

Honorable Mr M.S Chabane MP
Chairperson of the Portfolio Committee of Home Affairs

and to

Mr E. Mathonsi
Portfolio Committee Secretary

and to

Honorable Minister Dr Aaron Motsoaledi

Email: Electoralact1@parliament.gov.za

11 April 2022

Dear Honourable Member Chabane,

We refer to the recent public participation process your committee undertook regarding the Electoral Amendment Bill (B1- 2022) in the nine provinces from 7 March 2022 to 23rd March 2022.

We hereby submit as the undersigned signatories that the process was flawed for the following reasons.

Sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution place a constitutional duty on the National Assembly, the National Council of Provinces and the provincial legislatures respectively to facilitate public participation when executing their legislative processes. Whilst these legislative bodies have a broad discretion in determining what processes and procedures will be utilised to facilitate public involvement, the Constitutional Court (CC) over the years has developed tests and principles in order to determine whether the modes of operation adopted by the legislative bodies are constitutionally compliant and truly constitute meaningful participation.

In *Doctors for Life International v Speaker of the National Assembly*, the CC succinctly explains this duty by stating that “*what is ultimately important is that the Legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process*”. The CC distilled two aspects of the duty to facilitate public participation. The first is the duty to provide meaningful opportunities for public participation in the law-making process and the second is to take measures to ensure that people can take advantage of the opportunities provided. The public participation process should encapsulate providing information and building awareness, with a view to partnering in decision-making.

Considering these established principles, we write with grave concern that there has been a failure to meet these constitutional standards in the public participation process

concerning the Electoral Amendment Bill. One South Africa attended these public hearings across the country both to make oral submissions as well as to act as a monitoring group, to ensure that South Africans were afforded a meaningful opportunity to participate in what is arguably the most important piece of legislation in our democratic dispensation. Much to our dismay, we observed that this process was flawed and that there were serious issues in the process that jeopardised the meaningfulness of the process. To that effect, we note the following issues:

1. The legislatures failed to properly educate the public on the Amendment Bill and the purpose of the public participation process. In *Doctors for Life International*, the CC directed that:

“Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding to achieve meaningful involvement by ordinary citizens.”

It is evident that Parliament and the provincial legislatures have failed in their duty to educate the public on the import of the Bill as well as the purpose of the public’s participation. The most glaring example of this is that many people have made submissions in favour of or against the inclusion of independent candidates. These submissions were philosophical in nature and largely referenced people’s experiences, positive and negative, in local government and some idealised what independents could achieve in national government to counteract the shenanigans of party politics in Parliament.

Participants clearly did not understand that the CC had already made a ruling to include independent candidates in our electoral system and that the purpose of these hearings was to decide on a system that would best incorporate independent candidates into our electoral system. Instead of participants picking between a constituency-based system (as proposed in the Lekota Bill) versus a proportional representation system (in the Amendment Bill), participants are two years behind the curve and still debating the inclusion of independent candidates as a concept.

The Committee, as a throwaway line, also said that people could express a choice between the minority and majority views expressed in the MAC report. This added absolutely no value to the discussion as firstly, most South Africans do not know what the MAC Report is and, secondly, the Committee failed to provide the public and participants with the MAC Report before or at the hearings. To expect ordinary South Africans to express a view on a high-level report that was commissioned for the benefit of the Minister and the Committee with no education on the options, is not only unreasonable, but also incredibly confusing – the antithesis of the CC’s requirement that they “*provide meaningful opportunities for public participation in the law-making process*”.

This public participation process was about electoral systems and the question that should have been put forward was whether the public wanted a constituency-based system (Lekota Bill) or a proportional representation system (Amendment Bill) in order to facilitate the integration of independent candidates.

Because of the lack of public education, large parts of the data provided in these hearings is totally inconsequential and unhelpful to the committee members who need to report back to Parliament.

2. The Committee failed to give adequate notice to the public before the hearings.

In *Democratic Alliance v eThekweni Municipality*, the Supreme Court of Appeal (SCA) held that the Council had not complied with its own policy and that the seven-day notice period provided to the public to make written submissions was wholly inadequate, as there was no urgency for the decision to be made. The SCA noted that common sense dictates that where there is no immediate urgency, members of the public should be afforded a reasonable time period to submit *inter alia* comments and objections.

Although the above findings by the SCA are in respect of notice periods for written submissions, the overriding principle that comes forth from this dictum is that notice periods provided for public participation should be reasonable, adequate and in proportion to the urgency of the circumstances at hand.

The CC in *Doctors for Life* also held that even where matters are urgent, committees should not be too hasty to cut down on time periods for public involvement. As Ngcobo J expresses, “*The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable*”.

In *Moutse Demarcation Forum v President of the Republic of South Africa* the Court held that:

“For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made”.

In *Doctors for Life* the CC held in relation to notice:

“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”.

Two principles may be deduced from the above statements. The first is that the

interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken.

On the first score, the fact that the Committee gave notice to the public on 3 March 2022 that public hearings for the Executive Bill would commence on 7 March 2022 (a mere four days' notice) is unreasonable and inadequate in that, although the deadline for finalisation of the Executive Bill is looming, by making the notice period so short, the Committee was hindering the public participation process in a manner disproportionate to the seriousness of the circumstances.

It is further concerning that Parliament has resolved to apply to the CC for an application for an extension for the deadline. How can there be an application for an extension, yet the public participation process was so rushed?

On the second score, the fact that the hearings are taking place merely 3 months before the deadline is concerning, because Parliament was given an entire 2 years to legislate. How much impact can a public participation process have on a bill that is due in a few months? Negative inferences can be drawn from the timing of the process, such as that the Committee has already decided on a bill and that this process was merely to rubberstamp that choice; or that Parliament will choose the easiest and simplest bill to meet deadlines. Both outcomes are undesirable in a participatory and representative democracy.

We also note that there were little to no advertisements made online, on social media, local radio stations, newspapers or national television stations regarding the public hearings. This further flies in the face of adequate notice in order to facilitate meaningful public participation.

3. The legislatures acted unreasonably

The legislature has the duty to act reasonably in executing its duty to facilitate public participation and that standard must be applied in relation to measuring the extent of compliance with the duty to facilitate public participation on the legislature.

The CC has held that reasonableness will be judged by factors including:

“The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement’.

The test set is whether the legislature acted reasonably in discharging the duty to

facilitate public involvement. On the balance of the facts presented, we do not believe that the legislatures have acted in a manner that is reasonable.

Therefore, we are of the opinion that the public participation process was flawed in numerous respects.

We hereby request the Committee to, within 14 days, advise us on how it intends to remedy the public participation process in respect of the Electoral Amendment Bill.

We also hereby request that you advise us on the status of the condonation application to the Constitutional Court as resolved by your committee and how this will impact the process going forward given that there are only 60 days left until the expiry date set by the Constitutional Court.

Yours sincerely,

Princess Chantal Revell (Applicant, *New Nation Movement*)

One South Africa Movement

Independent Candidate Association

Africa School Of Governance

Outa

Devoted Citizens Movement

Righteous Remnant Rulers

Ngwathe Residents Association

Knysna Independents Movement

Cederberg Eerste

The Independents