



CONSTITUTIONAL COURT OF SOUTH AFRICA

Constance Mogale and Others v Speaker of the National Assembly and Others

CCT 73/22

Date of judgment: 30 May 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 30 May 2023 at 10h00, the Constitutional Court handed down judgment in an application brought by Ms Constance Mogale, the Land Access Movement of South Africa, Mr Mashona Wetu Dlamini and Mr Victor Modimakwane, as well as the organisations and communities they represent. The applicants applied directly to the Constitutional Court for an order declaring that the National Assembly, the National Council of Provinces (NCOP) and the provincial legislatures failed to fulfil their constitutional obligations to facilitate reasonable public involvement in the passing of the Traditional and Khoi-San Leadership Act 3 of 2019.

The application was brought against the Speaker of the National Assembly, the Chairperson of the NCOP, the Speakers of the nine provincial legislatures, the Minister for Cooperative Governance and Traditional Affairs (Minister), the Chairperson of the National House of Traditional Leaders, the President of the Republic of South Africa, the Congress of Traditional Leaders of South Africa and the National Khoi and San Council. Only the National Assembly, the NCOP, the KwaZulu-Natal Provincial Legislature, the Western Cape Provincial Legislature and the Minister opposed the application.

The Traditional and Khoi-San Leadership Bill (TKLB or Bill) was introduced in the National Assembly on 21 September 2015 and purports to address the failings of the Traditional Leadership and Governance Framework Act 41 of 2003. From 2015 to 2019, Parliament and the provincial legislatures held public participation processes across all nine provinces. The Bill was passed by both houses of Parliament on 26

February 2019 and signed by the President on 20 November 2019. The effective date of the Act was 1 April 2021.

The applicants challenge the adequacy of the public hearings held by the National Assembly and eight of the nine provincial legislatures. The alleged deficiencies include short and inadequate notice of the hearings; lack of pre-hearing education; that attendees were not provided copies of the Bill or were provided with insufficient copies; translation issues; that the content of the Bill was misrepresented; and that members of traditional communities were side-lined in favour of traditional leaders.

Parliament and the provincial legislatures that defended their processes acknowledged minor deficiencies in the public participation process, but submitted that the deficiencies were not so egregious to justify an order declaring the Act unconstitutional and invalid. Parliament contends that, considering the entire, extensive public participation process that was undertaken, the complaints of the applicants are inconsequential. The KwaZulu-Natal Provincial Legislature and the Western Cape Provincial Legislature, in particular, contend that proper processes were followed in those provinces to facilitate reasonable public participation.

In a unanimous judgment penned by Theron J, the Constitutional Court held that its exclusive jurisdiction was engaged in terms of section 167(4)(e) of the Constitution. The respondents raised a preliminary objection that the applicants' delay in bringing in the application should bar them from levelling a procedural constitutional challenge to the Act. The Court dismissed this preliminary point. It held that the delay was justifiable and should not prevent a determination of the merits, particularly given the profound impact that the Act has on millions South Africans living in traditional communities.

Although Parliament has a discretion to determine the manner in which to fulfil its obligation to facilitate public participation, the process followed must be reasonable. This is the standard for public involvement established by the Constitutional Court in its previous judgments. In considering whether Parliament and the provincial legislatures fell short of their constitutional obligation, the Court had regard to the following factors: the significance of the Act and its impact on traditional communities; the standard Parliament had set itself and the lack of urgency to pass the Bill. On an assessment of the public participation process followed by Parliament, the Court held that Parliament and the provincial legislatures overwhelmingly failed to fulfil their constitutional obligations to facilitate a reasonable public participation process.

At both the National Assembly and provincial legislature levels, the deficiencies in the hearings were endemic. Insufficient notice was given ahead of many of the hearings. At some hearings, there was a failure to conduct pre-hearing education. Some of the hearings were inaccessible: limited transport was provided and hearings took place in venues far from where people lived. At many of the public hearings, no copies of the TKLB were provided. Where copies of the Bill were provided, an insufficient number

of copies were provided. Further, copies provided were often in a language that the local community could not understand. Where there were no written copies of the Bill in the appropriate language, oral presentations were not given or were inadequate or inaccurate. At many of the hearings, there were translation issues. 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. Attendees at some hearings complained that they did not have sufficient time to consider the Bill in order to give meaningful input. Further, in many of the hearings, improper attention was given to certain groups to the exclusion of other groups. Particularly, in some hearings, attendees were silenced in favour of traditional leaders. In other meetings, attendees were silenced arbitrarily.

The public hearing reports that were put before the National Assembly's Portfolio Committee on Cooperative Governance and Traditional Affairs and the NCOP Select Committee on Cooperative Governance and Traditional Affairs, Water and Sanitation and Human Settlements (Select Committee) did not accurately convey the views of the public to these committees. The level of detail provided in the negotiating mandates following the public hearings organised by the provincial legislatures varied considerably. Following the public hearings organised by the provincial legislatures, the Select Committee called for written submissions from the public. The content of these submissions were insubstantially considered by the Select Committee. As a result, the views and opinions expressed at the public hearings and in the written submissions did not filter through to Parliament.

Assessed together, the deficiencies that occurred at the different stages of the public participation process are numerous and material. The Constitutional Court held that, collectively, these deficiencies demonstrate a wide-ranging and substantial failure to facilitate public participation. The Constitutional Court held that Parliament and the provincial legislatures' failure to comply with their constitutional obligation to facilitate public participation renders the Act unconstitutional and invalid. The declaration of invalidity was suspended for a period of 24 months to allow Parliament an opportunity to re-enact the TKLB in a manner consistent with the Constitution or to pass another statute in a manner consistent with the Constitution.