whether or not a particular province has enacted its own archives legislation, the national Act may or may not apply to the provinces. None of the respondents in this case have stated that their records were erased or disposed of in accordance with the archives legislation applicable to them.

[30] Finally, the order that the applicants seek will not cause disruption given that the TKLA has been implemented to a limited degree. In any event, the applicants ask for the declaration of invalidity to be suspended. If the applicants' challenge succeeds, Parliament can, after reasonable public participation has been facilitated, re-enact the TKLA or pass new legislation.

[31] For these reasons, I conclude that the delay was not unreasonable and should not be a bar to this Court entertaining the merits of this application.

Obligation to facilitate public participation

[32] The National Assembly, NCOP and provincial legislatures each have a constitutional obligation to facilitate public involvement in their legislative processes. Their obligations to facilitate public participation are contained, respectively, in sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution.

[33] Public participation is a crucial part of participatory democracy and the law-making process as it affords the public a meaningful opportunity to participate in the legislative process[28] and "strengthens the legitimacy of legislation in the eyes of the people".[29] This Court has set a standard for public participation facilitated by Parliament and the provincial legislatures.[30] Parliament and the provincial legislatures have also set their own standards in the Public Participation Framework (Framework) and the Practical Guide for Members of Parliament and Provincial Legislatures (Practical Guide).

[28] *LAMOSA* above n 16 at para 59.

[29] *Doctors for Life* above n 4 at para 115.

[30] The public participation cases that have come before this Court are *Doctors for Life* id; *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC); *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 12; 2007 (6) SA 47 (CC); 2007 (1) BCLR 47 (CC); *Merafong* above n 25; *Moutse* above n 21; *LAMOSA* above n 16 and *SA Veterinary Association v Speaker of the National Assembly* [2018] ZACC 49 (CC); 2019 (3) SA 62 (CC); 2019 (2) BCLR 273 (CC).

Standard of reasonableness

[34] Parliament has a discretion to determine the manner in which to fulfil the obligation to facilitate public involvement; the question for this Court to determine is whether Parliament's process was reasonable.[31] In *Doctors for Life* this Court set out the factors to be considered in determining whether public involvement is reasonable:

> "The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided."[32]

[35] This Court has repeatedly emphasised that, regardless of the process Parliament chooses to adopt, it must ensure that "a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate

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[31] In *Merafong* id at para 27, this Court stated:

> "The obligation to facilitate public involvement may be fulfilled in different ways. It is open to innovation. Legislatures have discretion to determine how to fulfil the obligation. Citizens must however have a meaningful opportunity to be heard. The question for a court to determine is whether a legislature has done what is *reasonable* in all the circumstances." (Emphasis added.)

See also *LAMOSA* above n 16 at para 60.

[32] *Doctors for Life* above n 4 at paras 128-9.

say".[33] A reasonable opportunity to participate in legislative affairs "must be an opportunity capable of influencing the decision to be taken".[34] It is unreasonable if the content of a public hearing could not possibly affect Parliament's deliberations on the legislation. If the hearing is not effectively or timeously advertised,[35] if people are unable to attend the hearing,[36] or if the submissions made at the hearing are not transmitted or accurately transmitted to the legislature, then the hearing is not capable of influencing Parliament's deliberations.[37] This does not mean that the legislature must accommodate all demands arising in the public participation process, even if they are compelling.[38] The public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public's views.[39] Even if the lawmaker ultimately does not change its mind, it must approach the public involvement process with a willingness to do so.

[36] In *Doctors for Life*, this Court interpreted Parliament's obligation to facilitate public participation in light of South Africa's obligations under the International Covenant on Civil and Political Rights,[40] which "guarantees not only the 'right' but also the 'opportunity' to take part in the conduct of public affairs" and "imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation".[41]

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[33] *LAMOSA* above n 16 at para 59, quoting with approval from *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) at para 630, also quoted with approval in *Doctors for Life* above n 4 at para 125.

[34] *Moutse* above n 21 at para 62.

[35] *LAMOSA* above n 16 at paras 77-8.

[36] Id at para 78.

[37] Id at para 71.

[38] *Merafong* above n 25 at para 50.

[39] *Doctors for Life* above n 4 at para 234: "It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to".

[40] International Covenant on Civil and Political Rights, 16 December 1966 (ratified by South Africa on 10 December 1998).

[41] *Doctors for Life* above n 4 at para 91.

[37] In determining whether conduct has been reasonable in the context of public participation the following factors are of particular importance:

(a) what Parliament itself has determined is reasonable, and how it has decided it will facilitate public involvement;[42]

(b) the importance of the legislation and its impact on the public;[43] and

(c) time constraints on the passage of a particular bill, and the potential expense.[44]

[38] I will examine each of these factors, in turn. Reasonable public participation, in this case, must be assessed in light of the high standard that Parliament has set for itself in respect of public participation, the significance of the TKLA and the absence of any efficiency concerns that may have justified less comprehensive public participation.

Level of public participation deemed reasonable by Parliament

[39] Parliament has codified the level of public participation it deems reasonable in the Framework and the Practical Guide. The features of reasonable public participation in terms of these documents include that pre-hearing workshops must be held in order to establish relationships with stakeholders, develop effective communication and awareness programmes, and ensure that communities are mobilised and that consultation meetings are convened. Summaries of the bill must be translated into at least three languages spoken in a particular province. There must be transport to the hearings. In terms of the Framework, invitations must be sent at least five weeks before the public hearings and, in terms of the Practical Guide, provincial legislatures must give at least seven days' notice of a hearing. Permanent delegates to the NCOP on the relevant Select Committee must attend public hearings arranged by the provincial legislatures. Negotiating mandates must be accompanied by detailed public comments.

[42] *LAMOSA* above n 16 at para 60.

[43] Id.

[44] Id.

Each amendment proposed by a provincial delegation must be considered in detail and decided on.

[40] In the case of the TKLB in particular, Parliament, in its committee meetings, recognised the importance of the TKLB and gave some indication of what it considered to be reasonable public participation in the circumstances. The chairperson of the Portfolio Committee recognised that a public hearing is "an intensive process". The chairperson of the Select Committee noted the importance of translating the TKLB in order to be "considerate in terms of the language that is being used in a particular area".

Significance of the legislation

[41] The TKLA replaces the TLGFA and seeks to address its failings. The parties agree that the TKLA is a piece of legislation that is of immense significance, impacting millions of South Africans. It aims to regulate one of the most controversial, complex areas of South African society: traditional communities and traditional leadership, against the background of centuries of colonial and oppressive regulation, which requires sensitivity to the experiences and needs of traditional communities. In submissions filed on behalf of Parliament, it was made clear that it also fully appreciates this.

[42] The High Level Panel also highlighted the significance of the issues regulated by the TKLB in its report. It noted that the non-recognition of Khoi and San communities and leaders in the TLGFA "potentially pose[s] a threat to social cohesion and nation-building in the country".[45] However, it highlighted that members of the Khoi and San communities raised concerns that certain clauses in the TKLB were discriminatory.[46] The High Level Panel recommended reconsideration of the

[45] *High Level Panel Report* above n 13 at 429.

[46] Id at 430.

provisions that may "elicit constitutional challenges and undermine social cohesion and nation-building".[47]

[43] The Expert Advisory Panel noted views held by the public that the TKLB and other draft legislation affecting communal land tenure "individually and collectively entrench the Bantustans by removing the right to equal citizenship in a unitary state, violating the principle of free, prior and informed consent, and reinforcing the powers of traditional authorities over customary and family land and resource rights".[48] The Expert Advisory Panel emphasised the importance of "[direct, wide, meaningful and adequate consultation] with rural communities and inhabitants of the former 'Bantustans' whose lived experiences, relationship and interaction between land, culture and heritage must inform government policy".[49]

[44] According to the reports and conclusions made by the High Level Panel and the Expert Advisory Panel, the TLGFA allegedly failed to address historical challenges faced by customary law and traditional communities. The TKLB failed to address the failings of the TLGFA and introduced further issues of concern. Parliament was alerted to these deficiencies and advised to consult thoroughly with communities before passing the Bill to prevent further entrenchment and perpetuation of colonial and oppressive customary law regulation.

[45] The applicants raise various constitutional objections to the content of the TKLA, including that it entrenches and worsens the position under the TLGFA. These objections are disputed by Parliament. As this Court is not called upon to adjudicate the constitutionality of the substance of the TKLA, it is not necessary to set these out in any detail. The TKLA concerns controversial, complicated customary law matters. This informs what was required of Parliament when consulting the public. The subject

[47] Id.

[48] Expert Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (May 2019) (*Expert Panel Report*) at 98.

[49] Id.

matter of the TKLA thus required Parliament and the provincial legislatures to consult thoroughly and carefully with members of the public.

[46] This case is about the significance of participatory democracy for millions of South Africans who for the most part live away from centres of power, in rural areas and in some of the poorest parts of our country. These are people who have the least access to power, wealth and influence. This case is about their ability to participate in the making of law that governs virtually every aspect of their daily lives, including access to land, basic services and rights to the benefits of the land upon which they live.

[47] The TKLA is legislation of considerable importance and substantial impact. Like the Traditional Health Practitioners Act[50] and the Restitution of Land Rights Amendment Act,[51] which this Court considered in *Doctors for Life* and *LAMOSA*, respectively, it is "of paramount importance and public interest".[52] It is legislation that, by its nature, required extensive and meaningful public participation.

Time constraints and expense

[48] There was no evidence that there was any pressure on Parliament to pass the TKLB within any particular timeframe. Nor do the respondents assert that there was any deadline requiring urgent action. Parliament could have taken as much time as was necessary to comply with its constitutional obligation to facilitate public participation.

[49] Some of the respondents argued that the cost of complying with the guidelines set for public participation was prohibitive. Complaints of lack of resources are disingenuous in this context for a number of reasons. Many of the flaws identified by the applicants would cost nothing, or very little, to remedy. It would not have been

[50] 22 of 2007.

[51] 15 of 2014.

[52] *LAMOSA* above n 16 at para 64.

entirely dependent on resources for the respondents to correctly describe the Bill, allow people to speak at hearings, advertise hearing dates timeously, accurately summarise submissions made at hearings and consider the completed public participation process when taking decisions.

[50] Some other complaints do require resources, such as holding pre-hearing workshops, providing transport, organising sufficient hearings and translating the Bill. However, Parliament considers these to be reasonable obligations in the Framework and the Practical Guide. The respondents put up no evidence to support a claim that these costs were prohibitive in respect of the TKLB. This Court has said that government reliance on limited resources needs to be supported by facts.[53] The respondents have not provided any evidence that they were restricted by limited resources. A claim of lack of resources must be properly made out. The respondents have not done so. Even if such a claim was made out, it would not excuse failure to take steps that Parliament and the provincial legislatures could have taken, at no material extra cost, to ensure that the standard for public participation set by this Court and by Parliament itself was met.

The relationship between the NCOP and the provincial legislatures

[51] It is necessary to consider the relationship between the NCOP and the provincial legislatures. The obligation to facilitate public involvement rests independently on both the NCOP under section 72 and the provincial legislatures under section118 of the Constitution.[54] The NCOP is a forum for expressing the interests of the provinces

[53] See *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC)*;* 2012 (2) BCLR 150 (CC) and *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).

[54] In *Doctors for Life* above n 4 at para 151, this Court stated: "Both the NCOP and the provincial legislatures have a crucial constitutional role in our democracy; they must ensure that the provincial interests are represented in the national law-making process".

in the national legislative process.[55] It may facilitate public involvement through the provincial legislatures, which are closer to the public.[56]

[52] It is important to note that the NCOP can only fulfil its duty to facilitate public involvement through public hearings held by the provincial legislatures if "those proceedings were attended by members of the NCOP or . . . members of the NCOP had access to the reports of those proceedings".[57] The participation of delegates or the circulation of reports is important for two reasons. First, as stated in *Doctors for Life*, the NCOP "plays a pivotal 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'".[58] The NCOP ensures that the public submissions gathered by each province are distributed to all the other provinces and can be considered and debated in a national forum.[59] If public participation in the provincial legislatures is not transmitted to the NCOP, that "deprive[s] the process of the potential to achieve its purpose". Secondly, if the NCOP is to rely on the provincial legislatures to facilitate public involvement, it must satisfy itself that the provincial legislatures hold public hearings that meet the constitutional standard. This requires the NCOP to be aware of the steps that the respective provincial legislatures took to facilitate public involvement. The provincial hearings are part of the NCOP process and "any shortcomings in the processes of the provincial legislatures fall to be imputed to the NCOP".[60]

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[55] *Doctors for Life* id at para 162 and *LAMOSA* above n 16 at para 74.

[56] *Doctors for Life* id at paras 159-64 and *LAMOSA* id at para 72.

[57] *Doctors for Life* id at para 164.

[58] Id at para 79, quoting Murray and Simeon "From paper to practice: The National Council of Provinces after its first year" (1999) 14 *SA Public Law* 96 at 101.

[59] This Court in *LAMOSA* above n 16 stated at para 71 that "the views and opinions expressed by the public at the provincial hearings did not filter through for proper consideration when the mandates were being decided upon", when they should have done.

[60] Id at para 81.

Assessment of the public participation process

[53] It is necessary to establish, as a matter of fact, the process adopted by Parliament to facilitate public participation and, as a matter of law, whether that process was reasonable. The applicants presented a picture of the public participation process in its entirety to this Court. These facts are largely undisputed by the respondents, save for the National Assembly and the KwaZulu-Natal and Western Cape Provincial Legislatures. Neither the National Assembly, nor the two provincial legislatures, however, have meaningfully disputed the applicants' allegations. I am of the view that the facts in this matter are thus common cause and this Court has not been asked to resolve factual disputes, as suggested by the respondents.

[54] The process adopted in respect of the TKLA was as follows. On 21 September 2015, the TKLB was introduced in the National Assembly. In January 2016, the Portfolio Committee invited written submissions from a range of stakeholders as part of the first leg of their public participation process. The adequacy of this leg is not disputed. The second leg of the National Assembly's process involved public hearings in each of the nine provinces. These hearings took place in 2016 and 2017.

[55] The TKLB was passed by the National Assembly and referred to the NCOP on 7 November 2017. The Deputy Minister of COGTA briefed the Select Committee on 14 November 2017. Initially, the Select Committee intended to run its own public hearing programme. However, on 10 May 2018, the Select Committee decided that it would not hold its own public hearings but would defer the holding of public hearings to the provincial legislatures. Thereafter, the provincial legislatures conducted public hearings in all nine provinces.

[56] On 14 August 2018, the Select Committee met and delegates tabled the negotiating mandates, which set out the parameters of the negotiation in the NCOP and proposed amendments to the Bill. Negotiating mandates are usually accompanied by reports from the public hearings organised by the provincial legislatures. Those

provinces that did report on their public hearings did so to varying degrees of detail and the negotiating mandates of three provinces did not mention the public hearings at all.[61] At this meeting, the Select Committee decided to invite written submissions rather than hold further public hearings. The closing date for written submissions was 19 September 2018. According to the applicants, no summary of the submissions was prepared for the Select Committee, which would thus only have known of the submissions' content if they were read or discussed at a subsequent Select Committee meeting.

[57] The proposed amendments in the negotiating mandates were considered by COGTA, who provided its written response and presented to the Select Committee on 11 September 2018. COGTA rejected all but two of the proposed amendments from the provinces and proposed two amendments of its own. The two amendments COGTA accepted were purely semantic. Members of the Select Committee and the provincial representatives were dissatisfied that the content of the negotiating mandates were not taken into account. COGTA was asked to prepare a list of amendments based on the views presented at the meeting. At the final meeting of the Select Committee before the consideration of final mandates, on 30 October 2018, this list of amendments was not tabled or referred to. Additionally, only cursory attention was given to the written submissions, which a parliamentary legal adviser incorrectly stated had already been deliberated on.

[58] After the 30 October 2018 meeting, six provinces provided final mandates. Three provinces submitted final mandates before the Select Committee's meeting on 30 October 2018 – these mandates, therefore, could not have been informed by anything that happened at the meeting, including any discussion that took place regarding the written submissions.[62] On 4 December 2018, the Select Committee met to consider the final mandates. Five votes were cast in favour of the TKLB – three by

[61] These were Gauteng, North West and the Western Cape.

[62] The Eastern Cape provided its mandate on 21 August 2018, North West provided its mandate on 30 August 2018 and the Northern Cape provided its final mandate on 23 October 2018.

delegates who were present, and two by delegates in absentia.[63] One vote was cast against the TKLB.[64] Three provinces' final mandates referred to the incorrect Bill and, therefore, did not cast valid votes.[65]

[59] The Select Committee then referred the TKLB to a plenary vote. The NCOP adopted the TKLB with amendments on 10 January 2019, after which it was referred back to the National Assembly. The National Assembly adopted the TKLB, as amended by the NCOP, on 26 February 2019. The Bill was signed by the President on 20 November 2019 and on 11 December 2020, the President published a notice determining that the Act would come into force on 1 April 2021.

[60] It would be an impossible standard for Parliament to comply with if a single flaw in a single hearing rendered the entire public participation process unreasonable. It is more apt to frame the assessment as one that considers the cumulative consequence of the entire process. The respondents conceded this in their oral submissions. Below, I consider the flaws as stated by the applicants thematically, having regard to the requirement that public involvement must enable people to know about the issues, have an adequate say, and be capable of influencing the decision to be taken. I categorise these flaws into those that prevented the public from: (a) preparing for the hearings, (b) participating in the hearings, and (c) having their views conveyed to the relevant lawmakers.

[63] Delegates from KwaZulu-Natal, Limpopo and Mpumalanga were present to cast their votes. Free State and Gauteng conveyed their final mandates to the Select Committee, but their delegates were not present.

[64] This was the Western Cape.

[65] These were the Eastern Cape, Northern Cape and North West.

Deficiencies preventing preparation for public hearings

Insufficient notice

[61] In respect of both the National Assembly and provincial legislatures' public hearings, there was insufficient notice given ahead of the hearings.[66] Often, notice was given only by word of mouth.[67] Inadequate notice of the National Assembly's hearings in the Northern Cape, for example, meant that attendees unnecessarily had to travel great distances to attend hearings because they were not aware of hearings that would be held closer to where they lived. Sometimes, notice was given unevenly. In the Western Cape, for example, traditional and community leaders were given notice of a hearing in advance, but community members were given a day's notice.

[62] In the Eastern Cape Provincial Legislature's process, insufficient notice resulted in the postponement of a number of hearings due to poor attendance. In one of the Gauteng Provincial Legislature's hearings, the chairperson of the hearing himself complained about the tight timelines for public participation imposed by the NCOP.

[63] The result of inadequate notice is that organisations and individuals are not given enough time to prepare themselves for the hearings. In *Moutse*, this Court held that the public should be given an adequate opportunity to prepare for hearings. This ensures that "meaningful participation is allowed", which results in the public being given an "opportunity capable of influencing the decision to be taken".[68] In *LAMOSA*, this Court held that notice of less than seven days is unreasonable.[69] In many cases, in both the National Assembly and the provincial legislatures' processes, the notice period was far less than that – sometimes one or two days.

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[66] In the National Assembly, this was the case in the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West and Western Cape. In the provincial legislatures, this was the case in the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape and Western Cape.

[67] This happened at certain National Assembly hearings in the Eastern Cape, Free State, Gauteng, Mpumalanga and North West.

[68] *Moutse* above n 21 at para 62.

[69] *LAMOSA* above n 16 at para 77.

Lack of pre-hearing education

[64] The National Assembly failed to conduct pre-hearing education in the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga and most of the North West. In the North West, people were transported to hearings and promised food, but were given no meaningful explanation of the purpose of the hearing. In the Free State, members of the public were told to attend by local branches of the African National Congress and were under the impression that the meetings were party events or related to more general grievances, such as service delivery and employment. In Mpumalanga, attendees thought that the hearing would be about service delivery and crime.

[65] In the provincial legislatures, there was no pre-hearing education in the Eastern Cape, KwaZulu-Natal and the Western Cape. It is unclear whether there was pre-hearing education in Mpumalanga and, on request from the Land and Accountability Research Centre (LARC),[70] no information was provided.

Accessibility of hearings

[66] In the National Assembly's process, the Bloemfontein hearing took place 60km outside of the city in Thaba Nchu. In Polokwane, there was a venue change the night before the hearing that was only communicated on Parliament's website. There were insufficient travel arrangements – in Mpumalanga, a Khoi-San community was given incorrect venue details and promised transport that never arrived.

[67] The Eastern Cape Provincial Legislature did not provide transport – this is something that attendees complained about at a hearing. The KwaZulu-Natal Provincial Legislature provided some transport, after it was specifically requested to

[70] LARC is an interdisciplinary research unit based in the Faculty of Law at the University of Cape Town and a partner of the ARD. The ARD requested LARC's assistance with monitoring the National Assembly's public hearings.

do so by LARC in order to accommodate people from rural areas who would have to travel long distances at their own expense to attend the hearings. No transport was provided for the first hearing in KwaZulu-Natal. The !Xun community, who wished to attend hearings held by the Northern Cape Provincial Legislature, experienced challenges accessing the venue and were told that they would be given a chance to present their views. It is unclear whether this ever happened, but there is no evidence of the community's views in the Northern Cape negotiating mandate. At the Beaufort West and Paarl hearings arranged by the Western Cape Provincial Legislature, attendees complained that the venues were far from where people lived.

Deficiencies preventing participation in public hearings

Communication of the content of the TKLB

[68] At many of the public hearings, no copies of the TKLB were provided. At many of the hearings where copies of the Bill were provided, there were not enough copies.[71] Often the copies provided were not in a language that the local community could understand.[72] In the public hearings organised by the National Assembly in KwaZulu-Natal and the Northern Cape, neither copies of the TKLB nor summary documents were provided beforehand or at the hearings. The same was true in the Eastern Cape, except at Mthatha, where an English summary was circulated in an isiXhosa speaking area. Similarly, in the Free State, no copies of the Bill were made available and in Bloemfontein an English slide presentation was circulated. At the Limpopo Provincial Legislature's hearings, no copies of the TKLB were provided in any language.

[71] In the National Assembly process, only a small number of English copies were made available at two of the three hearings in the North West and at one of the hearings in Limpopo. At the Gauteng Provincial Legislature's hearing in Johannesburg, there was a limited amount of English and Afrikaans copies of the TKLB available.

[72] In the National Assembly process, in Limpopo, Mpumalanga and the North West, only English copies of the TKLB were distributed. In Gauteng, only English and Afrikaans copies were available. At the Gauteng Provincial Legislature's hearing in Pretoria, only isiZulu copies of the TKLB were available. At the KwaZulu-Natal Provincial Legislature's hearings in Durban and Richard's Bay, no translated copies or summaries of the TKLB were provided. In the Mpumalanga Provincial Legislature's hearings, copies of the Bill were only provided in English and were unavailable in isiNdebele, which is spoken in that province. At one of the Northern Cape Provincial Legislature's hearings, attendees complained that there were no Afrikaans copies of the Bill.

[69] Where there were no written copies of the Bill in the appropriate language, there was often no oral presentation given. And where oral presentations were given, these were often inadequate or inaccurate.[73] Questions about the TKLB were either not answered or were insufficiently answered.[74]

[70] At many of the hearings, there were translation issues. At the National Assembly hearings in the Northern Cape, attendees had to volunteer to translate. In the Eastern Cape, there was a hearing that was conducted in English and isiZulu, with no translation into isiXhosa. In the Free State, although there were translators, attendees could not understand the explanations given by the translators. In Gauteng, the hearing was conducted in English and Afrikaans only and there were no translators.

[71] In both sets of hearings, the Bill was misrepresented as providing only for the recognition of the Khoi-San people and it was not conveyed that the Bill raised important consequences for other communities. In the National Assembly process, this happened at the hearings in the Eastern Cape, KwaZulu-Natal, Limpopo, Northern Cape and Western Cape. In the provincial legislatures' process, this happened in Gauteng and Mpumalanga. Attendees were also misled that the TKLB enjoyed support in other provinces. This happened at the National Assembly hearings in KwaZulu-Natal and Limpopo.

[72] Attendees at some hearings complained that they did not have sufficient time to consider the Bill in order to give meaningful input. This was the case in the National Assembly hearings in Limpopo, Mpumalanga and the North West. In

[73] In the National Assembly process, this was the case in the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape and North West. This was similarly so at the hearings of the Northern Cape Provincial Legislature. At the KwaZulu-Natal Provincial Legislature's hearing in Durban, no translated oral presentation on the TKLB was given. The TKLB was only very briefly explained at the hearings held by the Western Cape Provincial Legislature.

[74] In the National Assembly process, this occurred in the Eastern Cape, Free State, Gauteng, KwaZulu-Natal and Northern Cape.

Limpopo, traditional leaders were provided with the TKLB ahead of the hearing, but the same was not true for members of the public.

Prioritisation of certain groups and people prevented from speaking

[73] Improper attention was given to certain groups to the exclusion of other groups. In the National Assembly process, in the Western Cape, there was a hearing at which only ten people were allowed to speak and these were mostly traditional leaders. In KwaZulu-Natal, attendees who criticised abuse of power by traditional leaders were prevented from speaking. An attendee in Gauteng who made a comment about the recognition of Kings and Queens under the TKLB was dismissed by a Portfolio Committee member as "taking advantage of the Queen's presence at the hearing".

[74] The KwaZulu-Natal Provincial Legislature singled out traditional leaders, the Zulu King and Khoi-San communities for consultation whilst other communities that were also affected were not given the same special attention. Members of traditional communities who tried to make oral submissions were told that the hearing was not for them. In the Limpopo Provincial Legislature's process, four hearings were abandoned, supposedly due to poor attendance, with the result that no hearings at all were conducted in the Sekhukhune, Capricorn and Waterberg districts, which make up 60% of the province. There was only one hearing for the entire province. Two of the meetings that were abandoned because of supposedly poor attendance were in fact attended by between 150 to 200 people. The second of these meetings was abandoned because there were not enough traditional leaders present, demonstrating how traditional leaders were favoured over ordinary members of the community. The Limpopo Provincial Legislature sent written invitations to traditional leaders, who arrived at the hearings in government vehicles.

[75] In addition to attendees being silenced in favour of traditional leaders, attendees at other meetings were silenced arbitrarily. At the National Assembly hearing in Gauteng, many people wanted to speak, but only 12 people were given the opportunity to do so before the meeting was closed without explanation. One of the hearings held

by the Mpumalanga Provincial Legislature lasted only 40 minutes and only three people were allowed to speak because the Premier had to leave to attend another event. At the Western Cape Provincial Legislature's hearing in Beaufort West, two speakers were cut short and one of them was told by the chairperson that he "liked hearing his own voice".

Deficiencies preventing the public's views from being conveyed to and/or considered by the relevant lawmakers

Written submissions

[76] Following the public hearings organised by the provincial legislatures, the Select Committee called for written submissions. As mentioned above, the content of these submissions was insubstantially considered by the Select Committee in its final meeting before the tabling of final mandates.

[77] Some of the provincial legislatures also called for written submissions. The Free State Provincial Legislature solicited written submissions, all of which were attached to the negotiating mandate. The KwaZulu-Natal Provincial Legislature requested written submissions. Detailed attention is given in the negotiating mandate to the submissions of the provincial House of Traditional Leaders and the provincial COGTA department, but not to any other submissions received by the KwaZulu-Natal Provincial Legislature, including from LARC. The Limpopo Provincial Legislature invited written submissions, but did not properly advertise the request and no written submissions are mentioned in the negotiating mandate.

Inaccurate and inadequate reports of public hearings

[78] There were also inaccuracies in the reports which recorded the contents of the public hearings. The comments made by attendees at the public hearings conducted by the National Assembly in the Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape and Western Cape, were not accurately recorded in the Portfolio Committee's consultation report. The sole hearing in Gauteng is not recorded

in the consultation report at all. The upshot of this is that many negative comments about the TKLB were not recorded.[75] Sometimes the consultation report would reflect that there was criticism, but not what the content of the criticism was.[76] Where attendees were inadequately informed and, therefore, unable to properly engage with the TKLB, they were recorded as supporting it.[77] At the National Assembly hearings in the North West, there were complaints about the public participation process. This was not recorded in the consultation report.

[79] The level of detail provided in the negotiating mandates following the public hearings organised by the provincial legislatures varied considerably. The Free State and Western Cape's negotiating mandates each only raised one substantive issue from the public hearings. The Gauteng negotiating mandate did not mention the public hearings at all. It proposed amendments to the TKLB, but it is not clear whether these were the product of the public participation process. KwaZulu-Natal's negotiating mandate raised only one issue arising from the public hearings regarding the title of the Bill. Mpumalanga's negotiating mandate referred to the single public hearing held in that province. The substantive concerns with the TKLB related to the interests of traditional leaders. The North West Provincial Legislature's negotiating mandate did not mention the public hearings – the Provincial Legislature prepared a detailed report of its seemingly adequate public hearing programme, but this report was never filed with the NCOP. In many of the negotiating mandates, the amendments to the TKLB proposed at the public hearings were softened or misrepresented.

[80] It was particularly important that these reports present an accurate reflection of the public hearing process as the NCOP deferred its responsibility to facilitate public hearings to the provincial legislatures and was required to monitor this. The views and opinions expressed by the public at the provincial hearings had to filter through to the

[75] This is true in respect of the Eastern Cape hearings, the KwaZulu-Natal hearings, the Mpumalanga hearings, the Northern Cape hearings in Kuruman and Kimberly, and the North West hearings.

[76] For example, at the Cape Town hearing in the National Assembly process.

[77] For example, at the Swellendam and Oudtshoorn hearings in the National Assembly process.

NCOP for proper consideration through these reports. The NCOP did not consider or debate the substantive concerns in the negotiating mandates – provincial representatives complained of this in the Select Committee's meeting on 11 September 2018. The failure to accurately report and examine the issues raised in public hearings means that the substantive comments on the TKLB that emerged from the public participation process were ignored.

Collective assessment

[81] Assessed together, the deficiencies which occurred at the different stages of the public participation process are numerous and material. Parliament attempted, in its submissions, to explain reasons for certain deficiencies, pointing to "teething issues" and lack of resources. Given the scale of the evidence gathered by the applicants, I am of no doubt that, collectively, these deficiencies demonstrate a wide-ranging and substantial failure to facilitate public participation.

Conclusion

[82] It is clear from the evidence that Parliament failed to fulfil its constitutional obligation to reasonably facilitate public involvement in the legislative process leading to the enactment of the Bill. In reaching this conclusion, this Court has had regard to the following factors: the significance of the TKLA and its impact on traditional communities; the high standard Parliament had rightly set itself; the lack of urgency to pass the Bill; and Parliament's failure to afford members of the public a meaningful opportunity to be heard at public hearings, for the reasons outlined above.

[83] Failure to comply with the constitutional requirement to facilitate public participation renders legislation invalid.[78] Section 172(1)(a) of the Constitution empowers this Court to make this declaration of invalidity.[79] The result of a finding

[78] *Doctors for Life* above n 4 at para 209.

[79] Section 172(1)(a) of the Constitution reads:

that the National Assembly and the NCOP, through the provincial legislatures, failed to satisfy their respective obligations to facilitate public participation in sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution must therefore be a declaration of invalidity in respect of the entire TKLA.

[84] The applicants accept that, should the respondents seek to follow a new process to enact a new bill similar to the TKLA, then suspension of the order of invalidity is justified. An immediate order of invalidity would withdraw the recognition granted to Khoi-San communities and traditional leaders, and restore the TLGFA, causing immense disruption, as the TLGFA hugely differs from the TKLA (for example in the manner in which traditional councils are constituted and recognised and the powers and responsibilities that they have). Some steps have already been taken to implement the TKLA. Suspension will allow Parliament, at its discretion, to hold a new legislative process to pass the TKLA, a modified version of it, or an entirely new bill. This allows the new amended provisions (created following the appropriate public participation process) to come into force after the completion of the legislative process.[80]

Costs

[85] The KwaZulu-Natal and Western Cape Provincial Legislatures made submissions to this Court in defence of the public hearings that they held. The Minister made technical, preliminary objections to the application. These parties should bear the applicants' costs occasioned by their opposition. All remaining costs are to be paid by Parliament, whose failure to fulfil the constitutional obligation to facilitate public involvement in the legislative process led to this application.

[86] The applicants employed five counsel and, in their notice of motion, seek the costs of three counsel. This is a challenge concerning inadequacies in two sets of public

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"When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

[80] *Doctors for Life* above n 4 at para 69.

hearings in nine provinces relating to complex legislation of great significance. Counsel in a matter of this nature were required to condense a substantial record into a succinct narrative of the overall public participation process for purposes of making legal submissions. Given the enormity of this task, the costs of three counsel are justified.

Order

[87] The following order is made:

1. It is declared that Parliament has failed to comply with its constitutional obligation to facilitate public involvement before passing the Traditional and Khoi-San Leadership Act 3 of 2019 (Act).
2. The Act was, as a consequence, adopted in a manner that is inconsistent with the Constitution and is therefore declared invalid.
3. The order declaring the Act invalid is suspended for a period of 24 months to enable Parliament to re-enact the statute in a manner that is consistent with the Constitution or to pass another statute in a manner that is consistent with the Constitution.
4. Those respondents that opposed the application are directed to pay the applicants' costs, including the costs of three counsel, in the following proportion:
    (a) The sixth, eleventh and twelfth respondents are directed to pay the costs occasioned by their respective opposition to the application.
    (b) The first and second respondents are to pay all remaining costs.

For the Applicants:	G Budlender SC, M Adhikari, M Bishop, O Motlhasedi and E Cohen instructed by the Legal Resources Centre, Richard Spoor Incorporated and Henk Smith and Associates
For the First and Second Respondents:	N Cassim SC and Z Cornelissen instructed by the State Attorney
For the Sixth Respondent:	N Z Kuzwayo SC instructed by the State Attorney
For the Eleventh Respondent:	M Vassen instructed by the State Attorney
For the Twelfth Respondent:	G Mashaba SC, L Phasha and N Seme instructed by the State Attorney