CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/15

In the matter between:

LAND ACCESS MOVEMENT OF SOUTH AFRICA	First Applicant
ASSOCIATION FOR RURAL ADVANCEMENT	Second Applicant
NKUZI DEVELOPMENT ASSOCIATION	Third Applicant
MODDERVLEI COMMUNAL PROPERTY ASSOCIATION	Fourth Applicant
MAKULEKE COMMUNAL PROPERTY ASSOCIATION	Fifth Applicant
POPELA COMMUNAL PROPERTY ASSOCIATION	Sixth Applicant

and

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	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 RURAL DEVELOPMENT AND LAND REFORM	Twelfth Respondent
CHIEF LAND CLAIMS COMMISSIONER	Thirteenth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourteenth Respondent
MATABANE COMMUNITY	Fifteenth Respondent
MAPHARI COMMUNITY	Sixteenth Respondent
MLUNGISI AND EZIBELENI DISADVANTAGED GROUP	Seventeenth Respondent
LADY SELBORNE CONCERNED GROUP	Eighteenth Respondent

Neutral citation:	*Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgments:	Madlanga J (unanimous)
Heard on:	16 February 2016
Decided on:	28 July 2016

ORDER

Application for the exercise of exclusive jurisdiction and direct access:

Order:

1. It is declared that Parliament failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1)(a) of the Constitution.
2. The Restitution of Land Rights Amendment Act 15 of 2014 is declared invalid.
3. The declaration of invalidity in paragraph 2 takes effect from the date of this judgment.
4. Pending the re-enactment by Parliament of an Act re-opening the period of lodgement of land claims envisaged in section 25(7) of the Constitution, the Commission on Restitution of Land Rights, represented in these proceedings by the Chief Land Claims Commissioner (Commission), is interdicted from processing in any manner whatsoever land claims lodged from 1 July 2014.
5. The interdict in paragraph 4 does not apply to the receipt and acknowledgement of receipt of land claims in terms of section 6(1)(a) of the Restitution of Land Rights Act 22 of 1994.
6. Should the processing, including referral to the Land Claims Court, of all land claims lodged by 31 December 1998 be finalised before the re-enactment of the Act referred to in paragraph 4 above, the Commission may process land claims lodged from 1 July 2014.
7. In the event that Parliament does not re-enact the Act envisaged in paragraph 4 within 24 months from the date of this order, the Chief Land Claims Commissioner must, and any other party to this application or person with a direct and substantial interest in this order may, apply to this

Court within two months after that period has elapsed for an appropriate order on the processing of land claims lodged from 1 July 2014.

8. The National Council of Provinces must pay the applicants' costs, including costs of two counsel.

JUDGMENT

MADLANGA J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mhlantla J, Nkabinde J and Zondo J concurring):

Introduction

[1] This matter concerns the painful, emotive subject of colonial and apartheid era land dispossession. A subject that – despite the democratic government's efforts at resolution through the Restitution of Land Rights Act[1] (Restitution Act) – continues to plague South Africa's politico-legal landscape. To those who personally experienced the forced removals and those who – instead of inheriting the illegitimately wrestled land – inherited the pain of loss of homes or property, the dispossessions are not merely colonial and apartheid era memories. They continue to be post-apartheid realities. And it is understandable why that should be so. At the risk of being presumptuous, here was the upshot: the ejection from homes; the forcible loss of properties; severing from kin, friends and neighbours; the wrenching of those affected from their beloved connection to place and community; immeasurable emotional and psychological trauma; and the searing bitterness of it all. Concomitant to this was an untold assault upon the dignity of those at the receiving end of this distressing treatment. The continuing post-apartheid realities of land dispossession are more so in

[1] 22 of 1994.

the case of those who are yet to enjoy the fruits of restitution or equitable redress in terms of the Restitution Act.

[2] Land claims under the Restitution Act, whose main object was the restitution of land rights or equitable redress, could be lodged only up to 31 December 1998.[2] That date came and went without all who were entitled to lodge claims having done so. At the heart of this application is the constitutional validity of the Restitution of Land Rights Amendment Act[3] (Amendment Act) which aims to re-open the window for the lodgement of land claims. The applicants' case is two-pronged. The primary challenge seeks a declaration that the Amendment Act is invalid for failure by the National Council of Provinces[4] (NCOP) and some or all of the Provincial Legislatures to facilitate adequate public participation as required by sections 72(1)(a) and 118(1)(a) of the Constitution.[5] On this, the applicants are invoking this Court's exclusive jurisdiction. Alternatively, the applicants ask us to declare that section 6(1)(g), added to the Restitution Act by the Amendment Act, is unconstitutional and invalid. In respect of the alternative challenge, the applicants seek direct access.

[3] Should this Court declare the Amendment Act or section 6(1)(g) to be constitutionally invalid, the applicants seek an 18-month suspension of the order of invalidity but also interim relief: requiring the Commission on Restitution of Land Rights (Commission) to continue to process, settle and refer to the Land Claims Court claims filed by 31 December 1998, notwithstanding that there may be claims lodged under the Amendment Act in respect of the same land; and permitting the

[2] Section 2(1)(e) of the Restitution Act previously provided that a claim for restitution had to be lodged not later than 31 December 1998.

[3] 15 of 2014.

[4] Even though it is alleged that the failure was by the NCOP, the complaint is directed at Parliament of which the NCOP is a constituent part.

[5] Section 72(1)(a) of the Constitution requires the NCOP to "facilitate public involvement in the legislative and other processes of the Council and its committees". Section 118(1)(a) imposes a corresponding obligation upon the Provincial Legislatures.

Commission to accept, but not investigate or process in any substantive manner, claims filed under the Amendment Act.

[4] The applicants base their constitutional attack upon procedural defects in the passage of the Amendment Act. They allege that Parliament failed to facilitate adequate public participation before this Act was passed. Their substantive concerns about the Amendment Act are twofold. First, they are of the view that re-opening the window for lodgement of land claims will gravely prejudice claimants who filed their claims by 31 December 1998 but whose claims remain unresolved. This is primarily due to competing claims. Under the re-opened process, new claimants would be free to claim against land that has already been claimed or awarded to existing claimants. The Amendment Act contains no "ring-fencing" provisions; where people or communities have already lodged a claim or been restored to their land, the Amendment Act does not immunise the land against claims lodged under the Amendment Act. The applicants also aver that the Commission lacks capacity, which is why there are still many claims which are yet to be finalised. If more claims are added under the Amendment Act, that will exacerbate an already intolerable situation. Second, the applicants argue that section 6(1)(g) is impermissibly vague, and thus fails to protect adequately the interests of existing claimants. The section requires the Commission to "ensure that priority is given" to claims lodged by the 31 December 1998 deadline.[6] It does not, however, elaborate what this means in practice.

[6] The applicants contend that section 6(1)(g) is impermissibly vague as: (i) the words "ensure priority is given" are capable of multiple interpretations and as the term is not defined it will be up to Executive and administrative officials to give it meaning; (ii) this leads to a likelihood of conflicting interpretations by different officials at different times with regard to different claims; and (iii) this is itself problematic as the provision has the potential to affect various rights in the Constitution including that contained in section 25(7), and it is a principle of law that legislation should give proper guidance to administrators when exercising a discretion if fundamental rights may be limited. They also allege that various organs of State have adopted different interpretations of the provision already, none of which is outright correct, as they are all plausible. Thus, the applicants argue, the provision is in conflict with the doctrine against vagueness of laws which "requires that laws must be written in a clear and accessible manner" (see *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108).

According to the applicants, the following are plausible interpretations of the words "ensure that priority is given": (a) old claims have substantive priority over new claims competing for restoration of the same land; (b) land already restored to an old claimant cannot be expropriated and restored to a new claimant; (c) all old

[5] The application has been launched by a combination of organisations with interests in land rights and agrarian reform and various Communal Property Associations (CPAs). They have cited as respondents the Chairperson of the NCOP,[7] the Speaker of the National Assembly,[8] the Speakers of each Provincial Legislature,[9] the Minister of Rural Development and Land Reform (Minister),[10] the Chief Land Claims Commissioner (Commissioner)[11] and the President of the Republic of South Africa.[12] Four other litigants applied to intervene and were joined as respondents.[13] They comprise community organisations and entities with an interest in land claims.

Jurisdiction

[6] Section 167(4)(e) of the Constitution grants this Court exclusive jurisdiction in respect of matters where it is alleged that the President or Parliament has failed to fulfil a constitutional obligation.[14] The approach to this Court on the primary

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claims must be finalised before new claims can be processed; (d) old and new claims competing for the same land must be processed simultaneously, but non-competing new claims must only be dealt with after all old claims are finalised; or (e) a competing new claimant will only be treated as an interested party in respect of a corresponding existing claim.

[7] First respondent.

[8] Second respondent.

[9] Third to eleventh respondents.

[10] Twelfth respondent.

[11] Thirteenth respondent.

[12] Fourteenth respondent.

[13] Fifteenth to eighteenth respondents.

[14] Section 167(4) provides:

> "Only the Constitutional Court may—
>
> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
>
> (c) decide applications envisaged in section 80 or 122;
>
> (d) decide on the constitutionality of any amendment to the Constitution;
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
>
> (f) certify a provincial constitution in terms of section 144."

challenge is based on this section. This Court has dealt at length with circumstances where it must exercise exclusive jurisdiction.[15] It has held that it needs to be careful not to denude the High Court and Supreme Court of Appeal of their power to make declarations of constitutional invalidity in terms of section 172(2)(a) of the Constitution.[16] More specifically to the issue at hand, *Doctors for Life* has held that a challenge that there has been a failure to fulfil the obligation contained in section 72(1)(a) falls under this Court's exclusive jurisdiction.[17] Thus I need not belabour this issue. Suffice it to say, section 72(1)(a) imposes the obligation only on the NCOP, and not Parliament as a whole.[18] In *Doctors for Life* this Court pointed out that section 42(1) of the Constitution defines Parliament as being the National Assembly and the NCOP.[19] Where either House fails to satisfy its own

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[15] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) (*SARFU I*) at para 25; *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) at para 12; *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at para 22; *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 37; *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC) (*Women's Legal Centre*) at paras 23-5; *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts*) at paras 23-4 and 131-5; and *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*EFF*) at paras 19-23. In *Doctors for Life* this is what Ngcobo J held at para 23:

> "The purpose of giving this Court exclusive jurisdiction to decide issues that have important political consequences is 'to preserve the comity between the judicial branch of government' and the other branches of government 'by ensuring that only the highest court in constitutional matters intrudes into the domain' of the other branches of government."

[16] See *SARFU I* above n 15 at para 25; *Doctors for Life* above n 15 at para 20; *Von Abo* above n 15 at para 34; *Women's Legal Centre* above n 15 at para 20; *My Vote Counts* above n 15 at para 23; and *EFF* above n 15 at para 17. In *SARFU I* at para 25 Chaskalson P held:

> "If [section 167(4)] were to be construed as applying to all questions concerning the constitutional validity of conduct of the President it would be in conflict with section 172(2)(a) which empowers the High Court and the Supreme Court of Appeal to make orders concerning the constitutional validity of any conduct of the President."

Section 172(2)(a) provides:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[17] *Doctors for Life* above n 15 at para 27.

[18] The National Assembly has its own obligation to facilitate public involvement in its legislative process under section 59(1)(a).

[19] *Doctors for Life* above n 15 at para 29.

obligation to facilitate public involvement in the process of making law,[20] Parliament as a whole has failed in its constitutional obligation.[21]

[7] I am led to the holding that this Court has exclusive jurisdiction to entertain the primary challenge.

Background

Re-opening of the land claims process

[8] In 1994 Parliament passed the Restitution Act, legislation envisaged by section 25(7) of the Constitution.[22] The Restitution Act established the Commission in order to investigate and process land claims. It also created the Land Claims Court for the resolution of disputes concerning land claims. Between the date of the coming into operation of the Restitution Act and 31 December 1998, the deadline for the lodgement of claims under this Act, about 80 000 claims were filed.

[9] In 2011 the Department of Rural Development and Land Reform (Department) held a national workshop to evaluate the impact of the land claims process. The workshop was attended by nearly 1 300 delegates, many of whom called for the re-opening of the window for the filing of claims (re-opening of claims). Later that year the Department announced that a task team was preparing a proposal for the government on the issue.

[20] Ngcobo J in *Doctors for Life* above n 15 at para 29 observes that it is important that the obligation to facilitate public involvement is thrust upon both Houses of Parliament as they represent interrelated but distinct interests in the national legislative sphere. The importance of this observation to this case will be discussed later.

[21] Id.

[22] Section 25(7) provides:

> "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

Public consultation: Departmental process

[10] In May 2013 the Minister published the first draft Restitution of Land Rights Amendment Bill (Bill) providing for the re-opening of claims. The Department then began to seek public input. First, it invited public comment on the Bill during the 30-day period following publication. Written submissions received during this period raised concerns with the Bill and the claims process in general. These included the backlog in the finalisation of claims already lodged, continuing capacity problems within the Commission and potential conflicts between traditional leaders – who sought to claim separately from communities – and the communities concerned.

[11] Second, the Department undertook a Regulatory Impact Assessment (impact assessment) on the feasibility of re-opening the claims process. The impact assessment was completed in July 2013. It estimated that approximately 397 000 valid claims would be lodged. It also noted concerns by some about the sufficiency of the time for public consultation on the Bill. Certain academics argued for the withdrawal of the Bill because the time for consultation had been too scant. Various non-governmental organisations (NGOs) suggested that more time be afforded for public comment.

Public consultation: National Assembly process

[12] The parties have explained in great detail the steps taken by the National Assembly to facilitate public consultation in the enactment of the Bill. I do not find it necessary to recount each of those steps. Parallel with the Department's processes, the National Assembly also canvassed public opinion on the re-opening of claims. There were two principal mechanisms for this: an ad hoc committee (Ad Hoc Committee) established in June 2013; and the Portfolio Committee on Rural Development and Land Reform (Portfolio Committee). The Ad Hoc Committee's purpose was to review the legacy of the Natives Land Act,[23] including whether the land claims process should be re-opened. To this end, it held a two-day

[23] 27 of 1913.

workshop with parliamentary committees, Members of Parliament and other interested people and groups in June 2013, as well as another two-day workshop in Stellenbosch. The Ad Hoc Committee issued a report of its findings in October 2013. The report raised concerns about the limited time that members of the Portfolio Committee would have to process the legislation, and also recommended that the Department work with the Commission to prioritise claims lodged by the 31 December 1998 deadline.

[13] On 15 October 2013 the Department presented the Bill to the Portfolio Committee. The Portfolio Committee initiated its public consultation process shortly thereafter. Advertisements were placed in all 11 official languages in national, provincial and regional print media, as well as on the radio, explaining the Bill and calling for submissions. In November 2013 the Portfolio Committee began a three-month public consultation tour to discuss the Bill in all the provinces. The tour delegation stopped in locations totalling 18 and, according to its report, addressed 14 000 people[24] in all. Members of the public raised a number of concerns. The issues articulated included: a desire that the re-opening of the claims process be subject to the ring-fencing of old claims;[25] concerns that traditional leaders would exploit the re-opened process to lodge claims on land that had already been restored to CPAs; and a view that the Commission lacked capacity. In January 2014 the Portfolio Committee held two days of public hearings in Parliament. In addition to some of the concerns raised before, members of the public complained about the length of time that had already elapsed to finalise outstanding old claims and corruption and maladministration at the Commission.

[14] For three days in early February 2014 the Portfolio Committee held deliberations on the Bill. On 5 February 2014 the Portfolio Committee adopted the Bill with certain amendments. One of these amendments now forms section 6(1)(g) of the Restitution Act. The National Assembly passed the Bill on 25 February 2014.

[24] The first applicant asserts that the Portfolio Committee's report inflated the number of attendees. Nothing turns on this because – as will appear later – the applicants do not challenge the National Assembly's public consultation process.

[25] That is, claims lodged by the 31 December 1998 deadline.

[15] Although the applicants aver that the National Assembly's public consultation process had certain shortcomings,[26] they accept that it was constitutionally compliant. I agree.

Public consultation: NCOP process

[16] On 26 February 2014 the Chairperson of the NCOP referred the Bill to the NCOP Select Committee on Land and Environmental Affairs (NCOP Select Committee) and the Provincial Legislatures. It was accompanied by the following "Draft Provisional Programme for the Select Committee":

Briefing of NCOP Select Committee by Department	28 February 2014
Briefing of Provincial Legislatures by Department	5-7 March 2014
Public hearings in provinces	10-14 March 2014
Negotiating mandate[27] meeting	18 March 2014
Final mandate[28] meeting	25 March 2014

[17] A few points in the timeline are worth highlighting. First, from start to finish, the provinces had less than one calendar month to process fully a complex piece of

[26] These include that: the Portfolio Committee was not provided with copies of the impact assessment until February 2014; the version of the impact assessment received by the Portfolio Committee omitted certain portions which contained suggested amendments to the Bill, which formed part of a different and later version; as a consequence the Portfolio Committee was deprived of an opportunity to consider the proposed amendments even though the later version of the impact assessment was in existence when the Portfolio Committee finally considered the Bill; there were certain defects in the public hearings themselves; and the Portfolio Committee's own report on its public consultation process was presented to the Portfolio Committee, and made available to the rest of the membership of the committee, only after the Portfolio Committee had adopted the Bill.

[27] In terms of the Mandating Procedures of Provinces Act 52 of 2008 (Mandates Act), a negotiating mandate 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."

[28] In terms of the Mandates Act, a final mandate is—

> "the conferral of authority by a provincial legislature on its provincial delegation to the NCOP to cast a vote when the relevant NCOP select committee considers a Bill or prior to voting thereon in [an ordinary sitting of the NCOP]."

legislation with profound social, economic and legal consequences for the public. The timeline gave the provinces a mere three to five calendar days to notify the public of the hearings, from the date the Provincial Legislatures were briefed[29] until the date the public hearings commenced.[30] The provinces had only eight calendar days to conduct the hearings, consider public comments and confer appropriate negotiating mandates, from the start of the hearings until the negotiating mandate meeting.[31] Although the timeline was marked "Draft Provisional", it did not function as a draft. It was actually followed by both the NCOP and Provincial Legislatures.

[18] On 28 February 2014, in accordance with the first item on the timeline, the Department presented the Bill to the NCOP Select Committee together with two other Bills.[32] At the conclusion of that meeting, the chairperson stated that the NCOP Select Committee intended to pass the Bill before the term of Parliament ended.[33] Between 4 and 7 March 2014, in accordance with the second item on the timeline, the Department presented the Bill to the Provincial Legislatures or the relevant committee of each Provincial Legislature dealing with the Bill.

[19] The third item called for public hearings in each province. The NCOP Select Committee opted to hold these hearings through the Provincial Legislatures. This was not merely a matter of convenience; the NCOP Select Committee Members were also Members of their respective Provincial Legislatures. As such, Members were in a position to participate in the hearings of their respective provinces – and were expected by the NCOP Select Committee to do so.

[29] 5-7 March 2014.

[30] 10 March 2014.

[31] 18 March 2014.

[32] These were the National Environmental Management Laws Third Amendment Bill and the National Environmental Management: Waste Amendment Bill.

[33] Because this was a general election year, Parliament would have dissolved prior to the commencement of the elections. Upon dissolution, Parliament's term would have come to an end. Following the elections, a newly constituted Parliament would be sworn in and a new parliamentary term would commence.

Public consultation: Provincial Legislature process

Eastern Cape

[20] Leading up to the public hearings, posters were displayed on the "notice boards in the towns" in the relevant districts during the week of 3-7 March 2014 inviting members of the public to attend the hearings. During that period invitations were addressed to various interested parties – including the municipal Speakers and Councillors in the relevant districts, as well as Vulamasango, an NGO representing land claimants – to attend or make written submissions. Written submissions were received from the Democratic Alliance and Legal Resources Centre. The Eastern Cape Provincial Legislature held hearings in Mthatha and Port Elizabeth on 12 March 2014 and Queenstown and East London on 13 March 2014. The legal unit of the Provincial Legislature prepared summaries of the Bill in isiXhosa, Afrikaans and English.

[21] The Mthatha hearing lasted approximately four hours, and was attended by about 180 people at an overcrowded venue. Not only was the Bill considered alongside four other bills,[34] it was the last to be presented with less than two hours remaining. Copies of the Bill were distributed in English only; neither isiXhosa nor Afrikaans translations of the Bill were available. The first respondent insists that summaries in these two languages were distributed at the hearings. Members of the public expressed concerns which included: whether there was adequate funding for the re-opening of claims; whether outstanding claims should be re-filed; and the competing and divergent interests of communities, on the one hand, and traditional leaders, on the other. The hearing was brought to a close at a time when – according to the applicants – several people still wished to speak.

[22] The Port Elizabeth hearing was attended by approximately 60 people. Those in attendance questioned the wisdom of re-opening claims when a significant number of

[34] These were the National Environmental Management Laws Third Amendment Bill, National Environmental Management: Waste Amendment Bill, National Credit Amendment Bill and Infrastructure Development Bill.

old claims remained unresolved. They also voiced concerns regarding pressure from traditional leaders who wished to increase their control over land. They queried the fact that the hearing had been held in Port Elizabeth, since most affected people would be unable to attend. Some indicated that they had learned of the hearing because they coincidentally happened to be in Port Elizabeth that day.

[23] The Queenstown hearing was attended by approximately 150 people. Attendees voiced frustration that isiXhosa translations of the Bill were unavailable, and were unhappy that the Bill was discussed only after other bills had been presented. They too expressed concern about the intentions of traditional leaders.

[24] Members of the Eastern Cape Provincial Legislature failed to attend the East London hearing. Apparently this was due to a communication breakdown.

[25] It is worth noting that at the hearing before this Court, Parliament could not explain what exactly is meant by "notice boards in the towns" where the notices of the Eastern Cape hearings are said to have been displayed. Nor could it enlighten us on who reads what has been put up on these notice boards and under what circumstances. In short, we were left in the dark as to how accessible to the public this mode of notification was.

Free State

[26] Invitations to interested people and groups were issued on 5 March 2014. The hearings were advertised in local print media on 7 March 2014. The hearings were to be held in Senekal on 10 March 2014, Ficksburg on 11 March 2014 and Phuthaditjhaba on 13 March 2014. Subsequently, all the hearings were conducted predominantly in Sesotho and translated into either English or Afrikaans, while summaries of the Bill were made available in both Sesotho and English. The Legal Resources Centre lodged written submissions on 7 March 2014.

[27] The Senekal hearing was attended by approximately 220 people. Public concerns included the need for State-funded legal assistance – if required – for both claimants and land owners, whether the State would provide certain guarantees to land owners whose properties were subject to claims and how the Bill was to deal with fraudulent claims.

[28] The Ficksburg hearing was attended by approximately 250 people. Attendees questioned whether the Department would be able to fund new claims given its budgetary constraints. They also pleaded for the speeding up of the registration of restored land.

[29] Approximately 185 people attended the Phuthaditjhaba hearing. Their concerns were similar to those raised at the Senekal and Ficksburg hearings.

Gauteng

[30] The Gauteng Provincial Legislature advertised the single hearing it was to hold in local print media on 9 and 10 March 2014. The notice also invited written submissions. These were received from various NGOs including the first applicant and the Legal Resources Centre. The hearing took place in Johannesburg on 12 March 2014. It lasted three hours. The Bill was the last of three bills discussed at the hearing.[35] Both the presentation and copies of the Bill were in English. The chairperson stated that no questions would be answered as the purpose of the hearing was only to receive comments.

[31] Members of the public demanded that the re-opening of claims should commence only after all outstanding old claims had been settled. They observed that the timing of the Bill was suspiciously close to the then upcoming elections and that the Commission engaged in "staged" and "piecemeal" restoration of claimed land. They questioned the unavailability of the Bill in indigenous languages and in braille.

[35] The other two were the National Environmental Management Amendment Bill and the National Environmental: Waste Management Amendment Bill.

KwaZulu-Natal

[32] The KwaZulu-Natal hearings were advertised on local radio, and print advertisements were placed in English and isiZulu newspapers. The hearings were to be held in Newcastle on 12 March 2014 and Pietermaritzburg on 13 March 2014. The invitations were also for submission of written comment by 13 March 2014. Submissions were lodged by both public interest legal organisations and organisations operating in the agricultural sector. It is not clear when the advertisements began to run; the extracts before the Court are dated 7 March and 10-12 March. It is telling, however, that the second applicant, an NGO that is deeply involved in land reform in KwaZulu-Natal, was unable to attend either hearing due to the short notice provided. Many community-based organisations and community members with whom the second applicant works were also unable to attend the Pietermaritzburg hearing.

[33] Based on the attendance registers, there were approximately 85 and 120 people at the Newcastle and Pietermaritzburg hearings respectively. At the Pietermaritzburg hearing, people expressed unhappiness that the Bill had not been translated into isiZulu. Many voiced dissatisfaction with the fact that their claims remained unresolved, but this was deemed irrelevant to the Bill by those running the hearing. There was loud approval by the people of a suggestion by the Legal Resources Centre that the Bill provide for the ring-fencing of old claims to protect them from competing new claims.

Limpopo

[34] Following the Limpopo Provincial Legislature's briefing session with the Department on 5 March 2014, this Legislature issued invitations to interested parties to attend a public hearing that was to be held on 14 March 2014 in Polokwane. The general public was given notice of the hearing through radio advertisements. During the week prior to the hearing, the advertisements were broadcast seven times daily on all public radio stations, and daily on community radio stations, in Sepedi, English,

Tshivenda, Xitsonga, Afrikaans and isiNdebele. Written submissions were invited from various stakeholders. These were lodged by the Legal Resources Centre, Platinum City Development Corporation (Pty) Ltd, the third applicant, various CPAs, traditional leaders, current land claimants and prospective land claimants. The Provincial Legislature arranged transport to the hearing for residents of all districts and municipalities within the province at its own cost.[36]

[35] Despite these commendable efforts at notifying the public of the hearing, many interested parties remained unaware. The third applicant, a prominent land reform NGO, only learnt of the hearing through its sister organisations. It was unable to inform the communities with which it works or arrange for their attendance at the hearing. The fourth applicant only learned of the hearing in July 2014. That was when it was contacted about the current proceedings. It thus had no opportunity to make representations. The fifth applicant learned of the hearing from the Centre for Law and Society two days before it took place. Three community members were able to attend on its behalf. The sixth applicant too had only two days' notice of the hearing. One person attended the hearing on its behalf. Numerous community members were unable to attend because they could not miss work or other commitments on such short notice.

[36] The Limpopo hearing appears to have been attended by several hundred people. According to the first to tenth respondents, "more than 500" people attended, while the third applicant estimates "about 250 to 300 participants". Those whose concerns involved outstanding land claims were not permitted to raise them inside the venue of the hearing. Instead, they were directed to a table outside to present their issues there. Of the 15 people permitted to comment within the hearing, 10 were traditional leaders who voiced their support for the Bill. Three of the remaining five objected to the Bill. At the end of the hearing, the chairperson announced that written

[36] The applicants challenge this and aver that the fifth applicant had to provide transportation to various communities – Mpeni-Nghotsa, Mahonisi, Shitaci, Mahatlani, and Duvula – although the Legislature did reimburse it afterwards.

submissions would be accepted until 17 March 2014; a mere three days later, two of which were a Saturday and Sunday. And this in Limpopo, a predominantly rural province where access to email and fax is not widespread.

Mpumalanga

[37] The Mpumalanga Provincial Legislature was briefed on the Bill by the permanent delegate to the NCOP on 5 March 2014. It scheduled three public hearings, all on 12 March 2014, in Thaba Chweu, Elukwatini and Belfast. Following the briefing, written and telephonic invitations were extended to various parties. The hearings were advertised in print media during the week of 10 March 2014. Both the invitations and advertisements requested written submissions by 13 March 2014. Submissions were lodged by the Legal Resources Centre, Centre for Law and Society and South African Local Government Association.

[38] The Thaba Chweu hearing came to an early end "because of the failure of community members to attend as a result of a last minute logistical problem". All invited guests were present.

[39] The Elukwatini hearing was attended by approximately 270 people. Copies of the Bill were distributed in English. A concern was raised that re-opening the claims process would interfere with outstanding land claims adversely.

[40] It is unclear how many people attended the Belfast hearing. People in attendance interacted "robustly" with Members of the Mpumalanga Provincial Legislature. They complained about the slow pace of restitution and sought clarity on how the re-opening would affect existing outstanding claims.

Northern Cape

[41] On 7 March 2014 the Northern Cape Provincial Legislature sent invitations to interested people and groups to attend the single public hearing that it had scheduled.

The hearing was to be held on 11 March 2014 in Douglas. Community development workers in Siyancuma Municipality were requested to distribute flyers and pamphlets advertising the hearing. These were also displayed on municipal office notice boards in Douglas, Bongani and Breipaal. The residents of Douglas, Bongani, Breipaal and Buckland were informed of the hearing by means of a loudhailer. At the hearing written submissions were called for, and lodged by the Centre for Law and Society.

[42] The hearing was attended by approximately 168 people. Summaries of the Bill in Afrikaans and isiXhosa were distributed. Interpreters were available for those unable to express themselves in Afrikaans or English. Both oral and written submissions were presented at the hearing. These included a written submission by the Centre for Law and Society that highlighted various concerns about the Bill, such as budgetary constraints upon the re-opening of claims, the challenges faced by rural communities in respect of the current restitution programme and the Department's alleged failure to honour approved claims.

[43] At the hearing before this Court, Parliament conceded that – in context – the available information meant that the flyers and pamphlets were not only distributed by Siyancuma Municipality community development workers, but were distributed within this municipality only and that Douglas, Bongani, Breipaal and Buckland are all within Siyancuma Municipality. I pause to note that the Northern Cape is South Africa's largest province in terms of land mass. It is rural and sparsely populated. Siyancuma Municipality is but one of 27 municipalities in the Northern Cape. Many communities are located a vast distance away, in areas where dirt roads and poor infrastructure may render already-remote towns even more inaccessible. I have difficulty understanding how the publicity efforts in Siyancuma Municipality could reasonably have been expected to reach the residents of these communities. Even assuming some residents were miraculously informed of the hearing, in view of the challenges I have just described, I find it unlikely that many would have been in a position to travel to Douglas on what seems to have been less than four days' notice. In any event, it is a generous assumption to even think the Siyancuma hearing was

meant to be a province-wide hearing. In truth, it appears to have been meant for the area of Siyancuma Municipality only. What of the rest of the province then? This is a mystery.

[44] Also surprising is the fact that translations of the Bill were in isiXhosa and Afrikaans only. Setswana is widely spoken in the Northern Cape.

North West

[45] The North West public hearings were advertised in the print media and community radio stations. The advertisements were issued after the North West Legislature had been briefed on the Bill by the Department on 7 March 2014. The hearings were scheduled to be held on 13 March 2014 in Ngaka Modiri Molema District, Dr Kenneth Kaunda District, Dr Ruth Segomotsi Mompati District and Bojanala District.

[46] The hearing in Ngaka Modiri Molema District was attended by approximately 200 people, the one in Dr Kenneth Kaunda District by about 172 people, the one in Dr Ruth Segomotsi Mompati District by approximately 185 and the hearing in Bojanala District by about 197. All the hearings were addressed in Setswana. Attendees suggested that the government – and not land owners – should fix the price of land, and that registration of land claims should be advertised using local radio and print media. People also expressed a strong desire to get their land back and were concerned that they had previously received wrong advice regarding the land claims process. They were optimistic that the Bill would come to their rescue.

Western Cape

[47] The Western Cape public hearing was advertised on 7 March 2014 in four provincial newspapers in English and Afrikaans. Only one hearing was scheduled; and it was to be on 12 March 2014 in Cape Town. The advertisement requested written submissions by 11 March 2014. Written submissions were received from: the

Western Cape Government: Department of the Premier; Institute for Poverty, Land and Agrarian Studies; Rural Women's Action Research Programme of the Centre for Law and Society; and the Legal Resources Centre. The hearing was attended by approximately 30 people, including Members of the Griqua Royal House and some claimant communities. It lasted a little over 90 minutes. Presentations were made by the Commission, the Legal Resources Centre, Centre for Law and Society and Institute for Poverty, Land and Agrarian Studies. In addition to the concerns expressed in other provinces about the Bill's lack of protection for existing claims and capacity problems at the Commission, attendees were frustrated by the Department's failure to honour approved claims because of perceived lobbying by traditional leaders.

Negotiating mandates

[48] Apparently following the prescription in the penultimate stage of the timeline, the NCOP Select Committee met on 18 March 2014 to consider the provinces' negotiating mandates on the Bill. As mentioned, it was the practice that NCOP Select Committee Members attended hearings conducted by Provincial Legislatures.[37] Subject to a few exceptions,[38] however, the evidence before us suggests that the NCOP Select Committee Members failed to do so. It follows that the vast majority of Members at the 18 March 2014 meeting had no personal knowledge of what had transpired at the hearings conducted by the Provincial Legislatures.

[49] Also, Members could only have been able to inform themselves of what had happened at provinces other than their own through reports from each Provincial Legislature. However, following a discussion that ensued when a Member of the Free State delegation asked for a report on the public hearings in the Eastern Cape, the NCOP Select Committee ruled that provinces were not obliged to circulate reports of their hearings. Two provinces, Free State and Gauteng, had prepared no reports. The

[37] See [19].

[38] These were Ms Ponco and Ms Qikani in the Eastern Cape and Mr Moiloa in the North West. However, Mr Moiloa did not attend the meeting on 18 March 2014 at the NCOP.

Eastern Cape, Mpumalanga and North West had prepared reports that were never shared. As a result, the remaining provinces were oblivious to the public consultation process in these five provinces. It was an absolute impossibility for the NCOP Select Committee Members to achieve a uniform understanding of public concerns across the country. This – in turn – must have limited their ability to enrich the deliberations within the NCOP.

[50] Eastern Cape's negotiating mandate included a suggestion regarding the appointment of Judges to the Land Claims Court, as well as detailed amendments proposed by the Democratic Alliance and the Legal Resources Centre. The NCOP Select Committee was unable to consider the proposed amendments because they were not distributed until after the meeting. Free State's negotiating mandate proposed the appointment of retired Judges with appropriate expertise to the Land Claims Court. KwaZulu-Natal's negotiating mandate noted the limited time for public consultation and required the KwaZulu-Natal delegation to support the Bill subject to consideration of various detailed amendments. Limpopo's negotiating mandate required its delegates to take specific concerns into account when voting, including the protection of existing claims, the objections of traditional leaders to the establishment of CPAs and a variety of proposed amendments. According to Northern Cape's negotiating mandate, the delegates had to raise specific concerns, including a request for the establishment of satellite offices in remote areas of the province to assist people in lodging claims. Finally, Western Cape's negotiating mandate described the public participation process as inadequate and stated that Western Cape would only support the Bill subject to specific amendments, including changes to the deadline and cut-off period for the re-opening.

[51] Despite the substantive nature of these issues, they were considered only in part. The proposals from Northern Cape and Limpopo were not considered. The proposals from Eastern Cape, Free State, KwaZulu-Natal and Western Cape were not accepted. Western Cape's suggested changes were noted but not voted upon, because they were not tabulated as substantive proposed amendments. I am rather perplexed

by this stance; the Mandates Act indicates that negotiating mandates "may include" amendments,[39] but does not require proposed changes to be framed as formal legislative amendments. KwaZulu-Natal was the only province to frame its suggestions this way, and each of its detailed amendments was voted down. Its delegate was given no opportunity to take comments back to the KwaZulu-Natal Provincial Legislature for further deliberation.

[52] The applicants take issue with a few other features of the process. The second applicant is adamant that the KwaZulu-Natal summary of oral submissions contained in the negotiating mandate is "a completely inaccurate reflection" of the hearing attended by its representative.[40] Likewise, the first applicant avers that the description of submissions at the public hearings is "false". I also note that the Limpopo Provincial Legislature conferred its negotiating mandate on 17 March 2014, the very same day written submissions were due from the public. This timing would have made it difficult, if not impossible, meaningfully to consider those written submissions for possible inclusion in the negotiating mandate.

Final mandates

[53] The final stage of the timeline was the NCOP Select Committee meeting on 25 March 2014 for the purpose of considering the provinces' final mandates. At the meeting, Eastern Cape, Limpopo, Mpumalanga and Northern Cape presented final mandates in favour of the Bill. North West's final mandate contained certain conditions but voted in favour of the Bill. Western Cape voted against the Bill. Free State and Gauteng presented no mandate at the meeting, but subsequently presented final mandates in favour of the Bill. KwaZulu-Natal also presented no mandate at the meeting, but subsequently voted in favour of the Bill even though its

[39] See the definition of "negotiating mandate" in the Mandates Act in n 27 above.

[40] As stated in [32] above, the second applicant was unable to attend either public hearing in KwaZulu-Natal. A representative from the Legal Resources Centre attended the Pietermaritzburg hearing on the second applicant's behalf.

amendments were not incorporated. Based on these mandates, the NCOP Select Committee recommended approval of the Bill and submitted a report to that effect.

[54] On 27 March 2014 the NCOP passed the Bill. This occurred following a motion by the NCOP Whip to suspend rule 239(1) of the NCOP Rules. This rule provides that three working days must lapse between the tabling of the NCOP Select Committee report and the consideration of a Bill. The motion was granted, and the Bill was passed under the accelerated timeline.

[55] The Bill was subsequently submitted to the President for assent. He signed it on 29 June 2014. It took effect as the Amendment Act on 1 July 2014.[41]

Facilitation of public participation

[56] Section 72(1)(a) of the Constitution imposes an obligation on the NCOP to facilitate a consultative process with the public during law making. The section provides:

> "(1) The National Council of Provinces must—
>
> (a) facilitate public involvement in the legislative and other processes of the Council and its committees."

Sections 59 and 118 impose separate but parallel obligations on the National Assembly and Provincial Legislatures respectively to facilitate public participation.

[57] It is tempting to ask why the Constitution specifically imposes this duty, as Parliament and Provincial Legislatures are elected by the people to represent them in,

[41] 1 July 2014 is the date of publication. In terms of section 81 of the Constitution—

> "[a] Bill assented to and signed by the President . . . takes effect when published or on a date determined in terms of the Act."

In this instance the Amendment Act did not indicate the date upon which it was to come into effect. Therefore its date of publication was the day it became law.

amongst others, the law making process. The answer is not far to seek. The notion is a direct enunciation that South Africa's democracy contains both representative and participatory elements. These elements are not mutually exclusive. Rather they support and buttress one another.[42] This Court has rejected the argument that the public need not participate in the legislative process as its elected representatives are speaking on the public's behalf.[43]

[58] This Court's jurisprudence deals at length with why the Constitution imposes the obligation that Parliament facilitate public participation in the legislative process. It is beneath the dignity of those entitled to be allowed to participate in the legislative process to be denied this constitutional right. In a concurring judgment in *Doctors for Life*, Sachs J took the view that "[p]ublic involvement . . . [is] of particular significance for members of groups that have been the victims of processes of historical silencing".[44] He added:

> "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. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits."[45]

[59] On whether Parliament has met the obligation of facilitating public participation, the Constitution demands that the public must be afforded a meaningful chance of participating in the legislative process.[46] In *New Clicks* Sachs J wrote:

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[42] *Doctors for Life* above n 15 at para 115; *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele*) at paras 59-60.

[43] *Matatiele* above n 42 at para 56.

[44] *Doctors for Life* above n 15 at para 234.

[45] Id.

[46] Id at para 145.

> "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day 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."[47] (Emphasis added.)

[60] So, the standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness.[48] The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue.[49] When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances,[50] as the power to determine how participation in the legislative process will be facilitated rests upon Parliament.[51] The Court must have regard to issues like time constraints and potential expense.[52] It must also be alive to the importance of the legislation in question, and its impact on the public.[53]

[61] Relevant factors that Parliament ought to consider when determining how it will involve the public in its legislative process include: the rules it has adopted for this purpose; the nature of the legislation in question; and any need for its urgent

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[47] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) (*New Clicks*) at para 630. This extract was quoted with approval by Ngcobo J in *Doctors For Life* above n 15 at para 125.

[48] *New Clicks* above n 47 at para 630; *Doctors for Life* above n 15 at paras 120, 125-6 and 146.

[49] *Doctors for Life* above n 15 at para 127. There reference was made to this Court's decision in *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) where Mokgoro J held at para 49:

> "In dealing with the issue of reasonableness, context is all important."

[50] *Doctors for Life* above n 15 at para 145.

[51] Section 70(1) of the Constitution provides:

> "The National Council of Provinces may—
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement." (Emphasis added.)

[52] *Doctors for Life* above n 15 at para 126.

[53] Id.

adoption.[54] These too bear relevance to the Courts' determination of the reasonableness of Parliament's conduct.[55]

[62] Did the NCOP act reasonably in facilitating the involvement of the public in its process of enacting the Amendment Act? I answer this by looking at the following issues: the nature and importance of the Amendment Act; the self-imposed timeline; mandates of Provincial Legislatures at the NCOP; and public participation at Provincial Legislatures.

The nature and importance of the Amendment Act

[63] The right to restitution of land is sourced from the Constitution itself.[56] The Amendment Act gives effect to this right. As I state in the introduction, the subject to which the right relates touches nerves that continue to be raw after many decades of dispossession. The importance of the right to restitution, therefore, cannot be overstated. Restitution of land rights equals restoration of dignity. The sudden availability of land – a commodity which was pie in the sky for many – also facilitates the enjoyment of other constitutional rights. Families which – because of lack of land – lived in overcrowded shelters will be afforded an opportunity to enjoy privacy.[57] This is also closely linked to the enjoyment of the right of access to housing.[58] Lack of land results in unacceptably high levels of population density.

[54] Id at para 146.

[55] Id.

[56] Section 25(7).

[57] Section 14 of the Constitution stipulates:

> "Everyone has the right to privacy, which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched."

[58] Section 26 of the Constitution states:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

This in turn does not conduce to a healthy environment. Restored land affords the recipients a wholesome environment.[59] Compensation under the amended Restitution Act is also of great significance.

[64] Axiomatically, the re-opening of the land claims process is of paramount importance and public interest. It was crucial that there be reasonable public participation in the legislative process that resulted in the enactment of the Amendment Act.

Self-imposed timeline

[65] Upon receipt of the Bill from the National Assembly, the NCOP treated it as urgent. The only reason the NCOP proffers for having done so is that Parliament had to finalise the Bill before the end of Parliament's term, which was fast approaching at the time. The NCOP adds that had the Bill not been finalised, it would have lapsed.[60]

[66] Nothing was placed before the Court indicating that – besides the desire by Parliament to finalise it before the end of term – the Bill itself was objectively urgent. In that case, why did the NCOP not allow the Bill to lapse and subsequently invoke its power to reinstate it under rule 238(1)? No cogent reason was given. It is so that the term of the "fourth Parliament"[61] was fast coming to an end and the election of new Members of Parliament had to take place. But it has not been suggested that post the elections the Bill might not have been reinstated. All of this notwithstanding, the NCOP adopted a truncated timeline for itself and Provincial Legislatures to facilitate

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Section 28(1)(c) of the Constitution provides further that in addition to the general section 26(1) right, "[e]very child has the right to . . . shelter".

[59] Section 24 of the Constitution provides:

> "Everyone has the right—
>
> (a) to an environment that is not harmful to their health or wellbeing."

[60] Rule 238(1) of the NCOP's Rules provides:

> "All Bills introduced in the [NCOP] and which have not yet been passed by the [NCOP] in terms of Rule 197, when it rises on the last sitting day in any annual session, lapse, but may be reinstated on the Order Paper during the next ensuing session by resolution of the [NCOP]."

[61] Of the five-year term democratic Parliaments, the first was elected in 1994 and the fourth in 2009.

the involvement of the public in the legislative process. This timeline is the root cause of all the deficiencies in the process. I deal with the deficiencies later.

[67] Given the gravitas of the legislation and the thoroughgoing public participation process that it warranted, the truncated timeline was inherently unreasonable. Objectively, on the terms stipulated by the timeline, it was simply impossible for the NCOP – and by extension the Provincial Legislatures – to afford the public a meaningful opportunity to participate.

[68] The NCOP attempted to justify the timeline on the basis that the period of approximately four weeks to deal with the Bill was not unusual and fell comfortably in line with its rule regulating legislative cycles. Rule 240 provides:

> "(1) All section 76 or 74(1), (2) and (3) Bills should be dealt with in a manner that will ensure that provinces have sufficient time to consider the Bill and confer mandates.
> (2) Depending on the substance of the Bill, the period may not exceed six weeks.
> (3) In the event that the substance of the Bill requires sufficient time beyond the six-week period, the cycle may be extended with the approval of the Chairperson of the Council."

[69] Although I have serious doubts that even the six weeks would have been sufficient,[62] no reason was given as to why the full six weeks was not utilised by the NCOP in respect of the Bill. All that we are aware of is the unexplained rush to be done by the end of Parliament's term.

[70] On a conspectus of all that is relevant, the adoption of the timeline was a classic breach of what was held in *Doctors for Life*, that is "[t]he timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable".[63] In drawing a timetable that includes allowing the public to participate in

[62] Something I do not have to pronounce on.

[63] *Doctors for Life* above n 15 at para 194.

the legislative process, the NCOP cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue.

Mandates of Provincial Legislatures at NCOP

[71] I highlighted[64] shortcomings in the manner in which the NCOP dealt with and considered the negotiating and final mandates of Provincial Legislatures.[65] I will not burden the judgment by repeating them. Suffice it to say 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. This deprived the process of the potential to achieve its purpose.[66] In *Moutse* this Court held that public involvement must be an opportunity capable of influencing the decision to be taken.[67]

Public participation at Provincial Legislatures

[72] The relevance of the conduct of Provincial Legislatures is that it is open to the NCOP not to conduct public hearings itself and to have the Provincial Legislatures do this instead.[68] Therefore, although later I emphasise the separateness of Provincial Legislatures from the NCOP, in this context there is commonality between the public

[64] Above at [48] to [55].

[65] These include: the failure to actually attend provincial hearings by a majority of the NCOP Select Committee Members; the failure by some to attach reports to the mandates of some provinces, and the failure by others to even produce reports of the hearings at all; the ruling that the reports need not be circulated; and the failure to properly consider – and in some cases the non-consideration of – the substantive amendments which arose from the hearings.

[66] I should not be understood to be saying that every suggestion made by the public must be adopted. See *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) where Van der Westhuizen J stated the following at para 50:

> "[B]eing involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views."

[67] *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* [2011] ZACC 27; 2011 (11) BCLR 1158 (CC) (*Moutse)* at para 62.

[68] *Doctors for Life* above n 15 at paras 159-164.

participation process at the Provincial Legislatures and the NCOP's legislative process.

[73] The conduct of the Provincial Legislatures has not been spared in the challenge. The applicants aver that – in many respects – the efforts made by the Provincial Legislatures were flawed and did not pass constitutional muster. As will be demonstrated shortly, there were indeed flaws in the facilitation of public participation by the Provincial Legislatures. Although these flaws cannot be divorced from the truncated timeframes that the Provincial Legislatures were given, it is necessary to assess whether the Provincial Legislatures' efforts were themselves adequate.

[74] As with the National Assembly and NCOP, the Constitution places an obligation, in terms of section 118, on the Provincial Legislatures to facilitate public involvement in their legislative processes.[69] This obligation is central to a representative and participatory democracy. When compared to Parliament, Provincial Legislatures are closer to, and more in touch with, the people and better placed to reach the nooks and crannies of the country. As a result of their collectively wide, but geographically focused reach and ability to penetrate even the most remote areas of our vast country, their contributions to participatory democracy cannot be overstated. Public participation facilitated by Provincial Legislatures thus enables direct, formal input by affected people into the legislative process.

[75] Three aspects regarding the public participation facilitated by the Provincial Legislatures warrant attention. The first relates to the notices issued by the various provinces to advertise the public hearings. The notices were the genesis of the process of public involvement. In *Doctors for Life* Ngcobo J had this to say about two aspects of the duty to facilitate public involvement:

[69] See [56].

> "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."[70]

[76] Amongst the measures considered important was notice of and information about the relevant legislation. A notice does not only provide details of the place, time and purpose of a public hearing but it also assists in building awareness. Without notice, the public will be denied an opportunity to participate in the legislative process. According to *Doctors for Life*:

> "Legislatures must facilitate participation at a point in the legislative process where involvement by interested members of the public would be meaningful. It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions."[71]

[77] In almost all the provinces, advertisements of the public hearings were made not more than seven days before the hearings and in others, such as Mpumalanga, only two days prior to the hearings.[72] The obvious result is that some who – had they been aware of the impending hearings – might have participated in them were deprived of that opportunity. Also, the period between the notice and the public hearings was too limited to have allowed the public to study the Bill and prepare for the hearings adequately. This is likely to have had an adverse impact on the quality of submissions to the Provincial Legislatures.

[78] I take the view that in the Eastern Cape the notice did not meet the required standard. The manner of advertisement[73] is not likely to have resulted in the notices

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[70] *Doctors for Life* above n 15 at para 129.

[71] Id at para 171.

[72] See [37]. See also [20] to [47] for deficiencies in notice periods of the hearings conducted by the Provincial Legislatures.

[73] Posters were displayed on the notice boards in the towns in the selected districts.

reaching any significant number of intended recipients. The Northern Cape process was a complete disaster. A hearing was advertised within and for one municipality.[74] This municipality, Siyancuma, in the Douglas area is in the eastern part of the Northern Cape. The farthest areas from this municipality in this very vast expanse of land are no less than 900 kilometres away. The reality is not only that people from these areas were not given notice at all, it is also that even if they had somehow become aware of the Siyancuma hearing, many would most likely have not been able to attend it.

[79] What of the quality of the public hearings themselves? The applicants raise a number of complaints about this. First, they aver that during the public hearings in several provinces, neither the Bill nor summaries of it were provided in translated versions. They also say that more than one Bill was dealt with during the public hearings, the substance of the complaint being that as a result, little time was dedicated to the Bill. Some of the complaints appear to have merit. In certain instances some of Parliament's denials seem to be bald. Based on the ultimate conclusion I reach, I do not find it necessary to determine the complaints referred to in this paragraph one way or the other.

[80] It passes more than strange that only the KwaZulu-Natal and Western Cape Provincial Legislatures voiced concerns about the timeline set by the NCOP. I would be surprised if the other seven Provincial Legislatures did not realise that the timeline was not suited for purpose. And yet all seven accepted it without demur. Provincial Legislatures are not appendages of the NCOP. They are constitutionally created entities with their own separate existence and powers. Although – as was held in *Doctors for Life* – the NCOP may facilitate the public participation process through them,[75] this in no way subordinates them to the authority of the NCOP. They do not exist to be at the beck and call of the NCOP. They too have a duty to play their part properly in affording the public an opportunity to participate in the legislative process.

[74] See [43].

[75] *Doctors for Life* above n 15 at paras 159-164.

In this context, they perform their task as an important cog in the NCOP public participation process; but they do not lose their separate identity. If a timeline received from the NCOP makes it impossible for them to perform this function well, nothing precludes them from telling the NCOP as much. This would help cause the NCOP to apply its collective mind properly to the question of the timeline, and – if need be – extend it beyond that envisaged in rule 240(3) of its Rules. Accepting the timeline as they did, the seven Provincial Legislatures acted unreasonably.

[81] Where the NCOP has decided that public hearings should take place at the Provincial Legislatures, in truth these hearings are part of the NCOP process.[76] This is so notwithstanding the fact that Provincial Legislatures have their own distinct obligation to facilitate public participation and are separate from and not mere appendages of the NCOP. Thus – in this context – any shortcomings in the processes of the Provincial Legislatures fall to be imputed to the NCOP.[77]

Conclusion

[82] For all the reasons I have given, the NCOP public participation process was unreasonable and thus constitutionally invalid. Failure by one of the Houses of Parliament to comply with a constitutional obligation amounts to failure by Parliament. The deficient conduct of the NCOP in facilitating public participation in passing the Bill taints the entire legislative process and is a lapse by Parliament as a whole. This is of particular significance where – as here – there was a heightened need for the involvement of the NCOP.[78]

[76] Id at paras 159-164.

[77] Compare id at para 165.

[78] Section 76 of the Constitution, which sets out the procedures that must be followed when considering Bills that affect the provinces, gives more weight to the position of the NCOP than does the constitutional procedure for Bills that do not affect the provinces. This Bill was designated as falling under this category by the Joint Tagging Mechanism of Parliament when it was received from the Department. Section 76(3) of the Constitution requires any bill which falls within a functional area of Schedule 4 to the Constitution to be dealt with in terms of the section 76 procedure. In this instance the Bill indeed fell under the functional area of "urban and rural development" listed in Schedule 4.

[83] This conclusion makes it unnecessary to consider the alternative prayer for a declaration of invalidity of section 6(1)(g) of the amended Restitution Act in respect of which the applicants are seeking direct access.

Remedy

[84] Section 172(1)(a) of the Constitution enjoins this Court to declare that the conduct of the NCOP and Provincial Legislatures is inconsistent with the Constitution and therefore invalid.

[85] The issue here, as in *Doctors for Life*, is that the Amendment Act has come into operation.[79] Members of the public have already taken steps in terms of it. As at the time the applicants deposed to their affidavits, the number of new applications that had been filed since the re-opening of the claims period ranged between 75 000 and 80 000.[80] That being the case, an order of invalidity that has retrospective effect will be disruptive and prejudicial to those who have filed new claims. And it should be borne in mind that when these claimants lodged the new claims, they did so in good faith believing that the Amendment Act was valid. That is not all: crucially, the invalidity of the Amendment Act is not as a result of any inherent turpitude in its character. Rather, the Act sought to vindicate the very important constitutional right guaranteed in section 25(7) of the Constitution.

[86] In the circumstances, it seems unjust to invalidate the claims that have been lodged already. Section 172(1)(b)(i) of the Constitution gives this Court a discretion to make a just and equitable order, including an order limiting the retrospective effect of the declaration of invalidity. I consider it to be just and equitable that the order of invalidity should take effect from the date of judgment. That will leave new applications already lodged when judgment is handed down intact. If the Court were

[79] *Doctors for Life* above n 15 at para 214.

[80] This means that there are already more claims filed under the re-opened period than there were claims filed under the Restitution Act. According to the Commissioner, by 31 December 1998 approximately 80 000 applications had been filed.

to declare the Amendment Act invalid without limiting the retrospective effect of the declaration, the lodged new applications would cease to exist. The new applicants' right to restitution would be extinguished with the Amendment Act because the right to restitution in section 25(7) only exists "to the extent provided by an Act of Parliament".

[87] The applicants are asking for a suspension of the declaration of invalidity for 18 months, with accompanying prayers for: a mandamus that the Commissioner[81] continues to settle or refer to the Land Claims Court all land restitution claims filed by 31 December 1998,[82] notwithstanding that a claim has been lodged under the amended

[81] In context, in these proceedings the Commissioner appears to have been cited as representing the Commission. None of the parties has taken issue with this mode of citation. For purposes of the resolution of this matter, it will be assumed that the citation is proper.

[82] In relation to settling a claim for restitution, section 42D(1) of the Restitution Act contemplates a role for the Minister. It provides:

> "If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 30 June 2019, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:
>
> (a) The award to the claimant of land, a portion of land or any other right in land: Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant,
>
> . . .
>
> (b) the payment of compensation to such claimant;
>
> (c) both an award and payment of compensation to such claimant;
>
> (d) . . .
>
> (e) the manner in which the rights awarded are to be held or the compensation is to be paid or held; or
>
> (f) such other terms and conditions as the Minister considers appropriate."

A referral to the Land Claims Court is dealt with under section 14 of the Act. Subsection (1) provides:

> "If upon completion of an investigation by the Commission in respect of specific claim—
>
> (a) the parties to any dispute arising from the claim agree in writing that it is not possible to settle the claim by mediation and negotiation;
>
> (b) the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation; or
>
> (c) . . .
>
> (d) the regional land claims commissioner is of the opinion that the claim is ready for hearing by the Court,

Restitution Act in respect of the same land;[83] the grant of permission to the Commissioner to continue accepting new applications under the amended Restitution Act; and an interdict that claims lodged under the amended Restitution Act not be investigated or processed in any manner.

[88] I am loath grant the suspension prayed for. That is so because it will have the effect of heaping more new applications on the Commissioner when there are difficulties regarding how to handle those that have been lodged already.[84] The prospective declaration of invalidity I propose means no new applications will continue being filed after judgment, which would have been the case if we were to suspend the declaration of invalidity. In a manner of speaking, all affected parties get something. First, no further new applications can be lodged, thus diminishing the number of claims filed under the impugned Act. This ameliorates the situation that troubles the applicants. Second, new applications that have already been lodged are not invalidated.

[89] In the face of the prospective order of invalidity, a question arises as to when and how the preserved new claims that compete with old claims will be considered.[85] The effect of the prospective nature of the declaration of invalidity is to keep alive the contentious section 6(1)(g) of the Restitution Act[86] insofar as the disposal of the old and preserved new claims is concerned. In terms of this section the Commission must "ensure that priority is given" to old claims. This raises all the problems that the applicants are complaining about and brings about uncertainty that may be prejudicial to claimants whose claims were lodged by 31 December 1998. Because the

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the regional land claims commissioner having jurisdiction shall certify accordingly and refer the matter to the Court."

[83] Section 13(1)(a) of the Restitution Act envisages the simultaneous consideration of competing claims, in that it provides for mediation "where there are two or more competing claims in respect of the same land". Similarly, section 13(1)(b) envisages mediation for community claims where "there are competing groups within the claimant community".

[84] See [4].

[85] See the interdict asked for by the applicants referred to in [87].

[86] For example, see the applicants' concerns regarding section 6(1)(g) in [4].

Amendment Act has been declared invalid in its entirety, I do not find it necessary to grapple with what exactly section 6(1)(g) means merely for purposes of how it should apply to old and preserved new claims. It seems to me that a just and equitable remedy is to interdict the settlement, and referral to the Land Claims Court, of all new claims, whether competing with the old or not. Our wide remedial power under section 172(1)(b) of the Constitution permits us to do so. Even though the new claims have been kept alive, the reality is that the Restitution Act under which they were lodged has been found to be invalid. The interdict is consonant with this reality. In the face of the declaration of invalidity, there cannot be much cause for complaint for keeping the new applications in abeyance. Also, the question how new claims should be dealt with whilst there are outstanding old claims is fraught with imponderables. It is best left to the Legislature to resolve.

[90] It is not inconceivable that – because of a shift in government policy or any other reason – Parliament may decide not to re-enact an amending Act, or only do so after many years. For that reason, it becomes necessary to make provision for what should become of the interdict against the processing, referral to Court or finalisation of new claims by the Commission. It seems fitting that if, when a period of 24 months elapses, Parliament shall not have passed the envisaged amending legislation, the Chief Land Claims Commissioner must be directed to approach us for appropriate relief on the settlement, and referral to the Land Claims Court of outstanding new claims. Other parties to this application or any person with a direct and substantial interest in its outcome are at liberty to seek that same relief.

Costs

[91] There is no reason why costs should not follow the result. I take the view that, although effectively Parliament as a whole has failed to fulfil a constitutional obligation, only the NCOP must pay costs. Two issues remain. First, there is the question whether it must be the NCOP only that is saddled with costs or whether the other respondents who also opposed must pay. Second, the applicants asked for costs of three counsel. Must we accede to that? Starting with the first: although the

Provincial Legislatures also failed to fulfil their constitutional obligations; although they and the President, Minister and Commissioner opposed the application; and although there might well have been a basis for mulcting the Provincial Legislatures, the President, Minister and Commissioner for costs, the primary cause of what the applicants are complaining about was the truncated process imposed by the NCOP. In the exercise of discretion, I think it proper to award costs only against the NCOP as represented before us by the Chairperson of the NCOP.

[92] The papers are voluminous.[87] But I do not consider this matter to be of such magnitude – both in terms of volume and complexity – as to warrant the award of costs of three counsel. Costs of two counsel will be awarded.

Order

[93] The following order is made:

1. It is declared that Parliament failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1)(a) of the Constitution.
2. The Restitution of Land Rights Amendment Act 15 of 2014 is declared invalid.
3. The declaration of invalidity in paragraph 2 takes effect from the date of this judgment.
4. Pending the re-enactment by Parliament of an Act re-opening the period of lodgement of land claims envisaged in section 25(7) of the Constitution, the Commission on Restitution of Land Rights, represented in these proceedings by the Chief Land Claims Commissioner (Commission), is interdicted from processing in any manner whatsoever land claims lodged from 1 July 2014.

[87] Amounting to well over 3 000 pages.

5. The interdict in paragraph 4 does not apply to the receipt and acknowledgement of receipt of land claims in terms of section 6(1)(a) of the Restitution of Land Rights Act 22 of 1994.
6. Should the processing, including referral to the Land Claims Court, of all land claims lodged by 31 December 1998 be finalised before the re-enactment of the Act referred to in paragraph 4 above, the Commission may process land claims lodged from 1 July 2014.
7. In the event that Parliament does not re-enact the Act envisaged in paragraph 4 within 24 months from the date of this order, the Chief Land Claims Commissioner must, and any other party to this application or person with a direct and substantial interest in this order may, apply to this Court within two months after that period has elapsed for an appropriate order on the processing of land claims lodged from 1 July 2014.
8. The National Council of Provinces must pay the applicants' costs, including costs of two counsel.

For the Applicants:	G Budlender SC, A Dodson SC, M Bishop, S Magardie and L Siyo instructed by the Legal Resources Centre and Webber Wentzel
For the First to Tenth Respondents:	D Potgieter SC, I Semenya SC, N Mayosi and N Mbangeni instructed by the State Attorney
For the Twelfth and Fourteenth Respondents:	J Gauntlett SC and F Pelser instructed by the State Attorney
For the Thirteenth Respondent:	M Chaskalson SC and M Majozi instructed by the State Attorney
For the Fifteenth to Eighteenth Respondents:	C R Jansen SC and V Mtsweni instructed by Lawyers for Human Rights