CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 27/18

In the matter between:

SOUTH AFRICAN VETERINARY ASSOCIATION	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
MINISTER OF HEALTH	Third Respondent
MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	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
PRESIDENT OF THE SOUTH AFRICAN VETERINARY COUNCIL	Fourteenth Respondent

Neutral citation:	*South African Veterinary Association v Speaker of the National Assembly and Others* [2018] ZACC 49
Coram:	Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J
Judgment:	Goliath AJ (unanimous)
Heard on:	11 September 2018
Decided on:	5 December 2018
Summary:	Constitution — sections 59(1)(a), 72(1)(a) and 118(1)(a) — Parliamentary duty to facilitate public participation in the law-making process — non-compliance with duty Medicines and Related Substances Act — section 22C(1)(a) — veterinarians require licences to compound and dispense medicines — constitutionally invalid

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ORDER

In an application for direct access, the following order is made:

1. Direct access is granted.

2. To the extent that it includes the word "veterinarian", section 22C(1)(a) of the Medicines and Related Substances Act 101 of 1965 (Act) is declared to have been amended in a manner inconsistent with the Constitution.

3. The word "veterinarian" is severed from section 22C(1)(a) of the Act.

4. The first and second respondents are ordered to pay the costs of the applicant, jointly and severally, including the costs of two counsel.

JUDGMENT

GOLIATH AJ (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] Veterinarians are experts in the field of veterinary medicine and work hard to address the health and welfare needs of animals. They also play critical roles in environmental protection, research, food safety and public health. The South African Veterinary Association (SAVA) approaches this Court, as a body representing over a thousand veterinarians, to challenge the validity of an Act of Parliament which would alter the conditions under which veterinarians are able to perform these vital roles.

[2] SAVA, the applicant, brought an application for direct access to this Court in terms of section 167(4)(e) of the Constitution.[1] It concerns whether Parliament failed in its constitutional duty to facilitate public participation in the legislative process when

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[1] Section 167(4)(e) of the Constitution states:

"Only the Constitutional Court may—

. . .

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation."

it enacted section 16 of the Medicines and Related Substances Amendment Act[2] (Amendment Act). This amended the Medicines and Related Substances Act[3] (Principal Act), and was, it is contended, done contrary to sections 59(1)(a),[4] 72(1)(a)[5] and 118(1)(a)[6] of the Constitution.

[3] Section 16 of the Amendment Act, introduces the word "veterinarian" into section 22C(1)(a) of the Principal Act. The amended section reads:

> "[T]he Director-General may on application in the prescribed manner and on payment of the prescribed fee issue to a medical practitioner, dentist, practitioner, *veterinarian*, nurse or other person registered under the Health Professions Act, 1974 (Act 56 of 1974), a licence to compound and dispense medicines, on the prescribed conditions." (Emphasis added.)

[4] The effect of this amendment is that, along with other professionals listed in the section, veterinarians now require a licence issued by the Director-General of Health on prescribed conditions, to compound and dispense medicines. Under the provisions of section 34(1) of the Veterinary and Para-Veterinary Professions Act[7] which governed

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[2] 14 of 2015.

[3] 101 of 1965.

[4] Section 59(1)(a) states:

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

[5] Section 72(1)(a) states:

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

[6] Section 118(1)(a) states:

> "A provincial legislature must—
>
> (a) facilitate public involvement in the legislative and other processes of the legislature and its committees."

[7] 19 of 1982.

the compounding and dispensing of medicines prior to the Amendment Act, this was not required.[8]

[5] This case raises three questions. The first is whether direct access should be granted. If so, the second, and main issue, is whether Parliament failed properly to facilitate public participation in the law-making process, specifically relating to the insertion of the word "veterinarian". Finally, if this Court finds that the process through which the Act was passed falls short of the constitutionally enshrined standards of participation, it must determine an appropriate remedy.

Parties

[6] SAVA brings this application in terms of section 38(e) of the Constitution.[9] It acts in the interests of veterinarians. It also claims to bring this application in its own interest[10] and in the public interest.[11]

[7] The first and second respondents, the Speaker of the National Assembly (NA) and the Chairperson of the National Council of Provinces (NCOP) respectively, initially indicated that they intended to oppose the application brought by SAVA. They subsequently withdrew their opposition and indicated that they would abide the decision of this Court. The fifth to fourteenth respondents did not participate in the proceedings

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[8] Section 34(1) states:

> "A person who is registered or deemed to be registered in terms of this Act to practise a veterinary profession, may personally compound or dispense any medicine which is prescribed by himself or by any other person with whom he or she is in partnership or with whom he or she is associated as a principal or an assistant or a *locum tenens*, for use in the treatment of an animal which is under his or her professional care: Provided that he or she shall not be entitled to keep an open shop or pharmacy."

[9] Section 38(e) of the Constitution states:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
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> . . .
>
> (e) an association acting in the interest of its members."

[10] See section 38(a) of the Constitution.

[11] See section 38(d) of the Constitution.

before this Court. The third and fourth respondents, who are members of the Executive responsible for the Amendment Bill and for oversight of the veterinary profession, were represented at the hearing before us but made submissions only with regard to remedy.

[8] This Court requested the Johannesburg Bar Council to appoint counsel as amicus curiae (friend of the court) to make independent submissions to facilitate a proper hearing of the matter. Counsel made both written and oral submissions, primarily on the subject of remedy. The Court is deeply indebted to them for their assistance.

Background

[9] The Amendment Bill was approved by Cabinet during December 2011 and was published in the Government Gazette for public comment on 15 March 2012.[12]

[10] A second version of the Amendment Bill was published in the Government Gazette on 20 February 2014.[13] This version did not include the word "veterinarian", but instead only added "practitioner" to the list of people required to hold a licence to dispense and compound medicines. In terms of the Principal Act, "practitioner" was defined as "a person registered as such under the Allied Health Professions Act".[14] Notably, veterinarians do not fall into this definition. The Amendment Bill was introduced in the NA on 26 February 2014. Public hearings were held on 29 and 31 October and 5 November 2014. At one of these hearings the Pharmaceutical Society of South Africa (PSSA) commented that veterinarians should be treated in the same way as other health professionals regarding the dispensing and compounding of medicines. Consequently, it was suggested that the word "veterinarian" should be inserted into section 16. The PSSA's reason for this suggestion

[12] Publication of Medicines and Related Substances Bill 2012, GN 216 *GG* 35151, 15 March 2012.

[13] Publication of Explanatory Summary of the Medicines and Related Substances Bill 2013, GN 117 *GG* 37361, 20 February 2013.

[14] 63 of 1982. Section 1 states that—

> "'practitioner' means a person registered as an acupuncturist, ayurveda practitioner, chiropractor, homeopath, naturopath, osteopath or phytotherapist, in terms of this Act."

was an allegation that veterinarians are not properly trained to compound and dispense medicine despite this being part of their university curriculum.

[11] On 19 November 2014, the NA Portfolio Committee on Health (Health Committee) met with the Department of Health (Department), who submitted comments about proposals made at the public hearings. The Department agreed that veterinarians should be regulated like other health professionals and should require licences for dispensing and compounding of medicines. The Health Committee accepted this suggestion and included it in the Health Committee's amendments to the Bill. Thereafter followed a series of further deliberations conducted by the Health Committee until the Amendment Bill was adopted on 5 August 2015 and passed to the NCOP on 13 August 2015.

[12] The NCOP referred the Amendment Bill to the NCOP Social Services Select Committee (Select Committee) which was briefed by the Department about the contents of the Amendment Bill. SAVA submits that the Department did not brief the Select Committee about the insertion of the word "veterinarian" into section 22C(1)(a) of the Principal Act through its inclusion in section 16 of the Amendment Bill.

[13] The NCOP referred the Amendment Bill to the Provincial Legislatures (PLs) to enable the Provinces' representatives in the NCOP to obtain negotiating mandates and hold public hearings. Public hearings were held in seven provinces: Free State, Gauteng, Limpopo, Mpumalanga, Northern Cape, North West and Western Cape. There is no indication that hearings took place in the Eastern Cape or in KwaZulu-Natal. In Gauteng, Mpumalanga and North West, only one to two days' notice was given before the public hearings. In the remaining four provinces it could not be established that notice was given at all.

[14] On 2 November 2015, the NCOP passed the Amendment Bill with amendments and sent it back to the NA. The NA adopted the NCOP's amendments, and the Bill was signed into force by the President on 23 December 2015.

Direct access

[15] It is common cause that this matter engages this Court's exclusive jurisdiction. Section 167(4)(e) of the Constitution grants this Court exclusive jurisdiction in respect of matters where it is alleged that Parliament or the President has failed to fulfil a constitutional obligation. This Court has carefully circumscribed the circumstances in which it will exercise its exclusive jurisdiction.[15] It is wary of encroaching upon the jurisdiction which is conferred on High Courts and the Supreme Court of Appeal to make declarations of constitutional invalidity in terms of section 172(2)(a) of the Constitution.[16] An allegation that Parliament or the President has failed to fulfil a constitutional obligation must be interpreted narrowly. This narrow interpretation prevents any possible conflict with section 172(2)(a).

[16] The purpose of the constitutional provisions giving exclusive jurisdiction to the Constitutional Court is—

> "to preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other, by ensuring that only the highest Court in constitutional matters intrudes into the domain of the principal legislative and executive organs of State."[17]

[17] In *Doctors for Life* this Court pointed out that section 42(1) of the Constitution defines Parliament as consisting of both the NA and the NCOP.[18] Where either House fails to satisfy its obligation to facilitate public involvement, as specified in

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[15] *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 19-23; *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at paras 23-4 and 131-5; *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; *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at para 22 and *President of the Republic of South Africa v South African Rugby Football Union* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) (*SARFU*) at para 25.

[16] *SARFU* id at para 25.

[17] Id at para 29.

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

sections 59(1) and 72(1) of the Constitution respectively, in the process of making law, Parliament as a whole has failed in its constitutional obligation.[19] This case raises questions about whether Parliament failed to comply with sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution. In *King*, the Supreme Court of Appeal held that it did not have jurisdiction to decide a matter based on section 59(1)(a) of the Constitution as this fell within the exclusive jurisdiction of this Court.[20] Similarly, in *Doctors for Life*, this Court established that a challenge based on a failure to fulfil the obligation contained in section 72(1)(a) falls into this Court's exclusive jurisdiction.[21] Therefore, this matter falls squarely within the exclusive jurisdiction of this Court.

Public participation

[18] Democracies the world over vary in form and tradition. However, they share the common foundational value of government by the people.[22] In South Africa this occurs through a representative democracy that is both participatory and deliberative. This stems from the recognition that political rights in the Constitution facilitate both the election of representative leaders and a continuing entitlement by the people to be involved in political decision-making.[23]

[19] This Court's jurisprudence reaffirms the existence of a justiciable duty on the Legislature to involve the public when drafting and enacting legislation. *Doctors for Life* is the seminal authority for the principle that legislation can be declared invalid for lack of public participation in the law-making process. This Court recognised:

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[19] Id.

[20] *King v Attorneys' Fidelity Fund Board of Control* [2005] ZASCA 96; 2006 (1) SA 474 (SCA) at para 23.

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

[22] Our own Constitution recognises this foundation in section 42(3) which states:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution."

[23] *Doctors for Life* above n 15 at para 115.

> "In our country, the right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process."[24]

[20] In the majority judgment, participation was underscored as a core constitutional value. Ngcobo J said:

> "[O]ur democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy."[25]

[21] Sachs J, in a concurring judgment in *Doctors for Life*, stated:

> "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 as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."[26]

[22] Beyond the remarks made in *Doctors for Life,* this Court, in *Democratic Alliance*, underlined the importance of public participation:

> "The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views

[24] Id at para 106.

[25] Id at para 116.

[26] Id at para 235.

> considered. . . . It would accordingly be perverse to construe its terms in a way that belied or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy.
>
> The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making."[27]

[23] This Court has held that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Further, the obligation to facilitate public participation is a material part of the law-making process, and the failure to comply with this requirement renders the resulting legislation invalid.[28]

Failure by the NA to facilitate public involvement

[24] Parliament itself recognises the importance of public participation in the law-making process by regularly involving the public in its processes. In the present case, it is evident that the NA attempted to fulfil its section 59(1)(a) obligation to facilitate public participation. It held public hearings for the majority of the Amendment Bill. SAVA's challenge to the procedure adopted by the NA is a narrow one: the NA's failure to hold further public consultations following the insertion of the word "veterinarian" did not comply with the Constitution and the rules of the NA.

[25] Veterinarians were brought under the auspices of the Amendment Bill only after the NA's official public hearings. On this aspect of the Bill, therefore, there was no public participation whatsoever. This is despite the fact that the rules of the NA attempt to guard against this kind of non-consultative process when amendments take place after the NA public hearings.

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[27] *Democratic Alliance v Masondo N.O.* [2002] ZACC 28; 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) at paras 42-3.

[28] *Doctors for Life* above n 15 at para 209.

[26] Section 59(1)(a) requires that public involvement be facilitated at all stages of the NA's processes, including at a Committee level.[29] The insertion of a word, by the Health Committee, that materially affects a specific group would be exactly the situation for which this obligation was created.

[27] SAVA submits that the word "veterinarian" in section 22C(1)(a) affects the entire veterinary profession. It is alleged that the amendment materially changes the way that veterinarians will be able to compound and dispense medicines, and that for the insertion to be effectual a number of consequential amendments to other sections of the Principal Act are required. SAVA has placed before the Court at least fifteen amendments that would be necessary following the insertion, including amendments to the various schedules of the Principal Act. The vast number of required amendments stem from the fact that veterinarians were not previously included in the Principal Act. This absence in itself illustrates the material nature of the amendments. They had the effect of bringing an entire profession under the control of an Act that never applied to it. This cannot be considered a technical or semantic amendment.

[28] The failure by the Health Committee to facilitate public involvement renders the procedure followed in inserting the word "veterinarian" constitutionally invalid in terms of section 59(1)(a). To bolster this finding, an examination of the rules of the NA is useful. Rule 286 regulates the process to be followed when a Bill is before a relevant committee. Rule 286(4)(b) and (c) state:

> "The committee—
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> . . .

[29] In accordance with the powers given to it by the Constitution, the NA establishes a range of committees with assigned powers and functions. The committees are required to report regularly on their activities and to make recommendations to the NA for debate and decision. A large part of the NA's role in the law-making process happens in committees and much of its oversight over the executive is also done through committees, particularly the portfolio committees. There is a portfolio committee for each corresponding government department. The composition of the committees, as far as is practicable, proportionately represents the parties in the NA. That committee will deliberate on bills covering that department's area of jurisdiction and scrutinise and report on its annual budget and strategic plan. "How Parliament is structured" available at https://www.parliament.gov.za/how-parliament-is-structured.

(b) may seek the permission of the Assembly to inquire into extending the subject of the Bill;

(c) if the Bill amends provisions of legislation, must, if it intends to propose amendments to other provisions of that legislation, seek the permission of the Assembly to do so."

[29] The requirement that veterinarians be licensed to compound and dispense medicines is seemingly an extension of the subject of the Bill for which the Committee ought to have sought the NA's permission. Moreover, the amendment necessitates a number of further amendments to the other provisions of the legislation. The rules of the NA prescribe that permission must be attained before making changes of this nature. No such permission was requested or granted.

[30] Beyond the constitutional obligation to involve the public when making and amending Bills, the rules of the NA make it clear that there is an expectation that public participation will occur in all inquiries by the Committee. Rule 286(6)(c) states:

"In the process of inquiring into a Bill, the committee must, where applicable, as far as possible apply the following separate formal stages:

. . .

(c) invitation for further public comment and submissions on the substance of the Bill, followed by the hearing and examination of such or other oral submissions if deemed necessary."

[31] This rule gives expression to the constitutional obligation that is placed upon the NA. Having regard to the material nature of the amendment, the Health Committee is required, as far as possible, to invite further public comment. It is evident that there was no attempt to do this, and no argument was put forward that facilitating public participation was impossible.

[32] The amendment made at the Committee stage constituted a material amendment to the Bill and will have lasting effects on the professional operations of veterinarians. It is clear that there was no public participation facilitated by the NA with respect to this aspect of the Bill. In *New Clicks*, Sachs J wrote:

> "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."[30] (Emphasis added.)

From the above it is obvious that the standard by which public participation must be measured is reasonableness. The content of this standard will vary from case to case. However, a complete failure to take any steps to involve the public in a material amendment to a Bill cannot be reasonable by any measure. Therefore, we find that the NA failed in its section 59(1)(a) duty and the validity of the insertion of the word "veterinarian" is consequently tainted.

Failure of the NCOP to facilitate public participation

[33] A finding that the NA failed properly to facilitate public participation in the amendment process is sufficient to invalidate the insertion of the word "veterinarian" in section 22C(1)(a) of the Principal Act. However, SAVA contends that the NCOP also failed to fulfil their section 72(1)(a) constitutional obligation to facilitate public participation and the PLs fell short of the twin duty imposed upon them by section 118(1)(a) of the Constitution. In contrast to the NA's procedure, it is evident that some steps were taken at a provincial level to facilitate public participation.

[34] The NCOP referred the Bill to its Select Committee. The Department briefed the Select Committee about the contents of the Bill but seemingly did not mention the insertion of the word "veterinarian". It is generally at the Select Committee stage where

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[30] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (*New Clicks*) at para 630.

public involvement is facilitated by the NCOP. The Select Committee referred the Amendment Bill to the PLs to enable the provinces' representatives in the NCOP to obtain negotiating mandates and hold public hearings.

[35] SAVA has placed evidence before the Court regarding the public hearings that were held in the various provinces. The PLs have been less than forthcoming with information about the processes that were followed. All of the respondents are abiding this Court's decision and have offered no counter-arguments or facts. Consequently, even with the limited facts that this Court has before it, we are able to reach a conclusion about the adequacy, or otherwise, of attempts to facilitate public participation on the insertion of the word "veterinarian" at a provincial level.

[36] It is not necessary for this Court to determine whether the NCOP's process through which public participation was facilitated at this stage was so unreasonable that it invalidates the entire Act. We can concern ourselves only with the procedure followed by the NCOP with regard to the insertion of the word "veterinarian" because SAVA approaches us as a specific interest group, challenging only the amendments that affect veterinarians. This does not close the door for future litigants to bring cases in their own interest, or the public interest, based on flaws in the consultation procedure followed by the NCOP when passing this Act.

[37] SAVA's challenge to the procedure followed at a provincial level, which is described in the background,[31] is two-pronged. First, it is based on the short notice period given in some provinces. Second, SAVA submits that the failure to inform organisations representing the interests of veterinarians of the Bill, and the consequent denial of the opportunity to make submissions, was unreasonable.

[31] See [13].

Notice periods

[38] This Court in *Land Access Movement* held that when this Court considers the reasonableness of public involvement, it will examine the self-same factors that Parliament ought to consider when deciding how public participation will be facilitated.[32] These factors include: the Parliamentary rules regarding public participation, the nature of the legislation and any need for urgency in its adoption.[33]

[39] In *Land Access Movement*, the facts regarding the notice periods provided are similar to the ones before us. There, this Court held that a notice period of less than seven days was unreasonable. This is because it is highly likely that the short notice deprived people affected by the Bill of the opportunity to participate in the hearings.[34] It also prevented the public, interested parties and organisations from studying the Bill in order to prepare adequately for the hearings.[35] SAVA says that it was aware that the Principal Act was undergoing various amendments but believed that the amendments did not affect its members. Perhaps with a longer notice period, SAVA would have noticed the insertion of the word "veterinarian" and would have been able to make representations about the legitimacy of its inclusion in the Bill.

[40] The parliamentary rules mandate public participation. The Bill is of importance to the veterinary profession and there was no reason for adoption to take place with urgency. Consequently, I am of the view that, at least in Gauteng, Mpumalanga and the North West, the short notice periods were unreasonable and public participation was not properly facilitated for the extension of the scope of the Principal Act to veterinarians.

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[32] *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (*Land Access Movement*) at para 60.

[33] Id at para 61.

[34] Id at para 77.

[35] Id.

Invitation to interested groups

[41] *Doctors for Life* established the purpose of public participation when this Court held:

> "It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of State that the Constitution contemplates that the public will participate in the law-making process."[36]

[42] The failure to notify SAVA, and other similar organisations representing the interests of veterinarians, such as the South African Veterinary Council, undermines the purpose of facilitating public participation. The Amendment Bill predominantly affected veterinarians but they cannot reasonably be expected to have known about the amendment without its being brought to their attention. The Bill was published twice in two separate Government Gazettes. However, it was never published in the form that included the word "veterinarian".

[43] In *Matatiele,* this Court held:

> "The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."[37]

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[36] *Doctors for Life* above n 15 at para 135.

[37] *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele*) at para 68.

[44] None of the respondents have disputed the fact that veterinarians had a substantial interest in the Amendment Bill after its scope was extended to them. Moreover, there are no reasons advanced why no consultation was held with members of the veterinary profession or the organisations established to represent them. At the very least, the South African Veterinary Council, the statutory body created to regulate the veterinary profession, should have been consulted. Veterinarians were not given notice of the amendment, nor were they specifically invited to give comment.

[45] SAVA advances a number of arguments about the unique nature of the veterinary profession and uses these arguments to aver that veterinarians do not have to be licensed to compound and dispense medicines. Had the public participation process been facilitated properly, these arguments would have been heard and considered. They would not necessarily have prevented the inclusion of the word "veterinarian" in the Amendment Bill but any inclusion that did occur would have been more informed and procedurally sound. The attempts to facilitate public participation cannot be considered reasonable because they failed to ensure that the most directly affected group participated in the law-making process.

[46] 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).

Remedy

[47] Having found that the NA, the NCOP and the PLs failed to fulfil their constitutionally imposed duties, what remains is crafting an appropriate remedy. SAVA has offered three possible approaches. The first option is to declare the entire

Amendment Act invalid. The second option is to order that section 22C(1)(a) of the Principal Act is constitutionally invalid, but hold that this order should be suspended for 18 months to allow Parliament an opportunity to cure the invalidity. Finally, the word "veterinarian" in section 22C(1)(a) could be struck down as specifically invalid.

[48] In oral argument, counsel for SAVA averred that because public hearings had not been held in all nine provinces, the NCOP did not facilitate public participation in line with its constitutional obligations. This affected not only the validity of the insertion of the word "veterinarian" but the Act as a whole. Consequently, it was submitted that the entire Act should be invalidated. Counsel for the third and fourth respondents and the independent counsel urged against this. In the NCOP, it is not clear that the failure to hold public hearings in all provinces necessarily constituted a flouting of a constitutional obligation. It may have been that there was little interest in other aspects of the Bill and the participation that did occur, barring the neglecting of veterinary representatives, amounted to substantial compliance with Parliament's constitutional duties.[38] This Court cannot, on the facts that we have before us, make a determination about whether public participation was lacking in respect of amendments besides the inclusion of the word "veterinarian".

[49] There is also no evidence before us to suggest that the remainder of section 22C(1)(a) of the Principal Act was improperly amended, or that it should be reviewed. Therefore, the third remedy provided by SAVA, and favoured by the third and fourth respondents and the independent counsel, seems to be the most appropriate option. In *Coetzee*, this Court established the test for severability as follows:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute.

[38] *Doctors for Life* above n 15 at paras 191-2.

> The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[39]

[50] It is possible to sever the word "veterinarian" from the remainder of section 22C(1)(a). The section would then apply to all other identified professionals, but not to veterinarians – the same position that applied before the impugned amendment process. The balance of the section remains intact and capable of giving effect to the purpose of the legislative scheme which is, amongst others, to provide for the licensing of certain persons to compound, dispense or manufacture medicines.[40]

[51] *Doctors for Life* established that this Court may intrude into the realm of the legislative branch of government when Parliament has failed to give effect to its constitutional obligations.[41] This power is limited by section 172(1)(a) of the Constitution which states:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

[52] In line with the narrow challenge that we have before us, the relief granted should be similarly limited. Based on the arguments in the current case, a declaration invalidating the whole Act, or any portion of it besides the insertion of the word "veterinarian", would amount to judicial overreach because the remainder has not been shown by SAVA to have been enacted unconstitutionally. Thus, the only appropriate remedy is to declare section 22C(1)(a) constitutionally invalid to the extent that it includes the word "veterinarian" and order that this word be severed from the rest of the section.

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[39] *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16.

[40] Preamble to Principal Act.

[41] *Doctors for Life* above n 15 at para 23.

[53] It remains to be decided whether the declaration of invalidity should be suspended to allow Parliament an opportunity to rectify its error. The Court will make an order of suspension when it is just and equitable to do so, taking into account the circumstances of the case.[42] SAVA and the independent counsel submit that this case does not warrant a suspension order. This is because no chaos or prejudice to good governance will occur as a result of the severance and striking down without a suspension. The fact that the Department has agreed not to implement the licensing regime for veterinarians for three years is evidence of this lack of consequence. Parliament has a number of options that it can pursue after holding proper consultations with veterinarians and there are no pressing time constraints involved in this matter. Proper public participation is not assisted by imposing a deadline on Parliament by which time it must decide either to include or exclude veterinarians from the purview of the Principal Act. In light of this the declaration of invalidity should not be suspended.

Costs

[54] There is no reason why costs should not follow the result in this matter. SAVA raised the possibility of holding the third respondent liable for costs because it was responsible for the content of the amendment. This suggestion cannot be sustained. The Department was entitled to make any suggestions that it deemed appropriate but Parliament was obliged to ensure that, in considering them, it did so in compliance with the Constitution. It is evident that the constitutional invalidity is as a result of the failures by both the NA and the NCOP to facilitate public participation in the process that inserted the word "veterinarian" into the Principal Act. In the circumstances, the first and second respondents are ordered, jointly and severally, to pay SAVA's costs including the costs of two counsel.

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[42] *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 132.

[55] In the result, the following order is made:

1. Direct access is granted.
2. To the extent that it includes the word "veterinarian", section 22C(1)(a) of the Medicines and Related Substances Act 101 of 1965 (Act) is declared to have been amended in a manner inconsistent with the Constitution.
3. The word "veterinarian" is severed from section 22C(1)(a) of the Act.
4. The first and second respondents are ordered to pay the costs of the applicant, jointly and severally, including the costs of two counsel.

For the Applicant:	J H Ströh SC and R Doms instructed by Whally & van der Lith Inc
For the Third and Fourth Respondents:	N Rajab-Budlender instructed by the State Attorney
For the Independent Amicus Curiae:	C Georgiades SC and O Ben-zeev at the request of the Court