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"This case is about the significance of participatory democracy for millions of South Africans who for the most part live away from the centres of power, in rural areas and some of the poorest parts of our country."



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Traditional Khoi-San Leadership Act: The importance of meaningful public participation during the law-making process

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Recently the Constitutional Court (CC) handed down its judgment in the matter of *Mogale and Others v the Speaker of the National Assembly and Others (CCT 73/22) [2023] ZACC 14*. At the heart of this case was the question; whether the National Assembly and the National Council of Provinces, together with the provincial legislatures, failed to fulfil their constitutional mandate to reasonably facilitate public participation in the passing of the Traditional Khoi-San Leadership Act 3 of 2019 (TKLA). This is an important question, as failing to comply with the constitutional requirement to facilitate public participation renders legislation invalid. The applicants argued that they had so failed and that the TKLA should accordingly be declared unconstitutional and invalid. In a decision of profound consequence not only for those affected by the legislation, but for the very principle of participatory democracy, the CC ultimately agreed with the applicants and struck down the legislation.

The professed purpose of the TKLA is to address some of the failings of the previous Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). Many of these failings were highlighted by a high-level panel investigation, led by former President Kgalema Motlante, which noted with concern that the TLGFA denied people living under the authority of traditional leaders several of their constitutional rights. As was stressed by the CC the TKLA is legislation "of immense significance impacting the lives of millions of South Africans". The importance of the legislation loomed large in the decision of the CC.

The content of the obligation to facilitate public participation

The National Assembly, National Council of Provinces and provincial legislatures all have a constitutional obligation to facilitate public participation in terms of the Constitution. These obligations are contained, respectively, in sections 59 (1)(a), 72 (1)(a) and 118(1)(a) of the Constitution.



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In determining the content of this obligation, the CC noted that it has established a high standard for public participation through its jurisprudence and that Parliament and the provincial legislatures are regulated by their own standards by way of the Public Participation Framework and the Practical Guide for Members of Parliament and Provincial Legislatures.

Key to the assessment is whether the process Parliament embarked on was reasonable. While Parliament has the discretion to choose which process it adopts to effect public participation, the court held that the process must ensure that *"a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say"*. A reasonable opportunity, it explained, must be an opportunity with the potential to influence a law maker's decision – if public involvement does not give the public an opportunity to affect Parliament's deliberations on legislation, then the process cannot

be deemed reasonable. The public involvement process must give the public a meaningful opportunity to influence Parliament and Parliament must take account of the public's views. After all, the very purpose of public participation is to act as a safeguard to prevent the interests of affected persons from being ignored or misrepresented – this is especially important in light of our country's colonial past, which sought to disregard the views of the majority.

Factors to be considered in determining reasonableness

The CC held that there are three factors that should be considered in determining whether the process adopted by Parliament in relation to public participation was reasonable, namely, what Parliament has itself determined is reasonable; the importance of the legislation and its impact on the public; and time constraints in relation to the passing of the particular legislation and the potential expense.

As to the first, the CC noted that in terms of Parliament's guiding documents, a pre-hearing workshop must be held with stakeholders in order to build effective communication and awareness programmes that will ensure communities are mobilized and that meetings are convened. Summaries of the bill must also be translated into at least three languages spoken in a particular province and invitations must be sent at least five weeks, but not less than seven days, before a hearing.

In determining the significance of the legislation, the court noted that all parties agreed that the TKLA is a piece of legislation that is of immense importance – the non-recognition of the Khoi and San communities and their leaders in the TLGFA poses a threat to social cohesion and nation building. It was therefore an important factor that the TKLA seeks to recognise these communities and their leaders, despite some of the provisions of the TKLA



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being prima facie discriminatory. The CC emphasised that the TKLA concerns controversial and complicated customary law matters, which will have a direct impact on the lived realities of millions in South Africa – its significance therefore informs what is required of Parliament when consulting the public. Parliament and the provincial legislatures were therefore required to consult with members of the public **thoroughly and carefully**. *“This case is about their ability to participate in the making of law that governs virtually every aspect of their daily lives, including access to land, basic services and rights to the benefits of the land upon which they live.”* The TKLA therefore constitutes legislation that by its nature requires extensive public consultation.

Finally, in relation to the application of the third factor, the CC found that there was no evidence which demonstrated that Parliament was required to pass the Traditional Khoi-San Leadership Bill (TKLB) within a specific amount of time. There was also no evidence proffered in support

of the state’s argument that ensuring extensive public consultation was impossible due to limited resources being available. The CC held that where it is alleged that there is a lack of available resources, evidence to support this claim must be put up – this was not done in the present case. Further, it held that even where a claim of limited resources is made out, it does not excuse the failure of Parliament and the provincial legislatures to meet the standard of public participation set by the court and Parliament, especially where such steps would not have borne a significant cost.

Ultimately, in assessing the adequacy of the public participation process adopted in this instance the CC highlighted three concerns:

1. There were deficiencies which prevented adequate preparation for the hearings:
 - There was insufficient notice given to community members for the hearings: notice was given sporadically and not in the same manner across the country.
 - There was a lack of pre-hearing education: both the National Assembly and National Council of Provinces failed to conduct pre-hearing education.
 - The hearings were not accessible to all: certain hearings were held far from where the communities resided, with certain provinces only holding one hearing.
2. There were deficiencies preventing participation in public hearings:
 - At many of the hearings, no copies of the TKLB were provided. Where they were provided, they were seldom translated into languages spoken by the communities. There were also translation issues at many of the hearings.
 - Leaders were prioritised and certain members of the public were not allowed to speak or were cut short while making their submissions.



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3. There were deficiencies preventing the public's views from being conveyed:

- The details of the submissions made were not considered by the select committee in its final meeting before the tabling of final mandates.
- While certain provinces called for further written submissions, due to lack of publication and severe time constraints, submissions were not received.
- The manner in which the public hearings were recorded and reported was inaccurate and incomplete.

In its final collective assessment, the CC held that *"the deficiencies which occurred at the different stages of the public participation process are numerous and material"*. Considering these deficiencies,

the court further held that considering the significance of the TKLA and its impact on traditional communities; the high standard Parliament has set for itself; the lack of urgency to pass the Bill ; and Parliament's failure to afford members of the public a meaningful opportunity to be heard - it was clear that Parliament and the provincial legislatures failed to fulfil their constitutional obligation to reasonably facilitate public involvement. It accordingly upheld the application and declared that the TKLA was adopted in a manner, inconsistent with the Constitution and is therefore invalid. The order of invalidity was suspended for a period of 24 months to enable Parliament to re-enact the statute in a manner that is consistent with the Constitution or to pass another statute in a manner that is consistent with the Constitution.

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