CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 240/22

In the matter between:

SOUTH AFRICAN IRON AND STEEL INSTITUTE	First Applicant
FERTILIZER ASSOCIATION OF SOUTHERN AFRICA	Second Applicant
ARCELORMITTAL SOUTH AFRICA LIMITED	Third Applicant
H PISTORIUS & KIE PROPRIETARY LIMITED	Fourth Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Fifth Respondent
SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE	Sixth Respondent
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Seventh Respondent
SPEAKER OF THE KWAZULU-NATAL PROVINCIAL LEGISLATURE	Eighth Respondent

SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE Ninth Respondent

SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE Tenth Respondent

SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE Eleventh Respondent

SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE Twelfth Respondent

SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE Thirteenth Respondent

Neutral citation: *South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others* [2023] ZACC 18

Coram: Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J

Judgment: Mathopo J (unanimous)

Heard on: 21 February 2023

Decided on: 26 June 2023

Summary: [National Environmental Management Laws Amendment Act 2 of 2022] — [sections 59(1)(a) and 72(1)(a) the Constitution] — [constitutional obligation to facilitate public involvement] — [amended definition of "waste"] — [declaration of invalidity]

ORDER

On application for direct access to the Constitutional Court:

1. It is declared that Parliament has failed to comply with its constitutional obligation to facilitate public involvement in terms of sections 59(1)(a) and 72(1)(a) the Constitution in respect of the following provisions of the National Environmental Management Laws Amendment Act 2 of 2022:
   a. The amended definition of "waste" in section 61(k);
   b. The new definition of "commercial value" in section 61(c);
   c. The new definition of "trade in" in section 61(j); and
   d. The transitional provision in section 88.
2. The said provisions are accordingly declared invalid and unconstitutional.
3. The first and second respondents are directed, jointly and severally, to pay the applicants' costs, including the costs of two counsel.

JUDGMENT

MATHOPO J (Maya DCJ, Kollapen J, Madlanga J, Majiedt J Makgoka AJ, Potterill AJ, Rogers J and Theron J concurring):

Introduction

[1] This is an application invoking this Court's exclusive jurisdiction in terms of section 167(4)(e) of the Constitution.[1] It concerns an alleged failure by Parliament to comply with its constitutional obligations to facilitate public involvement, in breach of sections 59(1)(a) and 72(1)(a) of the Constitution.[2] The constitutional challenge is directed at specific provisions of the National Environmental Management Laws

[1] This section provides that "[o]nly the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation".

[2]Section 59(1)(a) provides that the National Assembly (NA) must facilitate public involvement in the legislative and other processes of the NA and its committees. Sections 72(1)(a) and 118(1)(a) contain similar provisions relating to the National Council of Provinces (NCOP) and the Provincial Legislatures.

Amendment Act[3] (NEMLA Act) that amend the definition of "waste" in the National Environmental Management: Waste Act[4] (Waste Act) and insert other related provisions into the Waste Act. The NEMLA Bill was assented to on 24 June 2022 but has not yet been brought into operation.

[2] The central issue in this case is whether material amendments to a Bill without further public involvement passes constitutional muster. There are two aspects that must be addressed: first, whether the amendments are material, and second, whether these amendments triggered the need for further public involvement.

Parties

[3] The first applicant is the South African Iron and Steel Institute (SAISI). SAISI represents the collective interests of the South African primary steel industry. Its members include three carbon steel producers and South Africa's only stainless-steel producer. One of its members is ArcelorMittal South Africa Limited (AMSA), the third applicant in this matter.

[4] The second applicant is the Fertilizer Association of Southern Africa (FERTASA). FERTASA represents the fertilizer industry in Southern Africa with its members producing, trading, blending and distributing fertilizer products across the region. Through FERTASA, the applicants wish to be heard and to call for public participation in respect of the impugned amendments.

[5] The first respondent is the Speaker of the National Assembly (NA), who is elected in terms of section 52 of the Constitution. The second respondent is the Chairperson of the National Council of Provinces (NCOP), who is elected in terms of section 64 of the Constitution. The third respondent is the Minister of Forestry, Fisheries and the Environment (Minister), who is the national executive responsible for

[3] 2 of 2022.

[4] 59 of 2008.

the implementation of the legislation in issue. The fourth respondent is the President of the Republic of South Africa (President) cited in his official capacity as the head of the national executive. The fifth to the thirteenth respondents are cited in their official capacities as Speakers of the Provincial Legislatures across the country. Only the first and second respondents oppose the application. The Minister, while not opposing, has filed an explanatory affidavit.

Background

[6] The Waste Act is environmental legislation, falling within the ambit of the National Environmental Management Act. The Waste Act establishes a regulatory regime governing the management of waste. The pre-amendment (that is, the current) definition of "waste" in the Waste Act reads:

> "(a) any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of, by the holder of that substance, material or object, whether or not such substance, material or object can be re-used, recycled or recovered and includes all wastes as defined in Schedule 3 to this Act;
>
> (b) any other substance, material or object that is not included in Schedule 3 that may be defined as a waste by the Minister by notice in the Gazette,
>
> but any waste or portion of waste, referred to in paragraphs (a) and (b) ceases to be waste—
>
> (i) once an application for its re-use, recycling or recovery has been approved or, after such approval, once it is, or has been re-used, recycled or recovered;
>
> (ii) where approval is not required, once a waste is, or has been re-used, recycled or recovered; or
>
> (iii) where the Minister has, in terms of section 74, exempted any waste or a portion of waste generated by a particular process from the definition of waste; or
>
> (iv) where the Minister has, in the prescribed manner, excluded any waste stream or a portion of waste stream for the definition of waste."

[7] On 16 September 2015, the National Environmental Management Laws Amendment Bill (Bill) was approved by Cabinet. On 13 October 2015, the Minister published a notice in the *Government Gazette* in which he invited public comment on the Bill. The closing date for public comment was 30 November 2015. This version of the Bill proposed to insert the following new definition of "waste" into the Waste Act (deletions from and additions to the existing definition are shown in strike-out text and underlining respectively):

> "(a) any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of, by the holder of that substance, material or object, whether or not such substance, material or object can be re-used, recycled or recovered and includes all ~~wastes as defined~~ waste which emanates from the sources in Schedule 3 to this Act; or
>
> (b) any other substance, material or object that is not included in Schedule 3 that may be defined as a waste by the Minister by notice in the Gazette,
>
> but any waste or portion of waste, referred to in paragraphs (a) and (b), ceases to be a waste—
>
> (i) once an application for its reuse, recycling or recovery has been approved ~~or, after such approval, once it is, or has been reused, recycled or recovered~~ and the waste or portion of waste is re-used, recycled or recovered in accordance with the conditions in the approval;
>
> (ii) where approval is not required, once a waste is, or has been reused, recycled or recovered;
>
> (iii) where the Minister has, in terms of section 74, exempted any waste or a portion of waste generated by a particular process from the definition of waste; or
>
> (iv) where the Minister has, in the prescribed manner, excluded any waste stream or a portion of a waste stream from the definition of waste."

[8] On 23 May 2017, the Bill was introduced in the NA. This version of the Bill contained non-material changes to the definition of "waste" published in October 2015.

Thereafter, the Bill was referred to the Portfolio Committee on Environmental Affairs (Portfolio Committee).

[9] On 24 April 2018, public hearings were held where comments and representations were made by a range of stakeholders. The Portfolio Committee proceeded to prepare a "B" version of the Bill, reflecting its proposed amendments. Again, the proposed amendments did not materially change the scope of "waste" from the previous version. On 8 November 2018, the Portfolio Committee considered and adopted the Bill with amendments. These amendments, which were unrelated to the definition of "waste", constituted the "D" version of the NEMLA Bill. The "D" version contained the following definition of "waste" (deletions from and additions to the existing definition are again shown in strike-out text and underlining):

> "(a) any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of, by the holder of that substance, material or object, whether or not such substance, material or object can be reused, recycled or recovered ~~and includes all wastes as defined in Schedule 3 to this Act~~; or
>
> (b) any other substance, material or object ~~that is not included in Schedule 3~~ that may be defined as a waste by the Minister by notice in the Gazette,
>
> but any waste or portion of waste, referred to in paragraphs (a) and (b), ceases to be a waste—
>
> (i) once an application for its reuse, recycling or recovery has been approved ~~or, after such approval, once it is, or has been reused, recycled or recovered~~ and the waste or portion of waste is re-used, recycled or recovered in accordance with the conditions in the approval;
>
> (ii) where approval is not required, once a waste is, or has been reused, recycled or recovered; or
>
> ~~(iii) where the Minister has, in terms of section 74, exempted any waste or a portion of waste generated by a particular process from the definition of waste; or~~
>
> (~~iv~~) where the Minister has, in the prescribed manner, excluded any waste stream or a portion of a waste stream from the definition of waste".

[10] On 27 November 2018, the "D" version of the NEMLA Bill was passed by the NA and transmitted to the NCOP for concurrence. A period of inactivity then followed, resulting in the lapse of the NEMLA Bill in terms of the NA Rules in May 2019. The Bill was subsequently revived by the NCOP on 17 October 2019.

[11] On 17 April 2020, the Supreme Court of Appeal handed down judgment in the *AMSA*.[5] The pre-amendment (that is, existing) definition of waste was considered in detail in this judgment. One of the primary issues was whether the pre-amendment definition of "waste" applied to Basic Oxygen Furnace slag (BOF slag), an important by-product of the steel-making process.[6] BOF slag has several commercial uses, primarily in the road construction and agricultural sectors. In the agricultural sector, it is used to condition soils and is specifically registered as a product in terms of the Fertilizers Farm Feeds, Agricultural Remedies and Stock Remedies Act.[7]

[12] There, AMSA argued that BOF slag, at the point of sale and dispatch to third parties, is not "waste" as it is not "unwanted, rejected, abandoned, discarded or disposed of". Both the High Court and the Supreme Court of Appeal agreed with AMSA's interpretation. The Supreme Court of Appeal held that the existing definition of waste is "clear and unequivocal". "On a fair reading", the Supreme Court of Appeal held, "it becomes readily apparent that any substance, material or object that is not 'unwanted, rejected, abandoned, discarded or disposed of' does not fall within the ambit of the definition". The Court further held: "any substance, material or object that has been recycled or recovered. . . ceases to be waste once recycled or re-used".[8]

[13] The Supreme Court of Appeal confirmed that finished products, by-products and co products of manufacturing processes, which a manufacturer intends to sell to

[5] *Minister of Environmental Affairs v ArcelorMittal South Africa Limited* [2020] ZASCA 40.

[6] Id at para 2.

[7] 36 of 1947.

[8] *AMSA* above n 5 at para 41.

customers, are not "waste". The Department of Environmental Affairs (Department) chose not to appeal the *AMSA* judgment.

[14] From June 2020 onwards, public participation hearings were conducted in the provinces in respect of the "D" version of the Bill. The definition of "waste" in this version of the Bill remained fundamentally unaltered. On 8 October 2020, the Gauteng Provincial Legislature finalised its negotiating mandate in respect of the "D" version of the Bill. This mandate recorded that, based on the ongoing discussions on the definition of waste, "the definition should be simple and unambiguous". It went on to state that the *AMSA* judgment —

> "points to the need for the definition to allow for rational, risk-based beneficiation of waste without the need for any waste management licence or compliance with the National Environmental Management: Waste Act, as the material in question would not be considered a waste."

[15] In June 2021, the NCOP Select Committee convened a virtual meeting to consider the mandates from the Provincial Legislatures. This was not a public participation meeting. In response to a proposal from the Gauteng Provincial Legislature's delegates that the definition of "waste" be simplified, the Department instead offered an entirely new definition. The new definition of "waste" was as follows (again, deletions from and additions to the existing definition are shown in strike-out text and underlining):

> "~~(*a*) any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of, by the holder of that substance, material or object, whether or not such substance, material or object can be reused, recycled or recovered and includes all wastes as defined in Schedule 3 to this Act; or~~
>
> (a) any substance, material or object –
>
> that the generator of that substance, material or object has no further use for within its own processes, whether or not it has any commercial value for the

generator, but which can be re-used, recycled, recovered and traded in by any person; or

(i) that is rejected, abandoned, discarded or disposed of, either temporary or permanently, or is intended to be discarded or disposed of by the generator of that substance, material or object, regardless of whether or not that substance, material or object has any commercial value for the generator or can be re-used, recycled, recovered or traded in by any person; or

(b) any other substance, material or object that is not included in Schedule 3 that may be defined as a waste by the Minister by notice in the Gazette,

but any waste or portion of waste, referred to in paragraphs (a) and (b), ceases to be a waste—

(aa) once it is re-used, recycled or recovered or traded in by the holder of that waste or portion of waste in accordance with a conditions stipulated in a valid waste management licence, where applicable, or in accordance with and applicable law or standard made in terms of this Act;

(bb) where the Minister has, in the prescribed manner, excluded the holder of any waste stream or a portion of a waste stream from the definition of waste, enabling the holder thereof to trade in the excluded waste stream or portion of the excluded waste stream, provided that the holder has satisfied the requirements of proving the environmentally safe use of the waste stream or portion of waste stream by it or any other person and committed to provide the Minister with annual reports of the use thereof.

~~(i) once an application for its reuse, recycling or recovery has been approved or, after such approval, once it is, or has been reused, recycled or recovered;~~

~~(ii) where approval is not required, once a waste is, or has been reused, recycled or recovered;~~

~~(iii) where the Minister has, in terms of section 74, exempted any waste or a portion of waste generated by a particular process from the definition of waste; or~~

~~(iv) where the Minister has, in the prescribed manner, excluded any waste stream or a portion of a waste stream from the definition of waste.”~~

[16] The amended definition included any substance for which the manufacturer had no further use within its own processes, whether or not the substance had commercial value. The phraseology, "unwanted, rejected, abandoned, discarded or disposed of" was omitted. Various consequential amendments, including definitions of "commercial value" and "trade in", as well as an entirely new transitional provision to cater for the new definition of "waste", were inserted. Far from streamlining the definition, the Department's new definition radically expanded its scope. The NCOP Select Committee endorsed the Department's proposal without any discussion, questioning or debate on its implications.

[17] The applicants' representatives first learnt of this new definition several weeks later on the Parliamentary Monitoring Group website. In July 2021, SAISI and FERTASA expressed their concerns in letters addressed to the Department and the Chairperson of the NCOP Select Committee and requested a further public participation process on the amended definition. These letters raised the concern that the amended definition was a significant departure from the previous definition contained in the Waste Act and would have significant implications for their industries.

[18] On 16 November 2021, the proposed amendments were introduced to the NCOP Select Committee as part of the "E-List" of amendments to the Bill. This reflected the Department's new proposed definition of "waste" and the consequential amendments following from that proposal, in identical terms to the proposals considered on 15 June 2021.

[19] On 14 December 2021, the amended NEMLA Bill – the "F" version – was passed by the NCOP, without any further public participation, and was returned to the NA for its concurrence.

[20] In February 2022, the NA Portfolio Committee was advised that the NCOP had made "considerable amendments to the Bill". However, the NA and the Portfolio Committee did not attempt to facilitate further public participation. On

1 March 2022, the NEMLA Bill was passed by both houses of Parliament and was sent to the President for his assent. This final version of the NEMLA Bill received the President's assent on 24 June 2022. It was substantially similar in terms to the 15 June 2021 proposals by the Department, the "E-List", and the "F" versions. The definition of "waste" was identical to the "F" version. In terms of section 89 of the NEMLA Act, the Act will "come into operation on a date fixed by the President by proclamation in the Gazette". That proclamation is still pending. Dissatisfied with the processes, the applicants launched a constitutional challenge in this Court.

In this Court

[21] The applicants' complaint is that during the legislative process leading to the enactment of the Bill, the NCOP and the Provincial Legislatures did not comply with their constitutional obligations to facilitate further public participation in their legislative processes as required by the Constitution. The applicants contend that although they were afforded an opportunity to participate in the legislative process leading to the "D" version of the Bill, they were not afforded an opportunity to make representations when the new definition of waste (the "E" and "F" versions), which introduced material amendments and transitional provisions, was proposed.

[22] The applicants further contend that Parliament was aware that the amendments were material as they included transitional provisions in section 88 of the NEMLA Act, which, among others, acknowledges that products that were not previously regarded as "waste" now fall within the definition. In addition, a new class of persons who did not previously fall within the definition would now be affected by the new amendment and required to comply with the detailed regulatory requirements of the Act.

[23] While conceding that further public participation was not conducted, the respondents deny the allegation by the applicants that they were not given an opportunity to comment on the amended definition of waste and contend that the applicants were given adequate opportunity in relation to the definition of waste, and fully participated in all parliamentary processes and had ongoing engagements with the

Department. The respondents emphasise that during this process, the views of members of the public, including their views on the scope and content of the definition of waste, were considered.

[24] The respondents dispute that the amendments are material and instead submit that while they are important, they retain the conceptual framework contained in the initial versions of the Bill. The respondents assert that it would be impractical and unrealistic for new public comment processes to be initiated every time an amendment is made to a draft Bill. If this were required of Parliament, it would delay it from enacting laws timeously. To buttress their argument, the respondents contend that those consulted are expected to express themselves exhaustively on the issues for consultation when they are invited to do so. According to the respondents, the definition of "waste" was one such issue on which the public was reasonably consulted. No prejudice would be suffered by the public because Parliament intended to rework the definition of waste to provide clarity and to better meet the objectives of waste regulation.

[25] Finally, the respondents assert that both the NCOP and the various Provincial Legislatures complied with the duty to facilitate public involvement in the legislative process. They further contend that it is impermissible to assess the legislative processes in a piecemeal fashion. Rather, a holistic approach must be adopted when assessing the constitutionality of the process.

Jurisdiction

[26] The applicants have approached this Court directly and assert that this Court has jurisdiction over the present dispute because it implicates the question of whether Parliament has fulfilled its constitutional obligation to facilitate public involvement. Whether this Court has jurisdiction under section 167(4)(e) to decide the dispute depends on two matters. First, whether sections 59(1)(a) and 72(1)(a) imposes an obligation on the NA, NCOP and Provincial Legislatures to facilitate public involvement in its legislative processes and those of its committees. The second question is whether the obligation to facilitate public involvement is the kind of

obligation contemplated in section 167(4)(e), this was answered definitively in *Doctors for Life*[9] – the respondents did not contest this. They also do not dispute that the applicants have legal standing to bring this application.

Issues

[27] As stated earlier, the overarching issue in this case is whether the NA, NCOP and Provincial Legislatures failed to comply with their constitutional obligations to facilitate public involvement as contemplated in sections 59(1)(a) and 72(1)(a) of the Constitution. If the processes followed by the NA, NCOP and Provincial Legislatures do not pass constitutional muster, then we must consider what is the appropriate relief, taking into account that the President has not yet proclaimed the effective date of the Bill.

Analysis

The materiality of the impugned amendments

[28] South Africa is a constitutional democracy that upholds representative and participatory democracy. The purpose of public participation and involvement in democratic processes is primarily to influence decision-making processes that affect the will of the people. Public participation is premised on the belief that those who are affected by a decision have the right to be involved in the decision-making process. Central to this is the acknowledgment that institutions with decision-making powers must involve those who are likely to be affected by such decisions.

[29] Since the first democratic Parliament of the Republic of South Africa, its vision has been and remains to build a truly representative people's Parliament. The facilitation of public participation and involvement in its processes remains central to the mandate of Parliament. According to section 42(1) of the Constitution, Parliament

[9] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

consists of the NA and the NCOP. The NA is responsible for, amongst other things, passing laws, ensuring that members of the executive perform their work properly, and providing a forum where the representatives of the people can publicly debate issues. The NCOP consists of 90 provincial delegates – each of the nine provinces are allocated 10 delegates. Therefore, each province is equally represented in the NCOP. The Constitution provides that the NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. The NCOP does this mainly by participating in the national legislative process, and by providing a national forum for public debate on important issues affecting the provinces. The NCOP also ensures that local government concerns are represented at the highest level.

[30] Public participation standards must be consistent with constitutional prescripts and legal requirements which include informing, educating and creating meaningful opportunities for the public to participate in decision making on issues that affect them.[10] Reporting, feedback, monitoring and evaluation are pivotal for the process of tracking outcomes of a given public participation opportunity thereby ensuring effective public participation.[11] It is important that as a bill progresses through different stages, the public must be informed and consulted. Information is therefore an absolute prerequisite for effective public participation. Public participation processes should provide for stages of participation that are commensurate with the level of public interest.

[31] *Doctors for Life* states:

> "All 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 objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them

[10] South African Parliament "Chapter 5 Public Participation Model" at para 5.3.1. Available at: Parliament_Public_Participation_Model.pdf

[11] Id.

> as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."[12]

[32] Public participation is a process in which the public is engaged in a given matter of public interest for the purpose of obtaining their views with the aim of ensuring the process is fair, reasonable and that the public is heard.

[33] In considering whether the final version of the Bill introduced a material amendment or not, the starting point is the examination of the definition of waste before and after the amendments and the regulatory scope of the Waste Act. The two versions which require comparison are the "D" version on the one hand and the "F" (and enacted) version on the other. The applicants do not complain of a lack of public participation up to and including the "D" version; their complaint is about the lack of participation thereafter. On a plain reading of the two definitions of "waste", they are remarkably different, with the revised definition being far more expansive. The impugned amendments significantly sought to amend the definition of waste in the Act by the insertion of sections 61(k),[13] 61(c)[14] and 61(j),[15] as well as the introduction of transitional provisions in section 88.

[34] Significantly, it was the Department's case that the definition introduced by way of the "E-list" changes were in part designed to counteract the Supreme Court of Appeal's decision in *AMSA*. Up to and including the "D" version of the Bill, the *AMSA* decision would have remained applicable, despite the superficial adjustments to the definition of "waste". The "F" version, by contrast, swept the *AMSA* decision aside, since the Supreme Court of Appeal's reasoning would no longer be justified by the revised wording of the definition. It is idle, in the circumstances, for the respondents to contend that the late change in definition was not material.

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[12] *Doctors for Life* above n 9 at para 235.

[13] The amended definition of "waste" in section 61(k).

[14] The new definition of "commercial value" in section 61(c).

[15] The new definition of "trade in" in section 61(j).

[35] All these amendments were introduced in June 2021, long after the period for public comment and public hearings had been concluded. The materiality of these amendments ushered in a new way of dealing with and defining waste. Up to version "D", the definition of waste was described as "any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of". The "F" version which then found expression in the NEMLA Act sought to expand this definition to include "wanted" materials for which a generator has "no further use for within its own processes, whether or not it has any commercial value for the generator."

[36] The effect of this amendment of the definition of waste was that a vast range of products, co-products and by-products that were never regulated as waste before, would now be subject to the onerous requirements of the Waste Act, with significant consequences including new regulatory requirements that have costs implications. In addition to the requirements envisaged in the transitional provisions which will be discussed below, section 20 of the Waste Act states that no person may perform a waste management activity except in accordance with a waste management licence or, if no licence is required, in terms of prescribed requirements or standards. Breach of this section could result in severe penalties, including up to 10 years' imprisonment, a fine of up to R10 million, or both.

[37] To further bolster the point that the amendments were material by virtue of the insertion of the transitional provisions as envisaged in section 88 of the NEMLA Act, it is important to note that subsection (2) requires the person in control of the substance, material or object, within 60 days from the date of commencement of the amended definition of waste, to:

> "(a) apply for a waste management licence, if the person conducts an activity, which is listed in terms of section 19(1) of the Principal Act;
> (b) comply with a norm or standard, if the person conducts an activity listed in terms of section 19(3) [Waste Act]; or

(c) apply for the exclusion of the substance, material or object from the definition of waste in the prescribed manner."[16]

[38] Possible implications for producers and customers presented by the transitional provision include:

(a) applying for an exemption in terms of section 74 of the Waste Act;
(b) ceasing the primary production activity which causes the co-product or by-product to be produced;
(c) ceasing the sale of the co-product or by-product and stockpiling these products on site; and
(d) customers of the co-product themselves having to obtain a waste management licence in order to utilise the product which is now to be considered "waste".

[39] According to the applicants, complying with these onerous requirements could take at least one year. Obtaining a waste management licence would cost approximately R500 000, depending on the complexity of the activity. In certain instances, a manufacturer or consumer may require more than one waste management licence, depending on the range of products, by-products and co-products as well as the relevant waste management activity. There are also further onerous procedures that the applicants would have to comply with before the waste management licence is granted, and even then, it is not guaranteed that the licensing authority would grant the licence. The applicants state that the procedure of obtaining a licence is "not clear, simple or a fast procedure but rather an onerous, burdensome, lengthy and expensive procedure". They further assert that having to apply for a waste management licence within 60 days would be impracticable, if not impossible. The repercussions for non-compliance are significant; they include fines and imprisonment upon conviction.

[16] Clause 88 of the "F" version of the Bill contained a substantially similar provision.

[40] The definition of waste under the Waste Act is without question fundamentally important. This is especially true when considering the fact that failure to comply with the requirements of the Waste Act (most of which are inextricably linked to what constitutes waste) carries severe consequences. Considering these facts, the changes were not merely "semantic or technical", but rather material.

[41] There are striking similarities between *SA Veterinary*[17] and this matter. In *SA Veterinary*, the NA added the word "veterinarian" to section 16 of the Medicines and Related Substances Act,[18] which lists the medical professionals required to have a licence in terms of that Act in order to compound and dispense medicines. The NA failed to conduct further public consultations when and after the addition was made.[19] This Court stated that the insertion of a word that materially affects a specific group is exactly the situation for which the constitutional obligation of public participation has been created.

[42] It was further alleged that the amendment materially changed the way that veterinarians would be able to compound and dispense medicines. Further, the amendment had the effect of bringing an entire profession under the control of legislation that had previously never applied to it. This was not considered a technical or semantic amendment. There, this Court held that the amendment constituted a material amendment to the Bill and would have lasting effects on the professional operations of veterinarians.

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[17] *South African Veterinary Association v Speaker of the National Assembly* [2018] ZACC 49; 2019 (3) SA 62 (CC); 2019 (2) BCLR 273 (CC).

[18] 101 of 1965.

[19] *SA Veterinary* above n 17 at para 46. This Court held:

> "In summation, the insertion of the word "veterinarian" is a material amendment to the Bill. This amendment was made by the NA without facilitating any public participation on this aspect. This clearly falls short of the requirements in section 59(1)(a) of the Constitution. Further, the NCOP, through the PLs, failed to properly facilitate public participation due to the exceptionally short notice periods that they gave before public hearings, and the failure to invite specific comment from members of the veterinary profession. Consequently, the insertion of the word "veterinarian" was also done contrary to sections 72(1)(a) and 118(1)(a)."

The duty to facilitate public involvement

[43] It is common cause that the proposed new amendments to the definition of waste were first introduced, discussed and approved at a meeting held on 15 June 2021 by the NCOP Select Committee. It must be remembered that the Gauteng mandate proposed that the definition of waste be simplified. The Department also made further proposals at the meeting with respect to the Bill. The public was not involved in this process. The public was furnished with the proposed amendments after the meeting on 15 June 2021. Those proposals were material – materiality triggers the need for further participation and the respondents did not call for further submissions from the public. A public participation process would have ensured that all interested and affected parties had the opportunity to raise their concerns.

[44] The standard for adequate participation is one of reasonableness. Recently this Court in *Mogale*[20] relying on *Doctors for Life*[21] set out the factors to be considered when determining whether public participation was reasonable. These include:

> "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. 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. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process.

[20] *Mogale v Speaker of the National Assembly* [2023] ZACC 14 at para 34.

[21] *Doctors for Life* above n 9 at para 127.

> The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided."[22]

[45] This Court in *New Clicks*[23] reiterated that "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." In the matter before us, there is no evidence that any measures were taken by the respondents to bring the public's attention to the impugned amendments. Public views were simply brushed aside and ignored. It is cold comfort for the applicants that there was public participation in various earlier stages of the Bill, if the public was not kept informed of the developments during the later stages of the Bill's progress. SAISI and FERTASA, on behalf of the steelmakers and the fertilizer industry, sent various letters to the Department and NCOP asking for an opportunity to be heard in light of the June 2021 developments. Sadly, their requests fell on deaf ears.

[46] The impugned amendments were not subject to any further public participation process at either the national or provincial level. The argument that further public participation was not necessary because the definition of waste remained substantially the same throughout the process is unsustainable. Parliament should have interrogated, specified and clarified the full import of the proposed amendments and afforded the public an adequate opportunity to comment or make representations. That argument is untenable and misses the vital point that it ushered in a new way in which the concept of waste was to be construed. Equally unsustainable is the respondents' argument that the changes introduced by the amendments sought to narrow the class of persons who bore obligations under the Waste Act from all holders of waste to a narrower category of generators of waste. There was a significant change in the allocation of legal obligations between generators of waste and not a mere textual adjustment.

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[22] *Doctors for Life* above n 9 at paras 128-9.

[23] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 360.

[47] I accept that Parliament and the Provincial Legislatures must be accorded a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement.[24] The NA, NCOP and the Provincial Legislatures should create conditions that are conducive to the effective exercise of the right to participate in the lawmaking processes. In *Doctors for Life*, this Court stated that a fundamental part of the public participation process is public access which "allows the public to be present when laws are debated and made",[25] one that ensures that the public is afforded the opportunity to "submit representations and submissions".[26]

[48] In this case, no effort was made to further engage the public and afford them an opportunity to submit their inputs on the impugned amendments. The argument that it would be impractical and cumbersome for a new public comment process to be initiated every time an amendment is made to a draft Bill is misconceived. During the initial stages of the Bill, when amendments in the respects now under consideration were superficial, members of the public were invited to comment. It begs the question, why when the proposed amendments became material, the public was ignored and brushed aside. This, in my view, tends to diminish the force of the respondents' argument. It was necessary for the NA, NCOP and the Provincial Legislatures to afford the public an opportunity to submit inputs or comments on the impugned amendments given their serious and far-reaching consequences.

[49] In facilitating public involvement, the relevant bodies (NA, NCOP, Provincial Legislatures) must ensure that issues affecting the public in relation to legislation under consideration are heard and considered by the public. There is no doubt that the proposed amendments generated a lot of interest in the public and, in particular, the iron, steel and fertilizer industries. The concerns of the public for further engagement were simply ignored. No legitimate basis was advanced as to why these

[24] *Mogale* above n 20 at para 34.

[25] *Doctors for Life* above n 9 at para 137.

[26] Id.

processes were dispensed with. I am accordingly satisfied that, in all the circumstances of this case, the failure by the NA, NCOP and Provincial Legislatures to hold further public hearings was not in accordance with their obligations to facilitate public involvement. In the result, the challenge relating to the impugned provisions of the NEMLA Act must succeed.

Conclusion

[50] Section 172(1)(a) of the Constitution mandates this Court to declare such failure by Parliament unlawful and invalid. The impugned provisions must be declared unconstitutional and invalid owing to the procedural defects in their enactment. There is no compelling reason to suspend the declaration of invalidity to give Parliament an opportunity to correct the defect. The impugned amendments have not yet been brought into force and there is no reason why the President should be entitled to bring into force provisions that have not been subjected to public participation. It is my finding that the declaration of invalidity will not lead to a regulatory vacuum as the preamendment (that is, the current) definition of waste remains in force and there will be no lacuna in the legislation. In its current form, the impugned provisions cannot be allowed to stand and must be set aside forthwith. If Parliament wishes to proceed with the impugned provisions in their current form, there is no reason why public participation would need to be a lengthy exercise.

Order

1. It is declared that Parliament has failed to comply with its constitutional obligation to facilitate public involvement in terms of sections 59(1)(a) and 72(1)(a) of the Constitution in respect of the following provisions of the National Environmental Management Laws Amendment Act 2 of 2022:

    (a) The amended definition of "waste" in section 61(k);
    (b) The new definition of "commercial value" in section 61(c);
    (c) The new definition of "trade in" in section 61(j); and

(d) The transitional provision in section 88.

2. The said provisions are accordingly declared invalid and unconstitutional.
3. The first and second respondents are directed, jointly and severally, to pay the applicants' costs, including the costs of two counsel.

For the Applicants:	G Marcus SC, C McConnachie and Z Raqowa Instructed by Bowman Gilfillan Attorneys.
For the First and Second Respondents:	N Maenetje SC, N Muvangua and N Stein Instructed by State Attorney.