

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**Doctors for Life International v The Speaker of the National Assembly and Others****CCT 12/05****Decided on: 17 August 2006****MEDIA SUMMARY**

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

On 17 August 2006, the Constitutional Court handed down judgment in an application by Doctors for Life International (DFL). The applicant, DFL, had applied directly to the Constitutional Court, challenging the constitutional validity of certain Bills. The application was originally brought against the Speaker of the National Assembly and the Chairperson of the National Council of Provinces. After argument at the original hearing, the Minister of Health and the Speakers of the nine provincial legislatures were subsequently joined as respondents in the matter.

DFL argued that Parliament failed to fulfil its constitutional obligation to facilitate public involvement when it passed four Bills, all of which related to health issues. These Bills are: the Sterilisation Amendment Bill; the Traditional Health Practitioners Bill; the Choice on Termination of Pregnancy Amendment Bill; and the Dental Technicians Amendment Bill. However, DFL's complaint was confined to the process followed by the National Council of Provinces (NCOP). DFL also argued that the Constitutional Court is the only court that could hear its application because it involved failure by Parliament to fulfil its constitutional obligation.

At the time of launching the application, DFL was not aware of the fact that all of the Bills, except for the Sterilisation Amendment Bill, had in fact already become Acts.

The respondents argued that they did comply with their respective duties to facilitate public involvement in the passing of the Bills. They also argued that this obligation to facilitate public involvement only requires that the public be given an opportunity to make either written or oral submissions sometime during the process of making laws. The respondents accepted that the Constitutional Court is the only court that could hear the application.

The Court had to consider four questions: first, whether the Constitutional Court is the only court which can hear a matter of this nature; second, whether it is competent for the Court to grant declaratory relief in respect of the proceedings of Parliament; third, the nature and scope of the constitutional obligation of a legislative organ of state to facilitate public involvement in the law-making process; and fourth, whether on the facts of the case the NCOP complied with that obligation when passing the health legislation under challenge, and, if it did not, the consequences its failure.

NgcoboJ held that the Constitutional Court is the only court which is capable of hearing a challenge of this nature because the challenge involved a decision on whether Parliament had failed to fulfil a constitutional obligation. He explained that Parliament has discretion to

decide on how to fulfil the duty to facilitate public involvement in the law-making process. And where this is the case, a dispute as to whether such obligation has been fulfilled requires a court to intrude into the domain of a legislative organ of state. He held that such intrusion can only be made by the Constitutional Court which is the highest court on constitutional matters.

On the question whether the Court can grant declaratory relief in relation to the proceedings of Parliament, Ngcobo J drew a distinction between the different stages in the law-making process, namely, before Parliament has concluded its deliberations on a proposed Bill; after Parliament has passed a Bill, but before the Bill has been signed by the President; and after a Bill has been signed by the President. He held that it is not competent for a court to grant relief in relation to a Parliamentary Bill after the Bill has been passed by Parliament but while it is under consideration by the President, except at the request of the President. He found that the Sterilisation Amendment Act was still in a Bill form when the proceedings were launched. He held that the Court would have been precluded by the Constitution from declaring the Bill invalid. He therefore concluded that the challenge relating to the Sterilisation Amendment Act must be dismissed.

However, he held that after a Bill has been signed into law and before it is brought into operation, it is competent for the Court to grant relief and declare the enacted law invalid. He found that the Traditional Health Practitioners Act, the Choice on Termination of Pregnancy Amendment Act, and the Dental Technicians Amendment Act had already been signed into law when the proceedings were launched. He concluded that it was therefore competent for the Court to consider challenges relating to these three statutes.

The Court unanimously supported Ngcobo J on the above matters.

Turning to the nature and scope of the duty to facilitate public involvement, Ngcobo J held that: first, the NCOP has an important role to play in the national law-making process, it represents the provinces to ensure that provincial interests are taken into consideration in the national law-making process – the provinces have a say in the national law-making process as they give voting mandates to their NCOP delegations; second, Parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as it is reasonable to do so. This duty will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of laws that will govern them; and third, in determining whether Parliament has acted reasonably, the Court will have regard to a number of factors including the nature of the legislation, and what Parliament itself has assessed as being the appropriate method of facilitating public involvement in a particular case.

Turning to the question whether the NCOP has complied with its duty to facilitate public involvement in relation to the Traditional Health Practitioners Act, and the Choice on Termination of Pregnancy Amendment Act, Ngcobo J, found that: a) these two Bills had generated great public interest at the NCOP as evidenced by requests for public hearings; b) in the light of these requests, the NCOP decided that public hearings would be held in the provinces and advised the interested groups of this fact; c) the nature of these Bills was such that public hearings should be held; d) a majority of the provinces did not hold hearings on these Bills because of insufficient time and this fact was drawn to the attention of the NCOP; and e) the NCOP did not hold public hearings. In the light of this, Ngcobo J held that the failure by the NCOP to hold public hearings in relation to the Traditional Health Practitioners

Act and the Choice on Termination of Pregnancy Amendment Act was unreasonable. He therefore concluded that the NCOP did not comply with its obligation to facilitate public involvement in relation to these two Acts as contemplated by section 72(1)(a) of the Constitution.

However, in relation to the Dental Technicians Amendment Act, Ngcobo J found that when the Bill was first published for public comment, it did not generate any public interest. Having regard to this and the nature of the Bill, Ngcobo J held that the NCOP did not act unreasonably in not inviting written representations or holding public hearings on this statute. He concluded that the NCOP did not breach its duty to facilitate public involvement in relation to this statute. He accordingly dismissed the challenge relating to the Dental Technicians Amendment Act.

On the consequences of failure to comply with the duty to facilitate public involvement, Ngcobo J held that the obligation to facilitate public involvement is a material part of the law-making process. Failure to comply with it renders the resulting legislation invalid. He accordingly declared the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act invalid, but suspended the order of invalidity for a period of 18 months to enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution.

In the course of his judgment Ngcobo J dealt extensively with the importance of participatory democracy in our constitutional order and the nature of the constitutional obligation imposed on the legislature to facilitate public involvement.

He stated that our Constitution was inspired by a particular vision of a non-racial and democratic society in which government is based on the will of the people. The very first provision of the Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated.

He also stated that in the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. 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.

Moreover, he held that our constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy. The vital relationship between representative and participatory elements, which lies at the heart of the legislative function, imposes a special duty on the legislature and pre-supposes that the legislature will have considerable discretion in determining how best to achieve this balanced relationship. The ultimate question is whether there has been the degree of public involvement that is required by the Constitution.

Ngcobo J's judgment was concurred in by Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J and O'Regan J, and in a separate judgment by Sachs J. On the aspect of participatory democracy, Sachs J wrote a concurring judgment, while Yacoob J wrote in dissent. Yacoob J's dissent was concurred in by Skweyiya J, and van der Westhuizen J wrote a judgment explaining why he agreed with the dissent of Yacoob J.

In his concurring judgment, Sachs J stated that the Constitutional Assembly itself came into being as a result of prolonged and intense national dialogue, while the Constitution it finally produced owed much to an extensive countrywide process of public participation in which millions of South Africans took part. Public involvement in our country had ancient origins and continued to be a strongly creative characteristic of our democracy, in which we had developed a rich culture of imbizo, lekgotla, bosberaad and indaba. The principle of consultation and involvement had become a distinctive part of our national ethos. Democracy did not go into a deep sleep after elections, only to be kissed back to short spells of life every five years.

He added that a vibrant democracy had a qualitative and not just a quantitative dimension, so that dialogue and deliberation went hand in hand. This was part of the tolerance and civility that characterised the respect for diversity the Constitution demanded. On the facts, he supported the orders made, without finding it necessary to come to a final conclusion on whether any failure to comply with the constitutional duty to involve the public in the legislative process, must automatically and invariably invalidate all legislation that emerged.

In his dissenting judgment Yacoob J concluded that the application should be dismissed holding that:

- (a) The Constitution does not require the public involvement provision to be complied with as a pre-requisite to any legislation being validly passed;
- (b) To infer a requirement of this kind when it is not expressly provided for is to impermissibly undermine the legislature and the right to vote; and
- (c) In the circumstances, the fact that no opportunity was given for public comment in the National Council of Provinces and in most of the provinces in the process of the passing of the health Bills though regrettable is of no constitutional moment in relation either to whether the NCOP or the provincial legislatures have complied with their constitutional obligations or to whether the health Bills have been validly passed.

Van der Westhuizen J concurred in the judgment of Yacoob J on the basis that public involvement in the processes of Parliament is very important and desirable, but not a constitutional requirement for the passing of every Bill. This is indicated by the wording and structure of the Constitution, interpreted contextually and purposively and in accordance with the separation of powers principle. The requirement to facilitate public involvement is a constitutional obligation, which may be enforced by a court, but its purpose is not to result in a declaration of invalidity of specific legislation.