IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. : CCT 12/05

In the matter between:

DOCTORS FOR LIFE INTERNATIONAL Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Second Respondent

THE NATIONAL MINISTER OF HEALTH Third Respondent

WRITTEN SUBMISSIONS OF THE APPLICANT PURSUANT TO THE CHIEF JUSTICE'S DIRECTIONS OF 2 JUNE 2005

1.

The argument deals exclusively with issues identified in the Directives of this Honourable Court dated 2 June 2005 under the heading identified. All references to sections are to sections of the Constitution Act 108 of 1996.

2.

NON-JOINDER AS A FATAL DEFECT

1.1 In the directions the parties identified as those which should be joined, are the speakers of the provisional legislature (without limiting such range of interested parties).

1.2. In order to determine whether the provincial legislatures need be joined the subject matter of the dispute and the effect of the order sought need be considered. Whilst reliance is placed in the papers on the breach of section 118(1), such breach as such, cannot found an application under section 167(4)(e) (see infra). The manner of treatment of the Bills by the Provincial Legislatures is thus relied upon only for its evidentiary value vis-à-vis the NCOP's overall conduct.

1.3. The NCOP is alleged to have acted in breach of section 72(1). This body has with respect been properly cited and is before the court.

1.4. It is submitted that the order sought can not relate to the Provincial Legislatures as such - they are not part of the Parliament and the declarator is sought is too wide. At the hearing leave shall be sought to amend the wording so as to omit the words “and 118(1)(a)” as well as “and the nine Provincial Legislatures” from the declarator sought in the notice of motion. It is conceded that as phrased the initial declarator was too wide and should, given the gist of the factual averments not have included the nine provincial legislatures; at least not without joining them.

1.5. The Applicant thus contends that these parties mentioned in 1.1 need not be joined any longer. It is the Applicant’s contention that on the facts, the provincial legislatures were not given sufficient time to comply with public participation requirements by Parliament. The complaint lies especially against the National Council of the Provinces (the NCOP). Whilst the speakers of the various provincial legislature may be able to provide valuable testimony as the factual averments underlying the complaint of a breach of section 72(1)(a), it is the Applicant’s contention that they are not entities to be cited as Respondents and to be put to the time and costs of considering their positions as such given the amended relief. Given the number of

speakers involved, this consideration assumed considerable importance.

16. In terms of Rule 6 of the Constitutional Court Rules, the party to be cited is the “authority” responsible for the executive or administrative act or “conduct” complained of. Whilst the speakers of the provincial legislatures and numerous other entities were obviously involved in the course of conduct complained of, it is the Applicant’s contention that they were not the entities ultimately responsible for this. Applicant’s case is that the parties before the court are the ones ultimately responsible for both the inadequate time given to the provincial legislatures and thus placing them under pressure to act and the acceptance of such inadequate compliance as sufficient as well as itself failing to ensure public participation. The NCOP is the organ responsible for the Bill once it leaves the National Assembly until it refers the same back and it is in this period that it is obligated to act in accordance with section 72(1)(a) and ensure compliance therewith.

3.

Should this Honourable Court not be persuaded that the said parties are not necessary parties to the application, this in submission should not result in the dismissal of the application. This court has an inherent discretion to order the joinder of the parties it considers necessary, at this stage. It is respectfully submitted that such an order will be appropriate in the circumstances of the case. The issue of compulsory joinder depends on a value judgment which is not always easy to predict; to non suit the Applicant will simply be counter productive.

4.

FAILURE TO FULFIL A CONSTITUTIONAL OBLIGATION

The question posed is whether the conduct alleged in the application can constitute a failure to "fulfil a constitutional obligation" by Parliament within the meaning of that phrase in section 167(4)(e).

5.

It is accepted that the conduct of the Provincial Legislatures as such does not qualify for they fall outside the concept of Parliament as defined in section 42(1) of the Constitution.

6.

The conduct of the NCOP is clearly that of Parliament. The essential complaint is that the NCOP passed the bills without there being any meaningful opportunity for public involvement in the processes of the NCOP.

7.

The importance of the constitutional obligations provided by sections 72 and 118 is underlined by section 42(4) of the Constitution which reads:

> ***The NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.***

8.

In terms of section 72(1)(a) the "*The National Council of Provinces must - facilitate public involvement in the legislative and other processes of the Council and its committees...*"

9.

It is respectfully submitted that "must" denotes in context an obligation connected with the procedures to be adopted in respect of the considering of legislation by the NCOP. It is not one of those instances where "must" can be interpreted.

10.

It is accordingly submitted that the failure alleged amounts to a failure to fulfil a constitutional obligation within the meaning of section 167(4)(e) and that the jurisdictional requirements for direct access are accordingly met.

11.

THE TIMING OF THE CHALLENGE

Section 79 provides for a review of a Bill at the instance of the President after it has been passed in terms of chapter 4. Section 80 provides for such review by members of the National Assembly after the President has assented to it (a 30 day period).

12.

There does not appear to be any specific provision expressly allowing a constitutional challenge to the legislative process prior to the stage in section 79. In this instance challenge lies at the behest of a party whose interest in the legislation via the provisions of section 27, is evident as all the Bills relate to Health issues.

13.

It is submitted that where the challenge relates to a procedural issue, declaratory relief can be granted if and when the alleged grievance arises at any stage of the

legislative process. It is accepted that when the challenge is directed at the consent of a Bill, it can only be lodged after the President has signed it for till then its content is mutable.

14.

It is submitted that in respect of a challenge to the manner of law making, the right arises as soon as the alleged breach arises. Such a breach cannot as a rule be remedied by a change in content.

15.

This can be exemplified:

Why can the Constitutional Court not be approached if a dispute arises whether a Bill must be dealt with in terms of section 74, section 75 or section 76?

16.

Why should the passing of a Bill not be attacked by a party on the basis that there was no quorum present due to two persons who were not members of the Assembly being counted as such?

17.

It seems totally irrational for an entire process to be followed only so that the end result can be declared null and void so as to be able to start anew.

18.

It is respectfully submitted that the decision of this Honourable Court in ***Ex Parte President of the Republic of South Africa : In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC)*** does not detract from the propositions advanced on behalf of an interested extra parliamentary party where these relate to a procedural defect. Once the alleged incorrect procedure harming the party's interests has occurred, that party must be entitled to seek relief there and then. It may even be that the party's contention is that if the correct procedure was adopted, the Bill would have become legislation. If enactment in terms of section 81 is the first time that a complaint can be raised, it means that no redress may be sought in respect of incorrect procedures which prevent Bills from being enacted. Such a limitation does not seem to be spelt out nor does it have a rational purpose.

19.

It is accordingly submitted that the application cannot be non-suited on this basis.

K.J. KEMP SC
Chambers, Durban

23 June 2005