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# Dispute Resolution ALERT

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Public participation during the legislative process is the essence of constitutional democracy and is entrenched in the Constitution of the Republic of South Africa, 1996. Public participation encourages meaningful input into the decision-making process and is premised on the belief that those who are affected by a decision have the right to be involved in the decision-making process.



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## A closer look at public participation during the legislative process

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At times, the decision-making process can take years, as various amendments are made to a bill. The issue of whether Parliament is obliged to facilitate public participation when a bill is amended during the decision-making process was considered by the Constitutional Court in the matter of *South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others* (CCT 240/22) [2023] ZACC 18.

### Facts

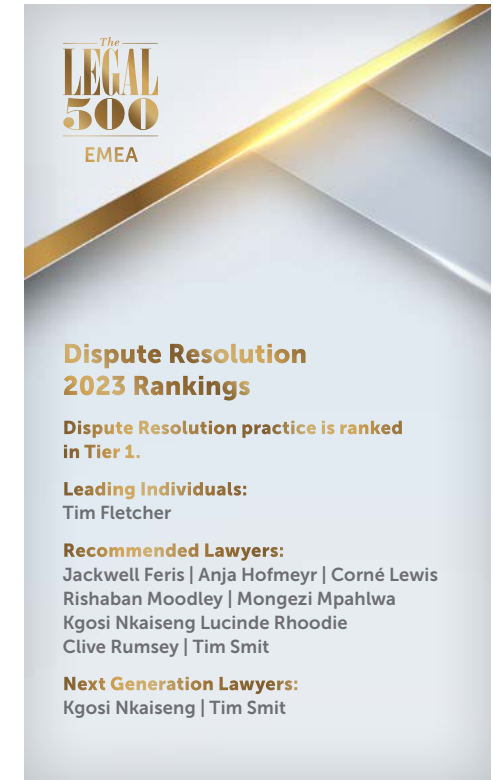
The facts of the matter are as follows: on 16 September 2015, Cabinet approved the National Environmental Management Laws Amendment Bill (Bill). The Bill was published in the Government Gazette inviting members of the public to provide their comments on the Bill. The Bill proposed various amendments to the National Environmental Management: Waste Act 59 of 2008 (Waste Act), including the introduction of a definition of "waste". The public was given until 30 November 2015 to provide the Minister of Forestry, Fisheries and the Environment, with their comments on the Bill.

Thereafter, the Bill was introduced into the National Assembly on 23 May 2017 and then referred to the Portfolio Committee on Environmental Affairs.

On 24 April 2018, the National Council of Provinces (NCOP) held public hearings to provide members of the public with the opportunity to make oral representations on the Bill. The Bill underwent numerous amendments which resulted in several versions of the Bill being created. In particular, the version "D" of the Bill introduced a different definition of "waste" than the definition proposed in the original Bill.

On 27 November 2018, the "D" version of the Bill was passed by the National Assembly and transmitted to the NCOP for concurrence. The NCOP Select Committee convened a meeting which resulted in proposed amendments to the "D" version of the Bill. One of the proposed amendments was a new definition of "waste".

Thereafter and on 14 December 2021, the "F" version of the Bill was passed by the NCOP. No public participation



## A closer look at public participation during the legislative process

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took place regarding the “F” version of the Bill and on 11 March 2023, the Bill was passed by both houses of Parliament and sent to the President for assent.

The South African Iron and Steel Institute and others (applicants) instituted an application to declare that Parliament failed to discharge its constitutional duty to facilitate public participation during the legislative process. The applicants argued that the amended definition of “waste” was introduced long after the previous versions of the Bill had been published for public comment, no public hearings were held in relation to the amended definition of “waste”, and these amendments were material as they had significant consequences.

In response, the Speaker of the National Assembly and the Chairperson of the NCOP (respondents) contended that the Bill was enacted by Parliament following a comprehensive public involvement process prior to the passage of the Waste Act. They further contended that the definition of “waste” is a dynamic issue which was

subject to extensive debate with the relevant industry stakeholders prior to the introduction of the Waste Act. Accordingly, they argued that the public involvement process that Parliament followed was in line with the relevant parliamentary rules and procedures.

In further explaining their position, the respondents argued that the provisions of the Constitution do not prescribe what public participation should entail and that Parliament is afforded a discretion in setting its own public involvement process.

### Findings

In considering these arguments, the Constitutional Court explained that:

*“... parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion.”*

The court then stated that the materiality of the amendments made by Parliament to the Bill presented a new way of dealing with and defining waste. The court considered that the effect of the amendments of the definition of waste was that various products which were never regulated as waste before would now be subject to the onerous requirements of the Waste Act. The effect of this had significant consequences, including new regulatory requirements which bore cost implications. As such, The court held that the respondents had a duty to facilitate public participation on the amendments following the original Bill.

In conclusion, Parliament’s constitutional obligations to facilitate public participation must be reasonable and fair in the circumstances. A bill can have far-reaching effects and any material amendments to it during the decision-making process must involve the public otherwise it cannot be reasonable by any measure.

**Neha Dhana**

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