CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 270/24

In the matter between:

SOUTH AFRICAN HUNTERS AND GAME CONSERVATION ASSOCIATION	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 NORTHERN CAPE PROVINCIAL LEGISLATURE	Tenth Respondent

SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE Eleventh Respondent

SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE Twelfth Respondent

SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE Thirteenth Respondent

NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS Fourteenth Respondent

EMS FOUNDATION TRUST Fifteenth Respondent

Neutral citation: *South African Hunters and Game Conservation Association v Speaker of the National Assembly and Others* [2026] ZACC 42

Coram: Mhlantla ADCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Nuku AJ, Rogers J, Savage J and Tshiqi J

Judgment: Rogers J (unanimous)

Heard on: 26 May 2026

Decided on: 9 October 2026

Summary: Parliament's duty to facilitate public participation — delay — factors relevant to overlooking unreasonable delay — materiality of changes during legislative process

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ORDER

On application in terms of section 167(4)(e) of the Constitution:

1. The application is dismissed.

2. The applicant must pay the costs of the fourteenth and fifteenth respondents, including, in the case of the fourteenth respondent, the costs of two counsel.

JUDGMENT

ROGERS J (Mhlantla ADCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Nuku AJ, Savage J and Tshiqi J concurring):

Introduction

[1] The applicant, South African Hunters and Game Conservation Association (SA Hunters), seeks an order declaring certain provisions of the National Environmental Management Laws Amendment Act[1] (NEMLA Act) invalid and unconstitutional. The basis of the relief is an alleged failure by Parliament to comply with its obligation to facilitate public involvement as required by sections 59(1)(a) and 72(1)(a) of the Constitution. SA Hunters invokes this Court's exclusive jurisdiction in terms of section 167(4)(e) of the Constitution.[2]

[2] Parliament, cited by way of the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (NCOP), and the Minister of Forestry, Fisheries and the Environment (Minister) do not oppose the application. They are cited as the first to third respondents. I shall refer to them collectively as the State parties. They have filed explanatory affidavits. The National Council of Societies for the Prevention of Cruelty to Animals (NSPCA) and the EMS Foundation Trust (EMS) oppose the application. They were not initially cited, but were granted leave to

[1] 2 of 2022.

[2] Section 167(4)(e) states that only the Constitutional Court may "decide that Parliament or the President has failed to fulfil a constitutional obligation".

intervene as the fourteenth and fifteenth respondents. The remaining respondents – the fourth to thirteenth respondents – are respectively the President of the Republic of South Africa and the nine Speakers of the provincial legislatures.[3] They have not participated in the proceedings. I shall refer to the NSPCA and EMS collectively as the respondents.

[3] SA Hunters is a voluntary association. Its objects include promoting and encouraging responsible hunting as an essential part of sustainable use and nature conservation, and representing a positive image of responsible hunting and hunters, sport shooters, nature conservationists, game farmers and professional hunters. Its objects also include promoting knowledge of and a love for nature, encouraging nature conservation and developing a conservation mindset among its members and the public.

[4] The NSPCA is a juristic body established in terms of the Societies for the Prevention of Cruelty to Animals Act.[4] Its main object is to prevent the ill-treatment of animals by promoting their good treatment by people. This it does by, amongst other ways, enforcing the Animals Protection Act.[5] It describes itself as being, along with the courts, the upper guardian of all animals in South Africa. EMS is an organisation established in terms of a deed of trust. Its objects include ensuring the welfare and protection of wild animals.

[5] The NEMLA Act received presidential assent on 21 June 2022 and was to come into force on a date to be proclaimed. Save for certain provisions not here relevant, it came into operation by proclamation on 30 June 2023. The NEMLA Act amended various statutes. This case only concerns amendments to the National Environmental

[3] The Speaker of the Eastern Cape Provincial Legislature (fifth respondent) and the Speaker of the KwaZulu-Natal Provincial Legislature (eighth respondent) filed notices to abide.

[4] 169 of 1993.

[5] 71 of 1962.

Management: Biodiversity Act[6] (Biodiversity Act). In particular, the application focuses on the definition of "well-being" in relation to animals.

[6] Among the considerations which led to the adoption of the concept of "well-being" in the Biodiversity Act is the recognition that animals are "sentient beings . . . capable of suffering and experiencing pain" and the growing realisation that biodiversity and animal welfare are intimately related. This, in turn, links animal welfare and animal suffering to the constitutional protection of the environment in section 24 of the Bill of Rights.[7]

Legislative history

First version

[7] The National Environmental Management Laws Amendment Bill (NEMLA Bill), which eventually became the NEMLA Act, was introduced into the National Assembly in May 2017. For convenience, I shall refer to this as the "first version". Section 2 of the Biodiversity Act sets out its objectives. The first version proposed to amend section 2(a)(ii) of the Biodiversity Act with the following as one of the Act's objectives (strike-out text denotes a deletion and underlining an insertion):

> "the use of indigenous biological resources in a ~~sustainable~~ manner <u>that is ecologically sustainable, including taking into account the well-being of any faunal biological resource involved</u>."

[8] The first version proposed, further, that the following be added to the matters on which the Minister was empowered, in terms of section 97, to make regulations:

> "(aA) the protection of the well-being of a faunal biological resource during the carrying out [of] a restricted activity involving such faunal biological resource."

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[6] 10 of 2004.

[7] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46; 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC) at paras 56 and 58 and the cases there cited.

[9] These were the only two places where "well-being" was mentioned. "Well-being" was not defined. The Biodiversity Act already contained a definition of "indigenous biological resource" that has remained unchanged. Other than in relation to bioprospecting, "indigenous biological resource" means:

> "(b) any resource consisting of—
>
> (i) any living or dead animal, plant or other organism of an indigenous species;
>
> (ii) any derivative of such animal, plant or other organism; or
>
> (iii) any genetic material of such animal, plant or other organism."

Second version

[10] The National Assembly facilitated public participation on the first version through its Portfolio Committee on Forestry, Fisheries and the Environment (Portfolio Committee). The upshot of this process was an amended version of the NEMLA Bill that was passed by the National Assembly in November 2018. I shall call this the "second version".

[11] The second version proposed to introduce, in section 1 of the Biodiversity Act, a definition of "well-being" as meaning "a state where the living conditions of a faunal biological resource are conducive to its health". The proposed amendment to section 2(a)(ii) of the Biodiversity Act was unchanged. The proposed insertion of paragraph (aA) into section 97 of the Act was amended to read: "the well-being of a faunal biological resource".

[12] In addition, the second version proposed to insert a new section 9A into the Biodiversity Act, reading thus:

> "The Minister may, by notice in the *Gazette* and subject to such conditions as the Minister may specify in the notice, prohibit any activity that may negatively impact on the well-being of a faunal biological resource."

Third version

[13] The second version of the Bill was transmitted to the NCOP. In addition to public participation facilitated by the provincial legislatures, the NCOP facilitated public participation on the second version through its Select Committee on Land Reform, Environment, Mineral Resources and Energy (Select Committee). I shall call the version that culminated from this process the "third version". It was approved by the Select Committee in terms of the final mandates of the provincial legislatures, and was adopted by the NCOP in December 2021.

[14] The third version contained a different definition of "well-being":

> "the holistic circumstances and conditions of an animal, which are conducive to its physical, physiological and mental health and quality of life, including the ability to cope with its environment."

[15] The third version no longer proposed an amendment to paragraph (a)(ii) in the Biodiversity Act's objectives in section 2. Instead, it proposed the addition of a new paragraph (iiA): "the consideration of the well-being of animals in the management, conservation and sustainable use thereof". The proposed new sections 9A and 97(aA) remained the same as in the second version, save that "a faunal biological resource" was replaced by "an animal".

[16] The NCOP referred the amended NEMLA Bill back to the National Assembly. The Portfolio Committee decided that no further public participation was needed and approved the amended Bill. In March 2022 the third version was passed by the National Assembly.

SA Hunters' case and the State's attitude

[17] SA Hunters' case is that the changes from the second version to the third version were material and that there should have been further public participation. It seeks an

order declaring invalid the definition of "well-being" and the provisions inserted into the Biodiversity Act as sections 2(a)(iiA), 9A and 97(aA). In regard to the need for further public participation after material amendments, SA Hunters relies on *SA Veterinary Association*[8] and *SA Iron and Steel*.[9] It is common cause that no further public participation occurred after the NCOP's adoption of the second version. On the merits, the question is thus whether the changes were such as to trigger the need for further public participation.

[18] Parliament and the Minister have filed explanatory affidavits in which they accept that there was inadequate public participation. For this reason, they do not oppose the application. It is for Parliament to decide how it will facilitate public participation, provided that the facilitation meets the objective standard of reasonableness. For this reason, Parliament's view that there was inadequate public participation may, in appropriate circumstances, carry considerable weight.

[19] Nevertheless, counsel were agreed that the State's stance cannot be dispositive. In this case, the State's position is deprived of the significance it might otherwise have had, given that neither Parliament nor the Minister explained why the changes from the second version to the third version were of sufficient materiality to require further public participation. Moreover, there is active opposition from the NSPCA and EMS. In terms of section 34 of the Constitution, they are entitled to a decision from this Court as to whether, as they contend, Parliament's public participation met the objective standard of reasonableness. This, in turn, depends on the materiality of the changes from the second version to the third version.

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

[9] *South African Iron and Steel Institute v Speaker of the National Assembly* [2023] ZACC 18; 2023 (10) BCLR 1232 (CC); 2026 (2) SA 368 (CC).

Delay

[20] There is, however, an important preliminary question: whether, as the respondents contend, SA Hunters should be non-suited for delay. SA Hunters launched its application on 23 July 2024 – some 25 months after the President assented to the NEMLA Act and 13 months after the impugned provisions came into force. The State parties did not address delay in their explanatory affidavits, though there is material in the Minister's affidavit that sheds some light on the potential prejudice caused by the delay.

Events relevant to delay

[21] SA Hunters participated in the National Assembly's public participation process. It submitted written comments to the Portfolio Committee in August 2017. Its comments were directed to what I have called the first version.

[22] After the referral of the second version to the NCOP, SA Hunters participated provincially by making submissions on the second version to the relevant Portfolio Committee of the North West Provincial Legislature. This was in September 2020. On "well-being", SA Hunters supported the inclusion in the Biodiversity Act of well-being of faunal biological resources. It submitted, however, that a distinction should be drawn between animals in the wild and captive animals. Animal well-being had to be aligned with principles of sustainable and responsible use of faunal biological resources. SA Hunters stressed that animal well-being should not be used as an excuse to stop sustainable use practices such as responsible hunting.

[23] The definition of "well-being" in the third version appears to have had its source in the report that the Limpopo Province submitted to the Select Committee in October 2020 together with its negotiating mandate. The Select Committee considered the negotiating mandates in June 2021. At that meeting, the Department of Forestry, Fisheries and the Environment (Department) supported the Limpopo definition.

[24] The third version of the NEMLA Bill was adopted by the NCOP in December 2021 and remitted to the National Assembly where it was passed on 1 March 2022. The President signed the NEMLA Act on 21 June 2022. SA Hunters' case appears to be that, at the time the NEMLA Act received presidential assent, it was unaware of the "well-being" changes made in the third version.

[25] SA Hunters describes what it calls a parallel process of engagement with the Department in the development of biodiversity policy. It states that it saw this as an opportunity to influence all prospective instruments on the subject, including the NEMLA Bill. In July 2021, at a time when the NEMLA Bill was still serving before the NCOP, SA Hunters commented on the Department's Draft Policy Position on the Conservation and Ecologically Sustainable Use of Elephant, Lion, Leopard and Rhinoceros (Draft Policy Position).[10] It argued for clear definitions of "welfare" and "well-being". It repeated what it had said to the North West's Portfolio Committee about the need to distinguish between animals in the wild, which face a variety of natural stresses, and captive animals.

[26] On 8 July 2022, the Department published for comment its Draft White Paper on Conservation and Sustainable Use of South Africa's Biodiversity (Draft White Paper).[11] Although the President had signed the NEMLA Act about two weeks earlier, the Draft White Paper still referred to it as the NEMLA Bill.[12] The Paper set out various "existing legal definitions that informed the policy". The third (that is, final) version of the "well-being" definition was quoted, with the NEMLA Bill referenced in brackets.[13]

[27] On 9 September 2022, SA Hunters submitted comments to the Department on the Draft White Paper. SA Hunters said that the "well-being" definition was

[10] Draft Policy Position on the Conservation and Ecological Sustainable Use of Elephant, Lion, Leopard and Rhinoceros, GN 566 *GG* 44776, 28 June 2021.

[11] Consultation on the Draft White Paper on Conservation and Sustainable Use of South Africa's Biodiversity 2022, GN 2252 *GG* 46687, 8 July 2022. The Draft White Paper was not included in the record in this Court.

[12] Id at 10.

[13] Id at 11.

problematic when applied to "management interventions such as culling, hunting, control of damage-causing animals and management of alien invasive species" and could "compromise the lethal use and control measures required in adaptive wildlife management". According to SA Hunters, the Draft White Paper's definition was "likely to threaten the growth of the wildlife economy and its associated benefits for conservation".

[28] On 28 October 2022, the Department published a Revised Draft White Paper on Conservation and Sustainable Use of South Africa's Biodiversity (Revised Draft White Paper).[14] The reference to the NEMLA Bill was now replaced with a reference to the NEMLA Act.[15] The Paper defined "animal well-being" in line with the third version previously mentioned, save that "or population of animals" was added after "an animal". This definition was described as "modified from [the] NEMLA Act".[16]

[29] On 10 November 2022, SA Hunters submitted comments to the Department on the Revised Draft White Paper. SA Hunters again expressed concern with the "well-being" definition. It questioned the use of the concepts of "mental health and quality of life" in relation to animals. It proposed, instead, working with the concepts of animal welfare and animal cruelty.

[30] SA Hunters took this up directly with the Minister in a letter dated 5 December 2022. SA Hunters expressed the view that the definition of "animal well-being" was a "fatal flaw", something that it saw as having stemmed "from the NEMBA review process". "NEMBA" is a reference to the Biodiversity Act. In SA Hunters' opinion, the definition of "well-being" – in particular the references to "mental health" and "quality of life" – could be "expected to result in constant legal battles". To use "well-being as proposed in the [Biodiversity Act] and the [Revised

[14] Publication of the Revised Draft White Paper on Conservation and Sustainable Use of South Africa's Biodiversity 2022 for Public Comment, GN 2689 *GG* 47378, 28 October 2022.

[15] Id at 8.

[16] Id at 18.

Draft White Paper]" did not provide policy clarity and was "overreach" by the Department, so SA Hunters asserted.

[31] SA Hunters' references in this letter to the "NEMBA review process" are unclear. In particular, what did SA Hunters mean when it spoke of the objectionable "well-being" definition "proposed in" the Biodiversity Act? If it meant the Biodiversity Act as amended by the NEMLA Act, it must have known of the definition contained in the third version. Both the Draft White Paper and the Revised Draft White Paper must have alerted SA Hunters to the fact that the NEMLA Bill and subsequently the NEMLA Act contained this definition. These Papers did not speak of any further amendments specifically to the Biodiversity Act. So, the definition "proposed in" the Biodiversity Act must have meant the definition which would become operative when the NEMLA Act was brought into operation.

[32] The Minister replied to SA Hunters on 16 February 2023. She pointed out that the "well-being" definition already existed in the NEMLA Act, which had been promulgated on 24 June 2022 and was to take effect on a date to be determined by the President. The same definition was used in the Draft White Paper and Revised Draft White Paper for "alignment between policy and legislation". The Draft White Paper made clear, according to the Minister, "that it does not intend for well-being to interfere with natural processes such as predation, but rather that well-being must be considered in anthropogenic interventions and activities".

[33] In its founding affidavit, SA Hunters said, with reference to the Minister's letter, that it had come as a complete surprise to it that the impugned provisions "would imminently take effect on a date to be determined by the President". As SA Hunters' counsel noted at the hearing, the Minister herself did not say that the NEMLA Act would be brought into operation "imminently". Nevertheless, the fact that SA Hunters' deponent made this statement in the founding affidavit must mean that SA Hunters realised that the NEMLA Act could come into operation at any moment.

[34] In the founding affidavit, SA Hunters also stated that it was under the genuine impression that the NEMLA Act would not take effect until the policy processes making up the parallel engagement (that is, consultation on the Draft Policy Position, Draft White Paper and Revised Draft White Paper) were finalised. This suggests not that SA Hunters was unaware of the content of the NEMLA Act, but that it was hoping the NEMLA Act would not be brought into operation while there was still public discussion on the White Paper.

[35] On 14 June 2023, the final White Paper on Conservation and Sustainable Use of South Africa's Biodiversity (final White Paper) was promulgated in the *Government Gazette*.[17] During the course of that month, SA Hunters submitted a memorandum to the Department's Wildlife Forum, objecting to the lack of public participation over the change in the "well-being" definition from the second version to the third version. The new definition, SA Hunters complained, was now being used not only in the NEMLA Act but also in the final White Paper. SA Hunters repeated its substantive objections to the definition.

[36] As previously mentioned, on 30 June 2023 the NEMLA Act came into force by proclamation. According to SA Hunters, this event "escaped [its] attention". SA Hunters states that it was "only during early 2024", following further engagements with the Department and various interest groups, that it "dawned upon" it that the NEMLA Act "took effect at the end of June 2023 and not during February of that year, as was suggested by the former Minister". The reference to the "suggestion by the former Minister" is to her letter dated 16 February 2023. This shows once again that, rightly or wrongly, SA Hunters thought in February 2023 that the NEMLA Act would be brought into operation very soon.

[37] To complete the timeline relevant to delay, SA Hunters states that "[d]uring May 2024" it sought legal advice, which pointed to the need for an application to this

[17] Publication of the White Paper on Conservation and Sustainable Use of South Africa's Biodiversity, GN 3537 *GG* 48785, 14 June 2023.

Court. SA Hunters says that it then had to "wade through and investigate the various stages of the legislative process which resulted in the enactment of the NEMLA Act". The application, as I have said, was lodged on 23 July 2024.

Submissions on delay

[38] On the facts, SA Hunters relies on the assertions I have summarised above as to (a) when it learnt of the changes from the second version to the third version; (b) when it discovered that the NEMLA Act had been brought into operation; and (c) the significance it attached to the parallel engagement with the Department. SA Hunters submits that prejudice caused by the delay will be neutralised if the declaration of invalidity that it seeks is suspended for 24 months, in accordance with its alternative prayer in the notice of motion. This suspension is supported by the State parties.

[39] The respondents cite *Doctors for Life*[18] and *Moutse*,[19] where this Court stated that although this Court's rules do not stipulate the time within which challenges of this kind should be brought, they need to be instituted as soon as possible after the impugned legislation has been passed.[20] They submit that SA Hunters has not provided an adequate explanation for the delay.

The applicable principles

[40] The rule that public participation challenges must be brought as soon as possible is akin to the rule that a legality review must be brought without undue delay. In the latter context, a court asks whether the delay is unreasonable and, if so, whether the

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

[19] *Moutse Demarcation Forum v President of the Republic of South Africa* [2011] ZACC 27; 2011 (11) BCLR 1158 (CC).

[20] *Doctors for Life* above n 18 at para 216 and *Moutse* id at para 24.

court should nevertheless overlook it.[21] A delay that is not satisfactorily explained is unreasonable.[22]

[41] Despite the absence of a reasonable explanation, a court can in its discretion overlook delay. In the exercise of this discretion, the court is guided by the values of the Constitution.[23] Relevant factors include the public interest in certainty and finality; the effect of delay on the availability of evidence; potential prejudice to affected parties and adverse consequences if the impugned decision is set aside; the nature of the impugned decision and the merits of the challenge; the extent and nature of the alleged illegality; and the conduct of the applicant and whether it acted in good faith.[24]

[42] The principle that an unreasonable delay can be overlooked applies also in public participation challenges. In *Moutse*, this Court concluded that it would not be in the interests of justice to non-suit the applicants for a delay of more than two years.[25] Among the reasons cited were that the respondents had been alerted early to the intended challenge; despite the delay, the respondents were able to provide evidence as to what happened during the public participation process; the blame for the delay lay with the applicants' lawyers rather than the applicants themselves; and it was possible to reverse the effect of the challenged law.[26]

[43] Similar considerations led this Court in *Mogale*[27] to overlook a delay of more than two years: the applicants had given early notice of their intention to challenge the

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[21] *Khumalo v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC); (2014) 35 ILJ 613 (CC) (*Khumalo*) at para 49 and *Economic Freedom Fighters v Speaker of the National Assembly* [2026] ZACC 17; 2026 (8) BCLR 761 (CC) (*EFF III*) at para 87 (judgment of Maya CJ).

[22] *Khumalo* id at para 50 and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) (*Buffalo City*) at para 52.

[23] *Khumalo* id at para 44.

[24] Id at paras 47-8, 52 and 57; *Buffalo City* above n 22 at paras 54-62; and *EFF III* above n 22 at para 90 (judgment of Maya CJ).

[25] *Moutse* above n 19 at paras 26-8.

[26] *Moutse* id at paras 27-9.

[27] *Mogale v Speaker of the National Assembly* [2023] ZACC 14; 2023 (6) SA 58 (CC); 2023 (9) BCLR 1099 (CC).

legislation; they were acting not only in their own interests but also on behalf of their organisations and in the public interest; the impugned legislation impacted the lives of millions of South Africans; the State parties had been able to put up significant evidence to defend their positions; the preparation of the application had required collecting a vast amount of information; and, if the applicant succeeded, there would be no disruption, since the impugned legislation had been implemented to only a limited degree and the declaration could be suspended.[28] The ultimate question, the Court said, is the interests of justice.[29]

[44] By contrast, this Court has refused to condone delay where the explanation was unsatisfactory. In *Glenister*,[30] this Court dismissed an application brought roughly 15 months after enactment. The delay had stemmed from the applicant's uncertainty as to whether to bring proceedings in the Constitutional Court or the High Court. This Court found the explanation to be unsatisfactory, because the applicant could have applied to this Court to hear both challenges together.[31]

[45] Similarly, in *Poverty Alleviation Network*,[32] this Court, without making a definitive ruling on delay, expressed scepticism about a nine-month delay, which the applicants had sought to justify on the basis of ongoing engagement with the National Executive and the South African Human Rights Commission.[33] This Court held that it was not, however, necessary for it to decide the delay point, given its conclusion on the main issues.

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[28] Id at paras 24-30.

[29] Id at para 19.

[30] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

[31] Id at paras 26-7.

[32] *Poverty Alleviation Network v President of the Republic of South Africa* [2010] ZACC 5; 2010 (6) BCLR 520 (CC).

[33] Id at para 29.

Discussion

When time began to run

[46] The NEMLA Act was promulgated on 21 June 2022. A public participation challenge was available as from that date, even though the Act was only brought into force on 30 June 2023. It is not unusual for this Court to hear public participation challenges before legislation is brought into operation. This Court has done so recently in cases concerning the National Health Insurance Act[34] and the Public Procurement Act.[35] Indeed, in *SA Iron and Steel* a public participation challenge was brought in respect of other provisions of the NEMLA Act itself, and this was heard and decided before any provisions of the Act were brought into operation.

[47] The delay must thus be reckoned from 21 June 2022. The delay was slightly more than 25 months. On the face of it, this is unreasonable.[36] The delay has not been satisfactorily explained.

What SA Hunters knew and when it knew it

[48] SA Hunters does not say that it was unaware that the National Assembly passed the final version of the NEMLA Bill on 1 March 2022 and that the President gave assent on 21 June 2022. SA Hunters seemingly asserts that it was not aware, at that time, of the changes made from the second version to the third version. However, its evidence on this is vague, hence the difficulty in being sure exactly what it is saying.

[34] 20 of 2023. This Act received presidential assent 15 May 2024 but has not yet been brought into force. On 5 May 2026 this Court heard argument on two related public participation challenges in respect of the procedure leading to the enactment of this legislation: CCT 251/25 *Board of Healthcare Funders NPC v Speaker of the National Assembly* and CCT 269/25 *Premier, Western Cape v Speaker of the National Assembly*.

[35] 28 of 2024. This Act received presidential assent on 18 July 2024 but has not yet been brought into force. On 18 May 2026 this Court heard argument on two related public participation challenges in respect of the procedure leading to the enactment of this legislation: CCT 103/25 *Premier of the Western Cape Government v Speaker of the National Assembly* and CCT 144/25 *City of Cape Town v Speaker of the National Assembly*. (Judgment in these two consolidated cases has been subsequently delivered: see *Premier of the Western Cape Government v Speaker of the National Assembly; City of Cape Town v Speaker of the National Assembly* [2026] ZACC 37.)

[36] Even if we were to calculate delay from the date the NEMLA Act came into force, that delay would be 13 months. This is still, on the face of it, unreasonable.

[49] SA Hunters had participated in the National Assembly and provincial public participation processes. One of its main concerns was the concept of well-being. It was aware that a definition of "well-being" was included in the second version. SA Hunters was not satisfied with the second version, hence the submissions it made to the North West's Portfolio Committee in September 2020. It is difficult to accept, in the circumstances, that SA Hunters did not concern itself with what became of the NCOP public participation process or with the final version of the Bill.

[50] Moreover, SA Hunters submitted detailed comments on the Draft White Paper published in July 2022 and the Revised Draft White Paper published in October 2022. As I have said, these Papers reflected the third version's definition of "well-being" in the NEMLA Bill and NEMLA Act respectively. SA Hunters' comments do not reflect a lack of awareness that the "NEMBA review process" had culminated in this version of the definition. SA Hunters' supposed surprise, in reaction to the Minister's letter of 16 February 2023, seems to have had more to do with when the NEMLA Act would be brought into operation than the content of the NEMLA Act.

[51] When it received the Minister's letter, SA Hunters apparently thought that the NEMLA Act would be brought into operation in the near future. Despite this fact, it did not seek legal advice or bring an application, nor (on its version) did it monitor the coming into force of the Act. It was only some 15 months later, in May 2024, that it sought legal advice, and it took another two months for the application to be launched.

[52] SA Hunters' reliance on parallel consultation with the Department is without merit. This consultation was not concerned, at least not explicitly, with further amendments to the Biodiversity Act. The Department was engaged in policy formulation. In itself, this process could not undo the promulgation of the NEMLA Act and afforded no reason for not challenging the NEMLA Act if there were grounds to do so. Policy discussions can have no effect on the pending promulgation of legislation that has already been passed by Parliament. That much should have been clear to SA Hunters, which had been actively engaged in the legislative process. Its averment –

that it held the belief "that not until such time as the policy processes . . . had been finalised, will the NEMLA Act take effect" – is unsustainable.

[53] A further exacerbating factor is that SA Hunters did not, in its replying affidavit in response to EMS' application, take the opportunity to address the issue of delay. EMS pertinently raised delay in its application.

[54] Unlike *Mogale*, this is not a case where substantial time was needed to prepare an application. The complaint fell within a narrow compass. It is common cause that no consultation occurred after the adoption of the third version. Everything turned on whether the change from the second version to the third version was sufficiently material to require further public participation. It is, therefore, difficult to understand SA Hunters' claim of having to "wade through and investigate the various stages of the legislative process" prior to filing its application.[37] The assertion that there should have been further public participation was raised at the Wildlife Forum meeting on 28 March 2023 and formed the essence of the objection SA Hunters lodged with the Wildlife Forum in June 2023. That document, however, did not foreshadow a court challenge. There is no evidence that the State parties knew anything of an intended challenge until the application was launched in late July 2024. The NSPCA only learnt of the pending application in November 2024.

[55] SA Hunters was thus, on its own case, aware of the basis of a potential challenge more than a year before it launched its application. It has not sought to blame lawyers for bad advice or for delay in preparing the application. In truth, we do not know what spurred SA Hunters into action in the first half of 2024. It refers in vague terms to further engagement with the Department and various interest groups. At most, this alerted it to the fact that the NEMLA Act, which had been promulgated in June 2022, had been brought into operation on 30 June 2023. Apart from the fact that SA Hunters should have been monitoring the proclaimed commencement date if it was concerned

[37] SA Hunters itself had been actively involved throughout the public participation process and raised multiple objections regarding the well-being provisions.

about the NEMLA Act, the simple fact is that it was the promulgation date, not the commencement date, that started the clock for purposes of delay.

The interests which SA Hunters represents

[56] As to the interests represented by SA Hunters, I accept that it is a non-profit organisation. However, its funding comes from its members, and those members include many with a commercial interest in the policy positions adopted by the organisation. According to SA Hunters, it has some 40 000 members, of whom more than 17 000 are dedicated hunters, including some professional hunters. Its members also include 480 game farmers. While there is no reason to question the genuine interest of the organisation and its members in conservation, this is an interest closely allied to its focus on responsible hunting, sport shooting and firearm ownership, all of which are mentioned in the first three sub-clauses of the objectives listed in its constitution.

[57] *Moutse* concerned an amendment to the Constitution which, among other things, changed the border between the provinces of Mpumalanga and Limpopo. This had the effect of causing parts of the Moutse community, which had previously been part of the Mpumalanga Province, to fall within the Limpopo Province. The challenge was brought on behalf of the affected community. It ultimately failed on the merits. In *Mogale*, several organisations and individuals brought a public participation challenge to the whole of the Traditional and Khoi-San Leadership Act,[38] acting not only in their own interest but in the public interest. The impugned Act affected millions of people in this country.

[58] The interests represented by SA Hunters are much narrower. Its primary motivation is clearly the perceived effect of the well-being provisions on the hunting and game-ranching activities of its members. The extent of the alleged illegality and prospects of success in the main case are relevant considerations. It is to these matters I now turn. I must emphasise that I do so solely insofar as these matters are germane to

[38] 3 of 2019.

the question whether this Court should exercise its discretion to overlook the delay, and not in order to finally decide them on their merits.

The extent of alleged non-compliance

[59] The public participation facilitated initially in the National Assembly and thereafter in the NCOP and the provinces is not criticised as having been inadequate. The public, including SA Hunters, was heard on the subject of well-being at both stages. The sole complaint is that, when the third version emerged from the NCOP process, it should have been subject to further public participation because of the changed definition of "well-being".

[60] In *SA Veterinary Association*, amending legislation required various professionals to obtain licences if they compounded and dispensed medicines. The veterinary profession was included only after the completion of public participation in the National Assembly. Although textually the amendment was small, substantively it was significant. An entire profession that stood to be affected by the legislation was, in effect, excluded from the National Assembly's public participation process. Members of the veterinary profession would not have understood the amending legislation to affect them, and so would have had no reason to participate. After the change was made, no invitation to comment was extended to the organisation representing the veterinary profession, the applicant in that case.

[61] *SA Iron and Steel* concerned amendments made by the NEMLA Act to the National Environmental Management: Waste Act[39] (Waste Act). From the second version to the third version of the NEMLA Bill, the definition of "waste" underwent a change which this Court described as radically expanding the scope of the Waste Act.[40] The evidence showed that the amended definition did not emanate from public participation, but was proposed by the Department when the Select Committee met in

[39] 59 of 2008.

[40] *SA Iron and Steel* above n 9 at para 16.

June 2021 to debate the negotiating mandates. The Department's case was that the change was designed in part to neutralise the effect of an appeal which it had lost in the Supreme Court of Appeal in April 2020.[41]

[62] In the present case, by contrast, the alleged failure is much narrower. As I have said, there was consultation in the National Assembly and NCOP on the subject of well-being. The amended definition of "well-being" in the third version had its source in the Limpopo Provincial Legislature's public participation report.

Materiality of changes

[63] In *SA Iron and Steel*, this Court said that the changes to the definition of "waste" were not merely "semantic or technical".[42] This must not be understood to mean that, whenever a change is more than "semantic or technical", there has to be fresh public participation. Public participation, as envisaged in the Constitution, is not confined to suggestions from the public of a mere semantic and technical nature. The public is entitled to make substantive suggestions, and these must be considered by lawmakers with an open mind. The legislative process would be paralysed and never-ending if every change made in response to public input, and going beyond the merely "semantic or technical", triggered a fresh round of public participation. It is a matter of degree, having regard to what is objectively reasonable.

[64] The only change of potential significance from the second version to the third version was the definition of "well-being". An important point to note, in this regard, is that the provisions in which "well-being" features are not self-executing. Unlike the alterations considered in *SA Veterinary Association* and *SA Iron and Steel*, the well-being provisions do not have automatic substantive effect.

[41] *Minister of Environmental Affairs v ArcelorMittal South Africa Ltd* [2020] ZASCA 40. The respondent in the Supreme Court of Appeal case was one of the applicants in *SA Iron and Steel* above n 9.

[42] *SA Iron and Steel* id at para 40.

[65] In section 2, one of the objectives of the Biodiversity Act is now the "consideration" of the well-being of animals. The fact that this must be considered does not translate into any automatic legal effect. To say that the well-being of animals must be considered is to say that it is a factor to be taken into account. Other objectives in section 2 include the management and conservation of biological diversity; the protection of the ecosystem as a whole; and the use of indigenous biological resources in a sustainable manner. SA Hunters contends that considerations of the latter kind may point to the desirability of, for example, culling and responsible hunting. If that is so, the objectives of the Biodiversity Act may require a balancing of competing objectives. The well-being of animals will not necessarily translate into protection in every case.

[66] Section 9A of the Biodiversity Act will now allow the Minister, by notice in the *Government Gazette*, to prohibit any activity "that may negatively impact on the well-being of an animal". This is an enabling provision, without any immediate effect. The Minister will need to take into account all the objectives of the Act when deciding whether to impose a prohibition under section 9A.

[67] It does not appear that the Minister has as yet imposed any prohibitions under this section. There is no evidence that the Minister intends to use the power in a way that would restrict the current lawful activities conducted by SA Hunters' members. If the Minister were minded to do so, he or she would need to follow a fair procedure in terms of section 3 or 4 of the Promotion of Administrative Justice Act[43] (PAJA). SA Hunters and its members would have the opportunity to be heard. If the Minister exercised the section 9A power irrationally or unlawfully, the decision would be subject to review in terms of PAJA.

[68] The Minister may now, in terms of section 97(1)(aA), make regulations relating to the "well-being of an animal". This is one of a long list of matters on which the Minister may make regulations. I note, in passing, that the Minister's pre-existing

[43] 3 of 2000.

regulatory powers include regulations relating to the hunting industry and to the compulsory or voluntary registration of ranching operations and game farms.[44] Section 97(3) requires the promulgation of regulations to be preceded by a consultative process in accordance with sections 99 and 100 of the Biodiversity Act. This includes public participation.

[69] Once again, there is no indication that the Minister has promulgated, or intends to promulgate, regulations that will restrict the current lawful activities of SA Hunters' members. If that is to be done, SA Hunters and its members will have an opportunity to be heard before regulations are issued, and will have remedies in terms of PAJA if irrational or otherwise unlawful regulations are promulgated.

[70] Does the third version's definition of "well-being" materially change the objectives of the Act in section 2 and the matters on which notices and regulations may be promulgated in terms of sections 9A and 97(1)(aA)? For purposes of assessing SA Hunters' prospects of success as a factor relevant to overlooking delay, it is unnecessary and undesirable to express a definite opinion on the matters of interpretation canvassed in argument. What must, though, be mentioned is that, in oral argument, counsel for SA Hunters did not persist with the contention that the change from "faunal biological resource" in the second version to "animal" in the third version was material.

[71] In regard to the rest of the "well-being" definition, the argument focused on the expansion of "health" to encompass "physical, physiological and mental health" and on the addition of "quality of life" and "ability to cope with its environment" as part of an animal's well-being. The respondents submit that the health of an animal necessarily includes its physiological and mental health. "Physiological" health refers to the state of health of a living organism's functions and mechanisms. It is, according to the respondents, inherently part of health as ordinarily understood. "Mental" health –

[44] Section 97(1)(b)(ix) and (dA).

health of mind – is also, so the respondents contend, part of overall health. This is certainly true for people, and the notion that it is true for animals as well is not outlandish, and has been the subject of scientific writing.[45]

[72] Arguably, SA Hunters trivialises this notion when it resorts to *reductio ad absurdum* (reduction to absurdity) by questioning how mental health can be applied to insects or fish. If the health of higher-order animals can sensibly encompass mental health, it is no answer to say that there are other lower-order creatures which do not have a sufficient mental component for it to feature as part of their health. One could hardly expect the lawmaker to list all the animals falling into one category or the other. If an animal does not have a mind capable of ill-health, it will simply not form part of the health assessment in relation to that kind of animal.

[73] I accept that, prior to the amendment in the third version, it could have been argued that the health of an animal did not include its mental health. It is equally true that the contrary could have been argued, and would no doubt have been vigorously argued in relation to many kinds of higher-order animals. It cannot be said, therefore, that the express reference to mental health in the third version definitely brought about a change. All that can be said with confidence is that the change foreclosed an argument that mental health should be disregarded.

[74] I acknowledge that having regard to an animal's "quality of life" may in some instances extend the assessment of the animal's well-being beyond its "physical, physiological and mental health". On the other hand, conditions negatively affecting an animal's quality of life will often have an impact on its health. The same is true for circumstances negatively affecting the ability of an animal to "cope with its

[45] Panksepp *Affective Neuroscience: The Foundations of Human and Animal Emotions* (OUP, New York 1998); Mendl et al "An Integrative and Functional Framework for the Study of Animal Emotion and Mood" (2010) 277 *Proceedings of the Royal Society B: Biological Sciences* 2895; McMillan *Mental Health and Well-Being in Animals* 2 ed (CABI, Oxfordshire 2020); Mellor et al "The 2020 Five Domains Model: Including Human-Animal Interactions in Assessments of Animal Welfare" (2020) 10 *Animals* 1870; and Dawkins *The Science of Animal Welfare: Understanding What Animals Want* (OUP, New York 2021).

environment". If an animal cannot cope with its environment, its health is likely to deteriorate.

[75] SA Hunters has argued that the "living conditions" referred to in the second version's definition meant physical conditions, whereas the "holistic circumstances and conditions of the animal" is a much wider concept. This proposition is doubtful. The holistic circumstances and conditions of the animal appear still to be a reference to the physical features of the environment in which it lives. It is not readily apparent what other circumstances and conditions could be contemplated. The word "holistic" merely requires that regard be had to the circumstances and conditions in their totality rather than assessing individual components in isolation. It is again not readily apparent why the "living conditions" contemplated in the second version would have been assessed in a different way.

[76] At the hearing, counsel for SA Hunters was asked to give an example in which the change in definition from the second version to the third version would have a practical impact, for example, in relation to hunting. Despite the question being repeated, counsel could not give the Court a practical example. It was left to the Minister's counsel to suggest that, in the case of an elephant that is well looked after in a zoo, the circumstances in which it lived might be conducive to its physical, physiological and mental health, and yet its "quality of life" might be impaired. Views may differ as to whether such captivity would not in due course negatively affect the elephant's health. The difficulty encountered by SA Hunters' counsel in answering the question, and the single (and not infallible) example offered by the Minister's counsel, hardly suggest a material amendment.

[77] In its affidavits, SA Hunters did not identify and delineate with any precision the negative consequences that were likely to eventuate because of the change in the "well-being" definition from the second to the third version or the likely severity of the negative consequences. SA Hunters made broad speculative statements about possible future impacts, some of which seem to be related to its concern in general about the

concept of animal "well-being", rather than anything linked specifically to the definition in the third version. Given the modest textual changes from the second to the third version, it was incumbent on SA Hunters to articulate more clearly how the changes were likely to impact, for example, upon "a staggering 8 979 wildlife ranches", "almost 6 million herbivores present on wildlife ranches throughout the Republic" and "the sale of approximately 22 500 game animals per year".[46] These sweeping statements of possible future impacts are in marked contrast with *SA Veterinary Association* and *SA Iron and Steel*, where this Court was able to pinpoint the precise consequences of the challenged changes.

[78] Having regard, therefore, to the character of the provisions in which well-being features and the arguably modest nature of the changes from the second version to the third version, SA Hunters' prospects of succeeding in its public participation challenge must be regarded as doubtful.

Prejudice

[79] As to prejudice, we know that the definition of "well-being" in the NEMLA Act informed the Draft and Revised Draft White Papers, and it featured in the final White Paper promulgated on 14 June 2023. In his explanatory affidavit, the Minister says that well-being has become a critical part of the Department's conservation mandate. The introduction of "well-being" into the Biodiversity Act was necessary to establish a benchmark against which the Department's officials could more effectively monitor and assess permits granted in terms of the Biodiversity Act.

[80] The Minister states that, since the coming into force of the NEMLA Act, the Department has worked on and developed the necessary regulations and framework to give effect to "well-being" considerations. In April 2024 it issued the final version of the Policy Position on the Conservation and Sustainable Use of Elephant, Lion, Leopard

[46] SA Hunters made the quoted statements in its affidavit in response to EMS' intervention application.

and Rhinoceros.[47] Over the period October 2023 to November 2024 it issued four Consultation Papers on various topics. Work of this kind, he says, is ongoing.

[81] The NSPCA and EMS have identified court cases in which the impugned provisions have been relied upon: cases concerning endangered penguins; wildlife in Marloth Park; the elephants in the Johannesburg Zoo; and the illegal trafficking into South Africa of two lion cubs.

[82] It is thus clear that a declaration of invalidity has the potential to cause disruption to the work of the Department and in litigation where the impugned provisions may be relevant. Some of this may be ameliorated by suspending the declaration. On the other hand, suspension will lengthen the period during which the impugned provisions will be operative, further entrenching them in the work of the Department and in litigation. If the changes from the second version to the third version are material – and this is the premise of SA Hunters' case – work done on the strength of the third version will have to be reversed. Furthermore, further public participation will take place in a context where the impugned provisions have been operative for well over three years.

Conclusion on delay

[83] The delay has not caused any evidential prejudice. However, the cumulative effect of all the other factors I have considered leads me to conclude that the Court should not in its discretion overlook the unreasonable delay.

Conclusion and order

[84] It follows that the application must be dismissed. There is no reason why SA Hunters should not be ordered to pay the NSPCA and EMS' costs. The NSPCA employed two counsel, which was reasonable in the circumstances.

[47] Policy Position on the Conservation and Sustainable Use of Elephant, Lion, Leopard, Rhinoceros, GN 4750 *GG* 50541, 24 April 2024.

[85] The following order is made:

1. The application is dismissed.
2. The applicant must pay the costs of the fourteenth and fifteenth respondents, including, in the case of the fourteenth respondent, the costs of two counsel.

For the Applicant:	A Liversage SC and K Pretorius instructed by Couzyn Hertzog and Horak Attorneys
For the First and Second Respondents:	N Stein instructed by Office of the State Attorney, Cape Town
For the Third Respondent:	N Rajab-Budlender SC and S Kazee instructed by Office of the State Attorney, Pretoria
For the Fourteenth Respondent:	L Morison SC and S J Martin instructed by Bowman Gilfillan Incorporated
For the Fifteenth Respondent:	I Learmonth instructed by Cullinan and Associates