SACHS J ABRIDGED JUDGMENT

Doctors for Life International v Speaker of the National Assembly and Others

226. I support the judgment by Ngcobo J, and add observations on two matters. The first concerns the special meaning that participatory democracy has come to assume in South Africa. The second relates to what I consider to be the need for caution when developing remedies in this area.

227. I believe that it would be gravely unjust to suggest that the attention the Constitutional Assembly dedicated to promoting public involvement in law-making represented little more than a rhetorical constitutional flourish on its part. The Assembly itself came into being as a result of prolonged and intense national dialogue. Then, the Constitution it finally produced owed much to an extensive countrywide process of public participation. Millions of South Africans from all walks of life took part. Public involvement in our country has ancient origins and continues to be a strongly creative characteristic of our democracy. We have developed a rich culture of imbizo, lekgotla, bosberaad, and indaba. Hardly a day goes by without the holding of consultations and public participation involving all 'stakeholders', 'role-players' and 'interested parties', whether in the public sector or the private sphere. The principle of consultation and involvement has become a distinctive part of our national ethos. It is this ethos that informs a well-defined normative constitutional structure in terms of which the present matter falls to be decided.

228. This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness. The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions.

229. It should be emphasised that respect for these three inter-related notions in no way undermines the centrality to our democratic order of universal suffrage and majority rule, both of which were achieved in this country with immense sacrifice over generations.[5] Representative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended. Accountability of Parliament to the public is directly achieved through regular general elections. Furthermore, we live in an open and democratic society in which everyone is free to criticise acts and failures of government at all stages of the legislative process. Yet the Constitution envisages something more.

230. True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to

criticise it from the sidelines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years.

231. Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation.

232. Furthermore, although the way in which the public is involved in legislative processes will inevitably have a programmatic dimension and grow over time, the use of peremptory language in the Constitution, read in the light of the foundational principles and the national ethos of consultation referred to above, indicates that the section is intended to have immediate operational effect. The constantly evolving means used to facilitate public involvement are therefore to be seen as the product of a constitutional duty placed on the National Council of Provinces (NCOP), not as its creators.

233. The need to prioritise mainstream concerns in a country that still cries out for major transformation, in no way implies that only the most numerous and politically influential voices of our diverse society are entitled to a hearing. There will be many individuals and groups who in general might support the transformative programmes of the ruling majority of the time, but who might disagree on this or that aspect of a proposed law. Others might have more fundamental objections to the policies of the ruling parties. All will for differing reasons wish to have a say in connection with proposed legislation.

234. A vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance for those whose strongly-held views have to cede to majority opinion in the legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits.

235. A long-standing, deeply entrenched and constantly evolving principle of our society has accordingly been subsumed into our constitutional order. It envisages an active, participatory democracy. 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. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.

236. I turn now to the question of remedy. I agree with Ngcobo J that the facts in the present matter call for invalidation of the two statutes in question. The NCOP established the framework for public involvement and then, simply because of time-tabling difficulties, reneged on its commitments. Though there was no question of intentional exclusion or other form of bad faith, the objective result was that sections of the public relying on those commitments were unreasonably deprived of a promised opportunity. The applicant had assiduously expressed an interest in making representations in relation to both Acts. The Choice on Termination of Pregnancy Amendment Act raised questions of intense concern to it. The applicant had a right to be heard in the manner originally established by the NCOP. As far as the Traditional

Health Practitioners Act is concerned, applicant's interest might have been relatively tangential, but the record makes it clear that many traditional healers themselves objected strongly to granting to and then the withholding from them of a reasonable opportunity to have their say.

237. For decades, even centuries, traditional healers have been ignored and even persecuted by various legislatures. If the stated purpose of the measure was to rescue them from marginalisation, their right to an audience with the law-makers would have been particularly pronounced. More than just their dignity was involved. The subject matter of the Act was new and they were peculiarly well-situated to make inputs that could have had a direct effect on policy, structures and implementation. Their involvement in law-making would have been a precursor to their later working together as recognised health agents with hospitals and state scientific bodies. Moreover, the nature of their work was closely tied to the topography, flora and fauna of the areas in which they lived. They were in a position to contribute strong local dimensions to the ideas and information being considered. Consultation was especially called for at the provincial level, where they would have the time and comfort to express themselves fully and in a manner that appropriately conveyed regional particularities to the legislators. This was legislative terrain that clamoured for participatory democracy.

238. On the facts of this case I accordingly agree with the orders of invalidation made by Ngcobo J, subject to the terms of suspension he provides for. In doing so I do not find it necessary to come to a final conclusion on the question of whether any failure to comply with the constitutional duty to involve the public in the legislative process, must automatically and invariably invalidate all legislation that emerges from

that process. It might well be that once it has been established that the legislative conduct was unreasonable in relation to public involvement, all the fruit of that process must be discarded as fatally tainted. Categorical reasoning might be unavoidable. Yet the present matter does not, in my view, require us to make a final determination on that score.

239. New jurisprudential ground is being tilled. Both the principle of separation (and intertwining) of powers in our Constitution, and the notions underlying participatory democracy, alert one to the need for a measured and appropriate judicial response. I would prefer to leave the way open for incremental evolution on a case by case in future. The touchstone, I believe, must be the extent to which constitutional values and objectives are implicated. I fear that the virtues of participatory democracy risk being undermined if the result of automatic invalidation is that relatively minor breaches of the duty to facilitate public involvement produce a manifestly disproportionate impact on the legislative process. Hence my caution at this stage. In law as in mechanics, it is never appropriate to use a steam-roller to crack a nut.

240. Having made the above observations, I concur in the monumental judgment of Ngcobo J, with which I am proud to be associated.