



LEGAL OPINION
[Confidential]

TO: Mr TSC Dodovu, MP
Select Committee on Cooperative Governance and Traditional Affairs, Water Affairs, Sanitation and Human Settlements

COPY: Xolile George
Secretary to Parliament

FROM: Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 18 March 2024

REFERENCE: 87/ 2024

SUBJECT: OPINION ON THE DEFERRAL OF THE INDEPENDENT MUNICIPAL DEMARCATION AUTHORITY BILL [B14B – 2022]

Introduction

1. The Chairperson of the Select Committee on Cooperative Governance and Traditional Affairs, Water Affairs, Sanitation and Human Settlements (Committee), Mr TSC Dodovu, MP solicited legal advice on the request for an extension of the timeline for the tabling of provinces' negotiating mandates on the Independent Municipal Demarcation Authority Bill [B14B – 2022] (IMDA Bill).
2. The legal question is whether there are persuasive and lawful grounds for the Committee to grant such a request, particularly by the Limpopo Legislature, Eastern Cape Provincial Legislature and the Western Cape Provincial Parliament.

Background

3. The IMDA Bill was passed by the National Assembly, as a section 76 Bill, a bill affecting provinces, and was transmitted for concurrence to the National Council of Provinces (NCOP) on 30 November 2023, and accordingly submitted to provinces for the formulation of mandates.
4. The Department of Cooperative Governance and Traditional Affairs briefed the Committee on 7 February 2024 and, in turn, the NCOP referred the Bill to Provincial Legislatures on the same date.

Legal framework

5. Section 72(1)(a) of the Constitution¹ provides that the NCOP must facilitate public involvement in the legislative and other processes of the Council and its committees.
6. Section 118(1)(a) of the Constitution provides that a provincial legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees.
7. Rule 219 of the Rules of the NCOP² provides as follows:
 - (1) All sections 76(3), (4), (5) and 74(1), (2) and (3) Bills must be dealt with in a manner that will ensure that provincial legislatures have sufficient time to consider the Bill, facilitate public involvement in the processing of the Bill, and confer authority on the provincial delegation to negotiate and vote on the Bill.
 - (2) Depending on the substance of the Bill, the period for the consideration of the Bill is at least eight weeks.

¹ Constitution of the Republic of South Africa, 1996.

² Rules of the NCOP, 10th Edition: December 2021

- (3) In the event that the substance of the Bill requires more time than the eight-week period, the Chairperson of the Council may, at the request of the Chairperson of the relevant committee or Speaker of a provincial legislature, extend the period.

Discussion

8. Parliament is constitutionally obligated to take *reasonable steps* to facilitate public participation before it enacts legislation. Affected persons must be afforded the opportunity to meaningfully participate in the legislative process. In this regard, public participation acts as a safeguard to prevent the interests of the marginalised being ignored or misrepresented. In *Doctors for Life*, the Constitutional Court recognised the South African tradition of participatory democracy as practised through, for example imbizo, lekgotla and bosberaad.
9. The NA, 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. 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 and strengthens the legitimacy of legislation in the eyes of the people.
10. In the matter of *Matatiele Municipality and Others v President of the Republic of South Africa and Others*³, the Constitutional Court explained that the system of democracy established by the Constitution is partly representative and partly participative in nature. The Constitutional Court explains this principle as follows:

“What our constitutional scheme requires is the achievement of a balanced relationship between representative and participatory elements in our democracy. The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the

³ (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006).

legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process.”

11. *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) is the seminal authority for the principle that legislation can be declared invalid for lack of public participation in the law-making process. This Court recognised:

“In our country, the right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process.”

In the majority judgment, participation was underscored as a core constitutional value. Ngcobo J said:

“[O]ur democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making process. Parliament must therefore function in accordance with the principles of our participatory democracy.”

Sachs J, in a concurring judgment in the *Doctors for Life* case, stated:

“All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the

respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.”

12. Parliament has a discretion to determine the manner in which to fulfil the obligation to facilitate public involvement; the cardinal issue is whether Parliament’s process was reasonable. In *Doctors for Life*, the Constitutional 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.”

13. 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. Accordingly, 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 opportunities provided.

14. 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 say. A reasonable opportunity to participate in legislative affairs must be an opportunity capable of influencing the decision to be taken. 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, if people are unable to attend the hearing, or if the submissions made at the hearing are not transmitted accurately transmitted to the legislature, then the hearing is not capable of influencing Parliament’s deliberations. However, this does not mean that the

legislature must accommodate all demands arising in the public participation process, even if they are compelling.

15. The public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public's views. Even if the lawmaker does not change its mind, it must approach the public involvement process with a willingness to do so.
16. In *Mogale*⁴⁴, the Constitutional Court posited that 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;
 - (b) the importance of the legislation and its impact on the public; and
 - (c) time constraints on the passage of a particular bill, and the potential expense.
17. Parliament has a Public Participation Framework and recently in *Mogale*, the Constitutional Court used it to assess the level of public participation deemed reasonable by Parliament. As previously advised, the rules of the NCOP provide that depending on the substance of the Bill, the period for the consideration of the Bill is **at least** eight weeks. **[our emphasis]**
18. Furthermore, the same NCOP rules provide that the subject Bill must be dealt with in a manner that will ensure that provincial legislatures have sufficient time to consider the Bill, facilitate public involvement in the processing of the Bill, and confer authority on the provincial delegation to negotiate and vote on the Bill.
19. Moreover, in the event that the substance of the Bill requires more time than the eight-week period, the Chairperson of the Council may, at the request of the Chairperson of the relevant committee or Speaker of a provincial legislature, extend the period.

⁴⁴ Constance Mogale and Others vs Speaker of the NA and Others CCT73/22 [2023] ZACC 14; 2023 (9) BCLR 1099 (CC)

20. In view of the above, the request by the Limpopo Legislature for an extension of time frames for public consultation by at least two weeks is reasonable, particularly in considering that the NCOP referred the Bill to Provincial Legislatures on 7 February 2024. In addition, the request by the Eastern Cape Provincial Legislature to defer the further processing of the Bill to a date after 31 March 2024 is reasonable. Similarly, the request by the Western Cape Provincial Parliament to extend the timeline for the provinces' negotiating mandates until the end of April 2024, alternatively, to let this legislation stand over for the next administration is not without merit.

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21. There can be no denying that the substance of the subject Bill is of strategic importance as, chief amongst its purpose, is to provide for the establishment of the Independent Municipal Demarcation Authority and set the criteria and procedures for determination or redetermination of municipal boundaries and delimitation of wards by the Authority.

22. In addition, we should heed the recent judgment of the Constitutional Court in *Mogale and Others v Speaker of the National Assembly and Others* [2023] ZACC 14, in which the court said, "*The obligation to facilitate public involvement rests independently on both the NCOP under section 72 and Provincial Legislatures under section 118 of the Constitution...The provincial hearings are part of the NCOP process and 'any shortcomings in the process of the provincial legislatures fall to be imputed to the NCOP'.*"

23. Importantly, the three provinces have said it themselves that the timeline given by the Select Committee is too short for the said provinces to facilitate adequate public involvement and consultation. Accordingly, the requests by the respective provinces for an extension of timeline for the provinces' negotiating mandates should be granted.

24. Unreasonably withholding the said requests has the real danger of opening up Parliament to unnecessary and costly litigation, and this will place Parliament on

a collision course with the current jurisprudence, particularly on the centrality of adequate public involvement and consultation in Parliament's law-making process.

25. We advise accordingly.

A handwritten signature in black ink, consisting of a large, stylized initial 'Z' followed by a horizontal line and a small flourish.

Z Adhikarie
Chief Parliamentary Legal Adviser