



TO: Chairperson, Select Committee on Finance [Mr Y Carrim, MP]

FROM: Constitutional and Legal Services Office

DATE: 25 November 2022

SUBJECT: Advice on issues of constitutionality raised in the public hearings in respect of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18B-2022]

Purpose

1. To advise the Select Committee on Finance (Select Committee) on issues of constitutionality raised in the public hearings in respect of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18B-2022] (the Bill). For the purpose of this advice, it is necessary to note that the Bill is being considered in accordance with the procedure set out in section 75 of the Constitution.
2. The two pertinent issues raised during the public hearings on 23 November 2022 are:
 - (i) The process to facilitate public involvement in the legislative process (section 72 of the Constitution); and
 - (ii) The limitation of rights in the Bill of Rights.

Public involvement

3. The Constitution creates an obligation on Parliament to facilitate public involvement. There are separate obligations for the National Assembly and the National Council of Provinces.¹

¹ Sections 59 and 72.

Accordingly, a failure of one House to facilitate public involvement will be a failure of Parliament as a whole.

4. The requirements for public participation apply irrespective of whether it is a s75 or s76 Bill. Notwithstanding that the Bill is being considered in terms of section 75 of the Constitution, the Select Committee must facilitate public participation on the Bill. The format this must take, depends on the numerous issues. What matters, as set out by the Constitutional Court (Land Access Movement of South Africa Judgement, Clicks case, Doctors For Life, etc.) is 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 say. What amounts to a reasonable opportunity will depend on the circumstances of each case."²
5. In *Doctors for Life International v Speaker of the National Assembly and Others*³ the Constitutional Court formulated the test as follows:

*"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. In this sense, public involvement may be seen as 'a continuum that ranges from providing information and building awareness, to partnering in decision-making.'"*⁴ (footnotes omitted)
6. In *South African Veterinary Association v Speaker of the National Assembly and Others*,⁵ veterinarians were brought under the auspices of the Medicines and Related Substances Amendment Bill only after the NA's official public hearings. On that aspect of the Bill there was no public participation. The challenge to the constitutionality of the Medicines and Related Substances Amendment Act 14 of 2015 based on this was successful.
7. At paragraph [42] the Court found that "[t]he failure to notify SAVA, and other similar organisations representing the interests of veterinarians, such as the South African Veterinary Council, undermines the purpose of facilitating public participation. The

² *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 630 (Sachs J)

³ *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

⁴ Para [129].

⁵ *South African Veterinary Association v Speaker of the National Assembly and Others* ([2018] ZACC 49).

Amendment Bill predominantly affected veterinarians but they cannot reasonably be expected to have known about the amendment without its being brought to their attention. The Bill was published twice in two separate Government Gazettes. However, it was never published in the form that included the word ‘veterinarian’.”

8. At paragraph [46] the Court found that insertion of the word “veterinarian” is a material amendment to the Bill, made by the NA without facilitating any public participation on this aspect. The Court held that this falls short of the requirements in section 59(1)(a) of the Constitution. (In addition the Court held that the NCOP, through the provincial legislatures, failed to properly facilitate public participation due to the exceptionally short notice periods that they gave before public hearings, and the failure to invite specific comment from members of the veterinary profession. Consequently, the insertion of the word “veterinarian” was also done contrary to sections 72(1)(a) and 118(1)(a) in the NCOP and provincial legislatures.)
9. In *Matatiele Municipality v President of the Republic of South Africa* ([2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (Matatiele)) at para 68, the Court held that “[t]he more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.”

Analysis

10. The written submission of Cause for Justice (CFJ) to the Select Committee, to use as an example of the process, indicates the following:

Previously, CFJ has engaged the Standing Committee on Finance in respect of the (original version of the) Bill, through delivery of:

- (i) (Initial) written submissions on 10 October 2022;*
- (ii) Oral submissions on 11 October 2022;*
- (iii) Further oral submissions on 18 and 28 October 2022;*
- (iv) Further (substantive) written submissions on 25 October 2022.*

FJ makes submissions in relation to the NPO Act only.

11. To this one adds the public hearings on 23 November 2022.
12. It is not the purpose of this advice to make a comprehensive analysis of the jurisprudence relating to public participation and to weight the entire process relating to the Bill against the former, simply due to time constraints. Be that as it may, two facts present themselves to a court who might be asked to make such a judgment:
- (i) It is clear that there has been a vibrant discussion during public hearings and thereafter on the original version of the Bill and, as a result of this public participation, the B-version of the Bill included amendments.
 - (ii) Although time allocated for making further submission on the B-version of the Bill was short, the issues to consider were not new, have been presented to the stakeholders, and is a consequence from the process in the National Assembly.

Limitation of rights in the Bill of Rights

13. I refer to the legal opinion submitted to the Select Committee by National Treasury that was procured from Adv J.J. Gauntlett SC KC and Adv F.B. Pelsler, dated 1 November 2022. It is not the purpose of this advice to repeat the arguments made in the opinion, to all of which I agree.
14. The opinion follows the two step approach to determine whether a right entrenched in the Bill of Rights has been limited and if so, whether such limitation will survive constitutional muster. To survive constitutional muster, the impugned provisions must be of a law of general application and the limitation must reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including those five elements listed in section 36 of the Constitution.⁶

⁶ 36. Limitation of rights.—(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

15. The opinion analyses the rights to freedom of religion, belief and opinion; and to freedom of association. Subsequently, it then advises whether the impact of the Bill on these rights satisfies the test whether these limitations created by the Bill will survive constitutional scrutiny. The opinion concludes that the provisions of the Bill are constitutional, but nevertheless makes suggestions to strengthen the Bill.
16. The critical issues in the opinion, and which has been raised during the public hearings of 23 November 2022, concern the following two issues:
- (i) the balance between limitation and its purpose, and
 - (ii) less restrictive means to achieve the purpose.
17. The arguments raised by the NPO Working Group and CFJ focus on whether the Bill – seen as a limitation on rights in the Bill of Rights – will achieve its purpose. The lack of capacity – demonstrated by the failure of the NPO Directorate, which is situated in the National Department of Social Development (DSD) in terms of the Nonprofit Organisations Act 71 of 1997 (NPO Act), is central to the argument that the Bill will not achieve its purpose.
18. A short response is that the B version of the Bill includes a further amendment to section 5 of the NPO Act the authority of the Directorate to delegate specified administrative functions to another organ of state. Furthermore, section 13 of the NPO Act is further amended by the B-version to deem a nonprofit organisation that has submitted an application for registration “to be registered unless and until the director has given notice to the applicant in terms of subsection (3) and the process envisaged in subsections (4) to (6) has been completed.”⁷

⁷ Section 13(3) – (6):

(3) If, after considering an application, the director is not satisfied that the application complies with the requirements for registration, the director must send the applicant a written notice, giving reasons for the decision and informing the applicant that it has one month from the date of the notice to comply with those requirements.

(4) The period within which compliance must be effected may be extended by the director on good cause shown by the applicant.

(5) If an applicant who has received a notice in terms of subsection (3) complies with the requirements for registration timeously, the director must register the applicant by entering the applicant’s name in the register.

(6) If an applicant who has received a notice in terms of subsection (3) has not complied timeously with the requirements set out in that notice, the director must—

- (a) refuse to register the applicant; and
- (b) notify the applicant in writing of the refusal and the reasons for it.

19. The amendments are aimed at the concerns raised in the process before the Standing Committee of Finance and the submissions before the Select Committee should take this into account. In my view it facilitates the process of registration.

Conclusion

20. In my opinion I agree with the opinion submitted by the National Treasury that the Bill is constitutional.



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