THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 269/25

In the matter between:

PREMIER OF THE WESTERN CAPE GOVERNMENT	Applicant
and	
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
SPEAKER OF THE WESTERN CAPE PROVINCIAL PARLIAMENT	Third Respondent
SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Fourth Respondent
SPEAKER OF THE KWA-ZULU NATAL PROVINCIAL LEGISLATURE	Fifth Respondent
SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE	Sixth Respondent
SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE	Seventh Respondent
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Eighth Respondent
SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE	Ninth Respondent
SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Tenth Respondent
SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE	Eleventh Respondent
MINISTER OF HEALTH	Twelfth Respondent

APPLICANT'S WRITTEN SUBMISSIONS

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INTRODUCTION AND OVERVIEW

1. This application concerns a systemic failure by the National Council of Provinces ("**the NCOP**") to fulfil its constitutional obligation to facilitate meaningful public involvement in the passage of the National Health Insurance Act 20 of 2023 ("**the NHI Act**").

2. The obligation in sections 72(1)(a) and 118(1)(a) of the Constitution requires a process in which public participation is capable of influencing the legislative outcome, and in which Parliament takes account of the views expressed.

3. The NHI Act is a statute of unprecedented significance in South Africa's democratic history. Its very purpose is to fundamentally change the way in which healthcare services are delivered and accessed. It will affect the lives of every South African. It deserves the fullest degree of public participation and involvement.

4. However, the NCOP, and particularly its Select Committee on Health and Social Services ("**the Select Committee**"), adopted a process that ensured that public participation was ineffective. The defect lies not in the fact that the NCOP disagreed with input received from the public. It is that, in material respects, it did not consider the public's input at all.

5. The failures manifest in five interrelated respects.

6. First, the NCOP adopted an unreasonable and inflexible timetable. It compressed the consideration of public input into a short period in November 2023, driven not by urgency inherent in the Bill, but by a desire to finalise it before the end of Parliament's term. Requests for reasonable extensions by the Western Cape Provincial Parliament

("**the WCPP**") were refused or ignored. The result was a rushed process in which meaningful engagement with public input was impossible.

7. Second, the NCOP failed to consider input from the provincial public participation. Public participation reports from Gauteng were never submitted at all, with the result that the views of that province did not reach the NCOP. The Western Cape's detailed public participation report was only placed before the Select Committee after the decisive stages of the process had been completed, when it could no longer influence the outcome. And even where provincial reports were available, they were not substantively engaged with.

8. Third, the NCOP failed to consider all the provinces' negotiating mandates together. The negotiating mandates meeting proceeded in the absence of the Western Cape's mandate and without a public participation report from Gauteng. In those circumstances, it was impossible for the Select Committee to achieve a coherent understanding of public concerns across the country through interaction and engagement between the provinces.

9. Fourth, the NCOP failed to afford the Western Cape Government ("**the WCG**") a meaningful opportunity to influence the legislative process. The WCG made detailed written submissions to the NCOP, including specific proposed amendments. Those submissions were not properly captured, were not placed before the Select Committee in any meaningful form, and were not properly debated or considered at any stage.

10. Fifth, because the Select Committee did not deliberate on any of the conditions and amendments attached to the provinces' negotiating mandates, it failed to request the National Department of Health ("**NDOH**") to make amendments, despite an express recognition by the NDOH that such amendments might be warranted.

11. The cumulative effect of these defects is decisive. As this Court held in *LAMOSA*[1] and *Mogale*,[2] where public input does not "*filter through*" to the stage at which decisions are taken, and is not considered or debated, the process is deprived of the potential to achieve its purpose**.** That is precisely what occurred here.

12. In these submissions, we address the following issues:

    12.1. First, we address the preliminary questions of jurisdiction, standing and delay.

    12.2. Second, we set out the general principles regarding the obligation to facilitate public participation, with particular focus on the highly instructive cases of *LAMOSA* and *Mogale*.

    12.3. Third, we describe the legislative process in the NCOP.

    12.4. Fourth, we describe the uncontested importance of the NHI Act, and the implication for the required degree of public participation.

    12.5. Fifth, we set out the relevant facts regarding the process adopted by the NCOP.

    12.6. Sixth, we address each of the grounds on which it is contended that the NCOP failed to facilitate public involvement.

    12.7. Lastly, we address the question of remedy.

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[1] Land Access Movement of South Africa and Others v Chaiperson, National Council of Provinces and Others 2016 (5) SA 635 (CC) (**LAMOSA**) para 71.

[2] Mogale and Others v Speaker, National Assembly and Others 2023 (6) SA 58 (CC) (**Mogale**) para 80.

PRELIMINARY ISSUES

Exclusive jurisdiction

13. Under section 167(4)(e) of the Constitution, this Court has exclusive jurisdiction to decide whether Parliament has failed to fulfil a constitutional obligation.

14. In terms of sections 59(1)(a), 72(1)(a), and 118(1)(a) of the Constitution, the National Assembly ("**NA**"), the NCOP and the Provincial Legislatures each have a distinct obligation to facilitate public involvement in their legislative and other processes.

15. Parliament's failure to reasonably facilitate public involvement implicates its constitutional obligations in terms of those sections of the Constitution. This Court has exclusive jurisdiction to decide that question.[3]

Standing and delay

16. The Premier brings this application on behalf of the WCG, in its own interest, in the interests and on behalf of the people of the Western Cape province, and in the public interest.[4]

17. The WCG made written and oral submissions to the NA's Portfolio Committee. Once the NHI Bill had been passed by the NA, the WCG made further written submissions to the NCOP. The WCG also made written submissions to the WCPP's Standing Committee on Health and Wellness and made oral submissions at one of the public hearings held by the WCPP.

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[3] Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) (**Doctors for Life**) para 30, LAMOSA paras 6 – 7; Mogale para 14.

[4] FA p003-14, paras 26 to 28.

18. Accordingly, the WCG has standing to challenge the sufficiency of the public participation process in its own interest.[5]

19. The WCG also has standing to bring this challenge in the interests and on behalf of the people of the Western Cape province and in the public interest, given its role in the provision of public healthcare in the province.

20. Parliament admits the Premier has standing.[6] The Minister alleges that the Premier lacks standing, seemingly on the basis that the application was brought out of time.[7] There is no substantiation for this assertion.[8] It is particularly meritless because the NHI Act has, to date, still not been brought into operation. Even if there was a delay, which is denied, it would not be in the interests of justice to non-suit the WCG.[9]

THE OBLIGATION TO FACILITATE PUBLIC PARTICIPATION

General principles

21. The NA, the NCOP and Provincial Legislatures each have a distinct obligation to facilitate public involvement in their legislative and other processes.[10]

22. This obligation entails taking steps to ensure that the public participate in the legislative process. This gives effect to both the representative and participatory nature of our democracy.[11] It "*enhances the civic dignity of those who participate by enabling their*

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[5] Doctors for Life para 216; Mogale para 19.

[6] Parliament AA p017-612, para 148.

[7] Minister AA p017-107, para 125.

[8] RA p018-87, para 342.

[9] See Mogale para 19.

[10] Sections 59(1)(a), 72(1)(a) and 118(1)(a).

[11] LAMOSA para 57.

voices to be heard and taken account of”,[12] while, at the same time, strengthening “*the legitimacy of legislation in the eyes of the people.*”[13]

23. Parliament and the provincial legislatures have a degree of discretion to determine how best to fulfil the duty to facilitate public involvement.[14] What is required will vary from case to case.[15] However, in every case, Parliament must act reasonably.[16]

24. Reasonableness is an objective standard, which is sensitive to the facts and circumstances of a particular case.[17] Context is all-important.[18] It involves a consideration of the cumulative consequence of the process as a whole.[19]

25. The minimum requirement of reasonableness is that the public must be afforded a meaningful chance of participating in the legislative process, to know about the issues, and to have an adequate say.[20] For an opportunity to participate to be meaningful, it must be “*an opportunity capable of influencing the decision to be taken*”.[21]

26. The process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public’s views.[22] While Parliament is not obliged to agree with or adopt any particular submission, if submissions made at a

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[12] Doctors for Life para 115.

[13] Id.

[14] Doctors for Life paras 123 – 124.

[15] Doctors for Life para 125.

[16] Doctors for Life para 125.

[17] Doctors for Life para 127.

[18] Id.

[19] Mogale para 60.

[20] LAMOSA para 59.

[21] Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others 2011 (11) BCLR 1158 (CC) para 62.

[22] Mogale para 35.

hearing are not transmitted, or are not accurately transmitted to the legislature, then the hearing is not *capable* of influencing Parliament's deliberations.[23] Even if the lawmaker ultimately does not change its mind, it must have approached the public involvement process with a willingness to do so.[24]

27. In assessing reasonableness, relevant factors include, amongst others:[25]

27.1. what Parliament itself considers reasonable, as codified in the Practical Guide, and how it has decided to facilitate public participation;

27.2. the nature and importance of the legislation, and its impact on the public;

27.3. genuine time constraints on the passage of the Bill, and any need for its urgent adoption.[26]

28. The NCOP occupies a special and unique place in the constitutional framework.[27] It is made up of delegates from the provinces, and is a forum for expressing the interests of the provinces in the national legislative process, allowing for debate and discussion between provincial legislatures, particularly on issues that affect provinces. It thereby ensures that concerns raised in one province can be considered by the other provinces in a national forum. The NCOP's role is thus that of a "*linking mechanism*", which acts simultaneously to involve the provinces in national purposes, and to ensure the responsiveness of national government to provincial interests.[28]

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[23] Id.

[24] Id.

[25] LAMOSA para 60.

[26] LAMOSA para 61; Mogale para 37 and para 39.

[27] Doctors for Life para 79.

[28] Doctors for Life para 79, section 42(4) of the Constitution.

29. Provincial legislatures also play a key role. They are closer to the public, and better placed to reach even the most remote areas of the country. Those who have difficulty participating in the national legislative process "*can much more easily convey their views about national legislation through their provincial legislatures*".[29]

30. The NCOP is entitled to fulfil its duty to facilitate public participation through public hearings held by provincial legislatures. However, in order for it to do so, the provincial proceedings must have been attended by members of the NCOP, or members of the NCOP must have had access to the reports of those hearings.[30] And the NCOP must be able to satisfy itself that those public hearings afforded a meaningful opportunity for people to be heard.

31. Importantly, in order for the provincial public hearings to be capable of influencing the outcome, the views and opinions expressed at the provincial hearings must "*filter through [to the NCOP] for proper consideration when the mandates [are] being decided upon*".[31] Conversely, if public participation at the provincial hearings is not accurately or comprehensively transmitted to the NCOP, that "*deprive[s] the process of the potential to achieve its purpose*".[32]

32. Lastly, on the question of timing and scheduling, this Court has emphasised that the timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable. [33] In drawing a timetable that includes public participation, the NCOP must apply its mind, taking into account the time truly required to complete

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29 Doctors for Life para 162.

30 Doctors for Life para 164; Mogale para 52.

31 LAMOSA para 71.

32 Id.

33 Doctors for Life para 194, LAMOSA para 70.

the process and the magnitude of the rights at issue.[34] This may require extending the intended timetable, even beyond the period contemplated in the Rules, and even if this means that the Bill may lapse.[35]

LAMOSA and Mogale

33. We have described above, at the level of general principle, the standard of reasonableness that applies to parliament's obligation to facilitate public participation in the legislative process. However, given their direct parallels with the present case, it is necessary to address, in greater detail, two decisions of this Court which give concrete content to the obligation insofar as it applies to the NCOP.

34. The first case is *LAMOSA*.

    34.1. It concerned the constitutional validity of the Restitution of Land Rights Amendment Act, which aimed to re-open the window for the lodgement of land claims beyond 31 December 1998.[36]

    34.2. The applicants' primary challenge was that the Amendment Act was invalid for failure by the NCOP and some or all of the provincial legislatures to facilitate adequate public participation, as required by sections 72(1)(a) and 118(1)(a) of the Constitution.[37]

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[34] LAMOSA para 70.

[35] LAMOSA paras 66 to 69.

[36] LAMOSA para 2.

[37] Id.

34.3. There was no dispute that the public participation process followed by the National Assembly was constitutionally compliant. The only dispute concerned the process followed by the NCOP and provincial legislatures.[38]

34.4. When the NCOP Select Committee met to consider the provinces' negotiating mandates, the Committee ruled that the provinces were not obliged to circulate reports of their hearings. Two provinces – the Free State and Gauteng – provided no reports, and three provinces produced reports that were never shared.[39]

34.5. This, the Court explained, made it an "*absolute impossibility for the NCOP Select Committee members to achieve a uniform understanding of public concerns across the country*" and "*must have limited their ability to enrich deliberations within the NCOP*".[40]

34.6. Despite various provinces including substantive proposals and amendments in their negotiating mandates, these were only considered in part.[41]

34.7. At the final mandates meeting, four provinces presented final mandates in favour of the Bill; one contained certain conditions but voted in favour; one voted against the Bill; and three presented no mandate at the meeting but subsequently voted in favour.[42]

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[38] LAMOSA para 15.

[39] LAMOSA para 49.

[40] Id.

[41] LAMOSA para 51.

[42] LAMOSA para 53.

34.8. The Court held as follows.

34.9. First, it found that the NCOP had imposed a truncated timeline for itself and the provincial legislatures, which, given the "*gravitas of the legislation*", was inherently unreasonable:[43]

34.9.1. The NCOP treated the Bill as urgent, and dealt with it on a 4-week cycle, purely because Parliament had to finalise the Bill before the end of its term and in order to avoid the Bill lapsing.[44]

34.9.2. The Court expressed "*serious doubts that even six weeks would have been sufficient*". In any event, no reason was given as to why the full six weeks was not utilised by the NCOP, save for the "*unexplained rush to be done by the end of Parliament's term*".[45]

34.9.3. This was a classic breach of the *Doctors for Life* principle that the timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.[46]

34.10. Second, the shortcomings in the manner in which the NCOP dealt with and considered the negotiating and final mandates of provincial legislatures meant that the views and opinions expressed by the public at the provincial hearings did not filter through for proper consideration when the mandates

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[43] LAMOSA paras 65 to 67.

[44] LAMOSA para 66.

[45] LAMOSA para 69.

[46] LAMOSA para 70.

were being decided upon, depriving the process of "*the potential to achieve its purpose*".[47]

34.11. Third, the public hearings in the provinces were flawed.

34.11.1. Advertisements of the public hearings were made not more than seven days in advance, depriving some of the opportunity to participate.[48]

34.11.2. The Court found it "*more than strange that only the KwaZulu-Natal and Western Cape Provincial Legislatures voiced concerns about the timeline set by the NCOP*". It emphasised that provincial legislatures are not mere appendages of the NCOP; that they do not exist "to *be at the beck and call of the NCOP*", and that they are constitutionally created entities with their own separate existence and powers.[49]

34.11.3. Therefore, the Court explained, if the timeline from the NCOP makes it impossible to perform their function well, "*nothing precludes them from telling the NCOP as much*", which in turn requires the NCOP to consider extending the period beyond that envisaged in the NCOP's Rules.[50]

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[47] LAMOSA para 71.

[48] LAMOSA para 77.

[49] LAMOSA para 80.

[50] Id.

34.12. The Court accordingly found the NCOP public participation process to be unreasonable and constitutionally invalid.[51]

35. The second case is *Mogale*.

35.1. It concerned the constitutional validity of the Traditional and Khoi San Leadership Act (TKLA). The applicants contended that the NA, NCOP and provincial legislatures had failed to facilitate public involvement in the passing of the TKLA.[52]

35.2. Following the NA process, the Bill was referred to the NCOP, and the provincial legislatures conducted public hearings in all nine provinces.[53]

35.3. At the negotiating mandates meeting of the Select Committee, where "*[n]egotiating mandates are usually accompanied by reports from the public hearings organised by the provincial legislatures*", those provinces that did provide reports did so to various degrees of detail, and three provinces did not mention the public hearings at all.[54]

35.4. The Select Committee invited written submissions, but no summary of the submissions was prepared for the Select Committee.[55]

35.5. The Department of Cooperative Governance and Traditional Affairs (COGTA) considered the proposed amendments in the negotiating

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[51] LAMOSA para 82.

[52] Mogale para 1.

[53] Mogale paras 54 and 55.

[54] Mogale para 56.

[55] Id.

mandates, provided a written response and presented it to the Select Committee, rejecting all but two purely semantic amendments and proposing two amendments of its own. COGTA was then asked to prepare a list of amendments based on views presented at the meeting, but the list was not tabled or referred to at the Select Committee's final meeting before considering final mandates.[56]

35.6. After this meeting, six provinces provided final mandates. Three provinces provided final mandates before the meeting, which accordingly could not have been informed by anything that happened at the meeting.[57]

35.7. At the final mandates meeting, five votes were cast in favour of the Bill, one against, and three final mandates referred to the incorrect Bill and therefore did not cast valid votes.[58]

35.8. The Court found that the process suffered from a number of flaws, namely:

35.8.1. deficiencies preventing preparation for the public hearings, including insufficient notice, lack of pre-hearing education and inaccessible hearings (including the fact that the Bloemfontein hearing took place 60km outside of the city);[59]

35.8.2. deficiencies preventing participation in public hearings;[60]

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[56] Mogale para 57.

[57] Mogale para 58.

[58] Id.

[59] Mogale paras 61 to 67.

[60] Mogale paras 68 to 75.

35.8.3. deficiencies preventing the public's views from being conveyed to and/or considered by the relevant lawmakers, including the fact that the Select Committee gave insubstantial consideration to the written submissions; the reports recording the contents of the public hearings were inadequate and inaccurate; and the level of detail in the negotiating mandates varied widely, with the Gauteng mandate not mentioning the public hearings at all;[61]

35.8.4. the views and opinions expressed by the public at the provincial hearings did not filter through to the NCOP and the NCOP did not consider or debate the substantive concerns in the negotiating mandates.[62]

35.9. The Court found that, collectively, the deficiencies in the public participation process were numerous and material and demonstrated a wide-ranging and substantial failure to facilitate public participation.[63]

THE NCOP PROCESS

36. Section 76 of the Constitution regulates the national legislative processes in respect of Bills affecting provinces. For obvious reason, this procedure attaches greater significance to the NCOP than the constitutional procedure for Bills that do not affect the provinces.[64]

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61 Mogale paras 76 to 80.

62 Mogale para 80.

63 Mogale para 81.

64 Doctors for Life para 85.

37. When the NA passes a Bill that falls within an area of concurrent national and legislative competence listed in Schedule 4 of the Constitution, the Bill must be referred to the NCOP.[65] The NCOP must then pass the Bill, pass an amended Bill, or reject the Bill. If the NCOP passes the Bill without amendment, then the Bill must be submitted to the President for assent.

38. The NCOP is composed of a single delegation from each province, consisting of ten delegates each.[66] Each province has one vote, which is cast on behalf of the province by the head of its delegation.[67]

39. The Mandating Procedures of Provinces Act 52 of 2008 (**"the Mandating Act"**) prescribes the procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf, as required by section 65(2) of the Constitution.

40. The Mandating Act specifies procedures for "negotiating" and "final" mandates.

41. In respect of a negotiating mandate, a committee designated by a provincial legislature must authorise its delegation with parameters for negotiation when the NCOP Select Committee considers a Bill after tabling and before consideration of final mandates. The negotiating mandate may include proposed amendments to the Bill.[68]

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[65] Section 76(1), read with section 76(3), of the Constitution.

[66] Section 60(1) of the Constitution.

[67] Section 65(1)(a).

[68] Section 5 and the definition of negotiating mandate.

42. In respect of a final mandate, a provincial legislature must authorise its delegation to cast a vote when the relevant NCOP Select Committee considers a Bill prior to voting on it in an NCOP plenary.[69]

43. Both negotiating and final mandates are required in respect of a Bill referred to in section 76 of the Constitution.[70]

44. Parliament has codified the level of public participation it deems reasonable, in the Practical Guide for Members of Parliament and Provincial Legislatures, 2019 ("**the Practical Guide**").[71]

45. The Practical Guide contains public involvement guidelines, which include the following[72] in respect of section 76 Bills:

    45.1. all negotiating mandates must be accompanied by reports detailing comments from the public;

    45.2. each proposed amendment by a provincial legislature must be considered in detail and decided on;

    45.3. a Select Committee must ensure that all provincial legislatures submit negotiating mandates and final mandates;

    45.4. the programme of a Select Committee must take into account the importance and complexity of a Bill.

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69 Section 6 and the definition of final mandate.

70 Section 7.

71 Mogale para 39.

72 Practical Guide 1: Members and Law-making, Section 6, pp.17-18.

46. In terms of the Rules of the NCOP:[73]

46.1. Bills[74] must be dealt with in a manner that ensures that provincial legislatures have sufficient time to consider the Bill, facilitate public involvement in the processing of the Bill, and confer authority on the provincial delegation to negotiate and vote on the Bill.

46.2. Depending on the substance of the Bill, the period for the consideration of the Bill is at least eight weeks.

46.3. In the event that the substance of the Bill requires more time than the eight-week period, the Chairperson of the Council may, at the request of the Chairperson of the relevant committee or Speaker of a provincial legislature, extend the period.

THE IMPORTANCE OF THE NHI ACT

47. One of the central factors in assessing the reasonableness of Parliament's conduct is the nature and importance of the legislation, and its impact on the public.

48. It is no exaggeration to say that the NHI Act is one of the most far-reaching statutes in South Africa's democratic history. Its purpose is to fundamentally restructure the manner in which healthcare services are delivered and accessed. Amongst the most drastic of the changes in the Act include the substantial reduction of the role of provinces, as procurement, contracting, planning, accreditation and funding will all be

[73] Rule 219(1) - (3): Legislative Cycle.

[74] This applies to all section 76(3), (4), (5) and 74(1), (2) and (3) Bills.

largely centralised; and the fact that, at full implementation, private medical schemes will be prohibited from funding any services that are available through NHI.

49. These and other features of the NHI Act are highly controversial. They have given rise to widespread concerns. No less than seven constitutional challenges are currently pending in the High Court, in which a range of parties – medical scheme associations, hospital groups, healthcare professionals and civil society organisations – all contend, on substantive grounds, that the provisions of the Act violate the Constitution.[75]

50. The Minister accepts that the NHI Act has far-reaching implications. Indeed, he seeks to make a virtue of this, describing it as transformative legislation,[76] which will do away with the current healthcare system, which he describes as unsustainable,[77] and replace it with a new one, which he describes as equitable and transformed.[78]

51. The merits or demerits of the NHI Act are not the subject of this case. What matters for present purposes is that the effects of the Act are far-reaching, complex, and controversial, and will have a drastic impact on the daily life, without exception, of every single South African.

52. This required Parliament, and particularly the NCOP, to consult carefully and thoroughly with the public.

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[75] RA p018-42, para 137.4.

[76] Minister AA p017-55, para 24.

[77] Minister AA p017-56, paras 28 and 29.

[78] Minister AA p017-57, para 32.

THE RELEVANT FACTS

53. On 13 June 2023, the NA passed the NHI Bill, with amendments as agreed to by the Portfolio Committee.[79] The NHI Bill, which had been classified as a section 76 Bill[80] – i.e. a Bill affecting provinces – was referred to the NCOP for concurrence.

54. A week later, on 20 June 2023, the Select Committee held its first meeting on the NHI Bill.[81] The Minister and the NDOH gave the Select Committee a briefing.[82]

55. The same day, the Select Committee adopted a programme for the third and fourth parliamentary terms.[83]

    55.1. The original timetable contemplated a six-week cycle for the NHI Bill. As explained, the NCOP Rules in fact require a minimum eight-week cycle, and contemplate that this may be extended in appropriate circumstances.

    55.2. Public participation hearings in the provinces were scheduled to take place between 5 September and 20 October 2023. Negotiating mandates would be considered on 24 October, and final mandates on 31 October 2023.

56. On 7 August 2023, the Select Committee called for written comments from the public, with an initial deadline of 2 September 2023, which was later extended until 15 September 2023.[84] The timetable was adjusted so that negotiating mandates would

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[79] FA p003-26, para 62.

[80] FA p003-26, para 60.

[81] FA p003-26, para 64.

[82] Parliament AA p017-582, para 61.

[83] Parliament AA pp017-582 - 017-583, paras 63 – 64.

[84] FA p003-27, para 65; Parliament AA p017-583, para 65.

be considered on 27 October (instead of 24 October) and final mandates on 7 November (instead of 31 October).[85]

57. In the Western Cape, in the period between 18 September 2023 and 29 September 2023, the WCPP Standing Committee held seven public hearings. Six of the public hearings were in different regions across the province. The other was at the seat of the WCPP in central Cape Town.[86]

58. On 6 October 2023, the WCPP requested an extension from the NCOP for the submission of its negotiating mandate, to allow the WCPP to hold three additional public hearings on the Bill (in Hermanus, Mossel Bay and Stellenbosch).[87] The WCPP Standing Committee explained that it had been inundated with requests from health stakeholders and community members to extend the public hearings.[88]

59. Despite the impending deadline, and despite repeated follow-ups,[89] it took the NCOP two weeks to respond to this request. It responded on 19 October 2023, accommodating only one additional hearing in the Western Cape, on 25 October 2023, and requiring the WCPP to submit its negotiating mandate on or before the scheduled date of 27 October 2023.[90]

60. By then, the WCPP had already finalised the planning for all three additional public hearings, including by placing advertisements in newspapers across the province. The

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[85] Parliament AA p017-585, paras 66 and 67.

[86] FA p003-36, para 95.

[87] FA p003-36, paras 96 – 100; “FA23” pp003-941 – 003-942; “FA 24” pp003-943 – 003-944.

[88] FA p003-36, para 96.

[89] FA p003-37, para 100.

[90] FA p003-37, para 101; “FA25” p003-945.

WCPP Standing Committee therefore resolved to proceed with the three additional hearings.[91]

61. The next day, on 20 October 2023, the WCPP motivated to the NCOP why it was proceeding with all three the additional hearings in compliance with its public participation obligations, and would not be able to produce a negotiating mandate by the deadline of 7 November 2023.[92]

62. The hearings were duly held on 25, 26 and 30 October 2023.[93] Therefore, by 30 October 2023, all the provincial legislatures had held and concluded public hearings in their respective provinces.[94]

63. On 31 October 2023, the Select Committee held a meeting for the NDOH to present its responses to the public comments which the NCOP had received pursuant to its own call for written comments.[95]

64. On 1 November 2023, the WCPP again requested an extension of the date for consideration of negotiating mandates to a date after 24 November 2023, to allow adequate time for the WCPP to collate the written and oral submissions it had received, and to substantively engage with them.[96] The WCPP planned to have all the submissions collated by 10 November 2023, to conclude its deliberations by 17

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[91] FA p003-38, para 102.

[92] FA p003-38, para 103; “FA 26” pp003-946 – 003-947.

[93] FA p003-38, para 104.

[94] Parliament AA pp017-584 – 017-585, para 69.

[95] FA pp003-27 – 003-28, para 68; “FA2” pp003.143 – 003-166 (the NDOH presentation); Parliament AA p017-589, para 82; “AA9” pp017-1479 – 017-1484 (the report of the meeting).

[96] FA p003-39, para 106, “FA 27” p003-39.

November 2023, and to draft and agree to its negotiating mandate by 24 November 2023.[97]

65. Another two weeks passed without a response to this request.

66. In the interim, the Select Committee followed a rushed process in which it went through the motions of considering input from the provinces, and the comments it had received in response to its own invitation.

67. For purposes of the meeting of 31 October 2023, the Select Committee had not furnished the NDOH with copies of 15 of the submissions. The Select Committee therefore met again on 7 November 2023 for the NDOH to provide its responses to the additional written submissions.[98]

68. On 9 November 2023, the Select Committee held a meeting for the NDOH to present its response to a report titled "*Stakeholders Response to the National Health Insurance Bill [B11B-2019] An Overview*" ("**the Stakeholders Response Report**"), which had been prepared by Parliament's Content Advisor.[99]

69. On 14 November 2023, the Select Committee proceeded with the negotiating mandates meeting.[100] The WCPP had not yet provided its negotiating mandate, nor its accompanying provincial public participation report. And by the start of the meeting, the WCPP had still not received any response to its 1 November 2023 request for an

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[97] FA p003-39, para 107; "FA 27" p003-39.

[98] FA p003-28, para 70; "FA3" pp003-167 – 003-179 (the NDOH presentation); Parliament AA p017-589, para 83; "AA10" pp017-1484 – 017-1486 (the report of the meeting).

[99] FA pp017-28 – 017-29, para 72; "AA11" pp017-1487 – 017-1488 (the report of the meeting); "AA12" pp017-1489 – 017-1532 (the NDOH presentation); "AA7" pp017-1428 – 017-1454 (the Stakeholders Response Report).

[100] FA pp003-29 – 003-30, para 75; Parliament AA p017-590, para 88; "AA14" pp017-1593 – 017- 1595 (report of the meeting).

extension.[101] Gauteng submitted a negotiating mandate, but it did not submit a public participation report.[102]

70. There was no consideration at the meeting of 14 November 2023 of the public participation reports that seven out of nine provinces had submitted. There was also no consideration of issues that were raised, and amendments that were proposed, in the negotiating mandates arising from the public participation reports. The meeting simply proceeded to vote on the negotiating mandates.

71. Immediately after the meeting, the NCOP responded to the WCPP's letter of 1 November 2023 (sent two weeks earlier) advising the WCPP to submit its negotiating mandate within three days, by 17 November 2023.[103] The WCPP indicated that it would not be able to do so, and that the NCOP's late response had made it impossible to consider any urgent contingent alternatives.[104]

72. The WCPP sent further correspondence to the NCOP on 17 November 2023, providing detailed reasons for why it was not possible to submit its negotiating mandate that day. It emphasised that it was not the WCPP's intention to defer the NCOP's processes any more than was necessary to do justice to the Bill, and to do justice to the inputs of the residents of the Western Cape.[105]

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[101] FA p003-39, para 109.

[102] Parliament AA p017- 585, para 70.

[103] FA pp003-39 – 003-41, paras 109 – 114; "FA 29" p003-952; "FA 30" p003-954; "FA31" p003-955; "FA 32" p003-956; "FA 33" p003-958.

[104] FA p003-41, para 114.

[105] FA p003-41, para 115; "FA 32" pp003-956 – 003-957.

73. Nevertheless, the Select Committee pressed ahead. On 21 November 2023, it proceeded to consider final mandates and adopt the NHI Bill – again, in the absence of negotiating and final mandates from the WCPP.[106]

74. The WCPP submitted its negotiating mandate on 24 November 2023. It submitted its final mandate on 27 November 2023.

75. On 28 November 2023 the Select Committee held a further meeting. Its purported purpose was to consider the WCPP's negotiating mandate and its final mandate.[107] There was never any consideration of the WCPP's public participation report. Thereafter, the Select Committee replaced its report dated 21 November 2023 with a report dated 28 November 2023.[108]

76. On 6 December 2023, the NCOP passed the NHI Bill and it was sent to the President for assent.[109]

THE NCOP'S FAILURE TO FACILITATE PUBLIC INVOLVEMENT

77. We now address each of the bases on which we contend that the NCOP breached its obligation to facilitate public participation.

78. We do so in a slightly different order than in the founding affidavit.

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[106] FA p003-33, para 84; p003-42, para 117; "FA15" p003-295 (the Select Committee report on the NHI Bill); Parliament AA pp017-597 – 017-598, paras 98 - 101; "AA15" pp017-1596 – 017-1597 (the report of the meeting).

[107] FA p003-35, para 88, read with paras 84 – 87. The WCPP's negotiating mandate is "FA17" p003-298; the WCPP committee report is "FA18" p003-299; the WCPP public participation report is "FA 19" pp03-300 – 003-935; the report of the meeting is "AA16" pp017-1598 – 017-1600.

[108] FA p003-35, para 88; "FA 20" p003-936 (the Select Committee's report of 28 November 2023).

[109] FA p003-35, paras 89 and 90.

79. That is because, as a matter of logic, it is the unreasonable and inflexible schedule – which we address first – which made it impossible for the Select Committee to consider input from all the provincial public participation processes (which we address second) and to consider all the negotiating mandates together (which we address third).

80. Two further consequences which followed were that the NCOP failed to afford the WCG a meaningful opportunity to influence the legislative process, and failed to request the NDOH to propose any amendments – which we address fourth and fifth, respectively.

Unreasonable and inflexible schedule

81. On 20 June 2023, the Select Committee adopted a programme for the third and fourth parliamentary terms.[110] The original programme contemplated a mere six-week cycle for the NHI Bill, with provincial hearings to run from 5 September to 20 October 2023; negotiating mandates to be considered on 24 October 2023, and final mandates to be considered on 31 October 2023. This was despite the fact that the NCOP Rules prescribe a minimum 8-week cycle, which the Chairperson can extend in appropriate circumstances, such as where the substance of the Bill requires more time.

82. Because of the extension for the submission of written comments on the Bill to 15 September 2023, the programme for the processing of the Bill was also extended,[111] so that negotiating mandates would be considered on 27 October (instead of 24 October) and final mandates on 7 November (instead of 31 October).[112]

[110] Parliament AA pp017-582 – 017-583, paras 63 – 64.

[111] Parliament AA p017-584, para 66.

[112] Parliament AA p017-585, paras 66 and 67.

83. Parliament says that the adjustment of the timetable had the effect that the Bill would, in effect, be processed on an eight-week cycle rather than a six-week cycle as originally contemplated.[113]

84. However, the adjusted timetable remained extremely rushed. It allowed only one business day for the consideration of "*submissions on the NHI Bill, sec 76 and DOH responses to the submissions*". The date for negotiating mandates was only three days later (27 October 2023), and final mandates on 7 November 2023.[114]

85. The Select Committee thereafter made further changes to the timetable to allow for two extra briefings by the NDOH. This was necessitated by the Select Committee's failure to furnish the NDOH with 15 additional written submissions, or the Stakeholders Response Report, prior to the meeting of 31 October 2023.[115]

86. Ultimately, at the meeting of 31 October 2023, the Select Committee set the dates for negotiating and final mandates as 14 November and 21 November 2023 respectively.

87. The result was that, in the two-week period between 31 October 2023 and 14 November 2023, the Select Committee engaged in a rushed process for considering public input. It did so not because the Bill was in any sense inherently urgent. It did so because it was anxious to conclude the process before the end of the Sixth Parliament's term.

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[113] Parliament AA p017-568, para 30.3.

[114] RA p018-16, para 43.

[115] RA p018-18, para 46.3.

88. We have already described, in setting out the relevant facts, the WCPP's requests for an extension of the period within which to submit its negotiating mandate. Simply, by way of summary:

88.1. On 6 October 2023, the WCPP requested an extension of the date within which to submit its negotiating mandate, in order to hold three additional public hearings.

88.2. The NCOP took two weeks to respond on 19 October 2023. It ultimately accommodated one additional public hearing but refused the extension. By the time it responded, the WCPP had already finalised planning all three additional public hearings, and accordingly proceeded with the hearings.

88.3. On 1 November 2023, the WCPP again requested an extension of the date for consideration of negotiating mandates, to allow adequate time for it to collate and engage with the submissions it had received, to substantively engage with them, and to agree to its negotiating mandate by 24 November 2023.

88.4. On 14 November 2023, the Select Committee proceeded with the negotiating mandates meeting without the Western Cape's negotiating mandate or its public participation report.

88.5. Only after that meeting, the NCOP responded to the WCPP's letter of 1 November 2023 (sent two weeks earlier), advising the WCPP to submit its negotiating mandate within three days, by 17 November 2023.

88.6. The WCPP indicated that it would not be able to do so, and that the NCOP's late response had made it impossible to consider any urgent contingent

alternatives. It sent further correspondence to the NCOP on 17 November 2023, providing detailed reasons for why it was not possible to submit its negotiating mandate that day.

88.7. On 21 November 2023, the Select Committee proceeded to consider final mandates and adopt the NHI Bill – again, in the absence of negotiating and final mandates from the WCPP.

88.8. The WCPP submitted its negotiating mandate on 24 November 2023. It submitted its final mandate on 27 November 2023.

88.9. On 28 November 2023 the Select Committee held a further meeting, the purported purpose of which was to consider the WCPP's negotiating mandate and its final mandate.

88.10. The Select Committee then replaced its report dated 21 November 2023 with a report dated 28 November 2023.

89. In essence, the WPCC identified the need for further public hearings in order to facilitate proper public participation in its province. It therefore did what this Court said it should do in *LAMOSA*. It voiced concerns about the timeline set by the NCOP, explained that the timeline made it impossible to perform its function properly, and called on the NCOP to consider extending the period.[116] The NCOP acted unreasonably in refusing to do so.

90. As we shall explain, this inflexible and rushed schedule had significant implications for the reasonableness of the public participation process. It meant that the Select

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[116] LAMOSA para 80.

Committee did not consider all the input from the provincial public participation. It also meant that the Select Committee conducted the negotiating mandate meeting in the absence of the WCPP's negotiating mandate.

91. Parliament's primary response to the criticism of its schedule is to lay the blame at the door of the WCPP. It says, in particular, that:

    91.1. the WCPP acted unreasonably by holding public hearings in district municipalities where hearings had already been held;[117]

    91.2. the WCPP should not have waited until the end of October 2023 to collate its public participation report;[118] and

    91.3. an extension of time would have adversely impacted the timetable, potentially resulting in the Bill lapsing.[119]

92. There is no merit in any of these responses. We address each in turn.

93. **First**, the mere fact that there had been public hearings elsewhere in a district municipality did not mean that there was no need for these hearings.[120]

    93.1. It is not for the (national) Parliament to determine where the provincial hearings should be held.

[117] Parliament AA p017-559, para 11.6.2; pp017-603 – 017-606, paras 124-125.

[118] Parliament AA p017-560, paras 11.6.4 – 11.6.7; pp017-604 – 017-605, paras 128 – 129.

[119] Parliament AA p017-569, para 30.7.

[120] RA p018-34, para 103.

93.2. The Standing Committee in the WCPP resolved to conduct further public hearings because it had been "*inundated with calls from various health stakeholders and community members to extend public hearings*".[121]

93.3. Because of the size of the regions and the distances involved, not all interested parties were able to attend the initial hearings. The three towns where the further hearings were held – Mossel Bay, Hermanus and Stellenbosch – were between 30km and 50km from the town in which a previous hearing had been held within that district municipality. It is inevitable that a substantial number of people, particularly those reliant on public transport, will not travel these distances in order to attend public participation hearings.[122]

93.4. In other words, in order to avoid the very deficiency identified in *Mogale* – where provincial hearings were inaccessible on account of being held 60km outside of the City[123] – the WPCC resolved to arrange additional hearings to ensure broader participation and inclusivity.[124]

93.5. This is consistent with the approach adopted in the Eastern Cape, where hearings were held in two centres per district.[125]

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[121] "FA 24" pp003-943 – 003.944; RA p018-34, para 104.

[122] RA pp018-34 – 018-35, paras 105 – 107.

[123] Mogale para 66.

[124] RA p018-38, para 108.

[125] RA p018-38, para 110.

94. **<u>Second</u>,** there is no merit in the contention that the WCPP delayed unreasonably in collating the comments received from the public participation hearings. [126]

    94.1. Before the WCPP Standing Committee could proceed with the consideration of these submissions, it had to recommence the advertisement process and make the necessary logistical arrangements for the additional public hearings.[127]

    94.2. Due to the voluminous nature of the submissions that the WCPP Standing Committee received, it required additional time to collate, process and consider all written and oral inputs submitted after 29 September 2023, and then to formulate its negotiating mandate.[128]

    94.3. It would have rendered the three further public participation hearings a sham if – as Parliament seems to suggest it should have done – the WCPP had formulated its negotiating mandate <u>prior</u> to those hearings.[129]

95. **<u>Third,</u>** there is no merit in Parliament's argument regarding the potential knock-on effects for its timetable.

    95.1. The essence of the Speaker's argument is that if negotiating mandates were considered after 24 November 2023, then there was a likelihood that the Bill would not be passed by the Sixth Parliament.[130]

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[126] Parliament AA p017-560, para 11.6.4; p017-561, para 11.6.6; p017-604, para 129.

[127] RA p018-36, para 112. Confirmatory affidavit of Nomonde Jamce p018-101.

[128] RA p018-36, para 113.

[129] RA p018-36, para 115.

[130] Parliament AA p017-571, para 36.

95.2. This, she says, is because the week of 27 November to 1 December 2023 was the last week for Committee meetings for 2023, and the negotiating and final mandate meetings could not both have occurred in the week from 27 November to 1 December 2023.

95.3. She insists, in addition, that it was necessary to ensure that deliberations for final mandates did not spill over into 2024, because the programme for the first term was packed and short.

95.4. This was a classic breach of the principle enunciated in *Doctors for Life* and *LAMOSA* that the timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.[131]

95.5. Indeed, it is telling that in this case the Speaker relies on the identical justification for the rushed timetable as that advanced, and rejected, in *LAMOSA*. That is, she offers no justification for refusing the WPCC's request for an extension save for the "*unexplained rush to be done by the end of Parliament's term*".[132]

95.6. Just as in *LAMOSA*, there is nothing before the Court demonstrating the objective urgency of the Bill, beyond Parliament's desire to finalise it before the end of term. And there is no answer to the question so pertinently posed by this Court in *LAMOSA*: "*why did the NCOP not allow the Bill to lapse and subsequently invoke its power to reinstate it under rule 238(1)?*"[133]

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[131] LAMOSA para 70.

[132] LAMOSA para 69.

[133] LAMOSA para 66.

Failure to consider input from the provincial public participation

96. By the end of October 2023, members of the public had made two distinct categories of public comments:

    96.1. some members of the public had submitted written comments to the NCOP pursuant to its own call for written comments;

    96.2. all nine provincial legislatures had held public hearings in their respective provinces, and members of the public had provided oral and written input to the provincial legislatures.

97. However, the NCOP followed a process which meant that it failed properly to consider this input. It failed in at least **four** material respects

98. **First**, it did not consider the public input from provincial public participation in Gauteng and the Western Cape.

99. It is common cause that the Gauteng Provincial Legislature never submitted a public participation report to the Select Committee at all. The respondents have offered no explanation for this failure.[134] It was in direct breach of the Practical Guide. And the consequence is fatal: it means that public input from South Africa's most populous province simply never reached the NCOP. It was never placed before the Select Committee. It was entirely absent from the law-making process.

100. In the words of this Court in LAMOSA, this made it an "*absolute impossibility for the NCOP Select Committee members to achieve a uniform understanding of public*

[134] RA p018-5, para 12.1.

concerns across the country" and "*must have limited their ability to enrich deliberations within the NCOP*".[135]

101. For its part, the WCPP did submit an extensive and detailed public participation report to the Select Committee, comprising some 650 pages.[136] It submitted the report together with its negotiating mandate. However, the meeting of 28 November 2023, at which the Select Committee met to consider the WCPP's negotiating and final mandates, in one brief sitting, was formalistic and devoid of any real purpose.[137] Because the Select Committee had already deliberated on the negotiating mandates of the other provinces on 14 November 2023, it was no longer possible for the Western Cape input to influence the law-making process.

102. **Second**, the negotiating mandate meeting of 14 November 2023 was not capable of facilitating public involvement in the manner required by the Constitution, the Practical Guide and the Mandating Act, because the Select Committee did not consider all the negotiating mandates together. We address this below as a self-standing ground on which the NCOP failed to facilitate public participation.

103. **Third**, even in respect of the seven provinces for which provincial public participation reports were available at the negotiating mandate meeting of 14 November 2023, these were not properly considered, and were in any event manifestly inadequate.[138]

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[135] LAMOSA para 49.

[136] The report is "FA19" pp003-300 – 003-935.

[137] FA p003-58, paras 163 – 164; RA p018-5, para 12.1.

[138] See RA pp018-22 – 018-24, paras 69 – 77.

104. The Select Committee did not engage with the issues raised in the public participation reports, nor with amendments proposed in negotiating mandates. Instead, it reduced the process to a binary exercise: provinces either supported or opposed the Bill.

105. That approach is fundamentally at odds with the constitutional requirement that Parliament must take account of the public's views, even if it ultimately rejects them.

106. **Fourth,** the Select Committee simply ignored the express conditions and requirements in certain negotiating mandates, which required engagement with public input or proposed amendments.

107. For example, the terms of the negotiating mandates stipulated by Limpopo, Mpumalanga, North-West and KwaZulu-Natal were not dealt with at the meeting of 14 November 2023.[139] In two of those (Mpumalanga and North-West), the express mandate was to negotiate in favour, with proposed amendments. In the other two (Limpopo and Kwazulu-Natal), the express mandate was to consider the provincial public participation report of that province.

    107.1. The Limpopo negotiating mandate expressly stated that it is to negotiate in favour of the Bill with inputs as attached. Those inputs are the views on the Bill per district from the public participation hearings.

    107.2. The Mpumalanga negotiating mandate was to negotiate in favour of the Bill with a proposed amendment, namely the deletion of clause 48C (dealing with the source of funding).

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[139] FA p003-33, para 83; RA p018-24, para 78.

107.3. The North-West negotiating mandate was to vote in favour, with proposed amendments which were annexed to the negotiating mandate.

107.4. The Kwazulu-Natal negotiating mandate was to support the Bill subject to the comments from the public being meticulously considered by the Department prior to the final and voting mandate being conferred by the House.

108. But at the meeting, the Select Committee simply proceeded to vote on and adopt what is likely one of the most significant and controversial statutes in South Africa's democratic history.[140] It did so without considering, debating or deliberating on any substantive input arising from the public participation processes in the provinces, including the conditions and proposed amendments attached to the negotiating mandates.

109. The respondents' defences to these challenges are unavailing.

110. It is no defence to say that the Practical Guide is non-binding and is just a guideline.[141]

110.1. It is for good reason that the Practical Guide requires negotiating mandates to be accompanied by public participation reports, each proposed amendment by a provincial legislature to be considered in detail and decided on, and the Select Committee to ensure that all provincial legislatures submit negotiating mandates.[142]

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[140] FA p003-50, para 134.

[141] Parliament AA p017-600, para 109; p017-613, para 153; Minister AA p017-113, para 155.

[142] RA p018-12, para 22.

110.2. It is to ensure that when the delegates on the Select Committee are considering the negotiating mandates, they do so with the benefit of an understanding of the issues raised in the public hearings around the country, and any amendments proposed in negotiating mandates (read with the accompanying reports) arising from those issues.[143] The Speaker acknowledges that this is "desirable".[144]

110.3. Our courts have regularly emphasised the importance of guidelines. Although this has been expressed in the administrative law context, the same principles apply in the legislative context: guidelines are there to "*achieve reasonable and consistent decision making*";[145] they can only be deviated from "*if there is a reasonable basis for such deviation in which case that basis should be clearly articulated*"; and organs of state accordingly cannot "*ignore them at will*".[146]

110.4. The reason that the respondents need to attempt to sidestep the Practical Guide is not because there is a reasonable basis for doing so, or that rigid compliance with its terms would produce unlawful or irrational results.[147] It is simply that the Practical Guide was not complied with.

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[143] Id.

[144] Parliament AA p017-601, para 134.

[145] CTP Limited and Others v Director-General Department of Basic Education and Others (447/2018) [2018] ZASCA 156 (20 November 2018) para 30.

[146] Mobile Telephone Network (Pty) Ltd v Independent Communications Authority of South Africa [2026] ZAGPPHC 99 (4 February 2026) para 93.

[147] See National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others 2020 (1) SA 450 (CC) para 33.

111. It is also no defence to rely, as the respondents do, on the Stakeholders Response Report of 7 November 2023.[148]

111.1. The Report was limited to summarising the written comments which the NCOP received in response to its own call for comments. It did so in section 4, which included a table with stakeholders' proposed amendments to the Bill.[149]

111.2. The Speaker's suggestion that the Stakeholders Response Report summarised public participation in the provinces is false.[150] It is not borne out by the Report itself. The Report did not deal in any way with the provincial public hearings. It did not purport to list, summarise or address any provincial public participation reports.[151] It also did not purport to capture any of the amendments proposed in the provincial public participation reports.[152]

111.3. Indeed the Report referred to the provincial public hearings and stated that the submissions received "*will culminate in the negotiating and final mandates that will be presented to the Committee on 7 and 14 November 2023 respectively.*"[153]

111.4. Moreover, even insofar as the Stakeholders Response Report summarised the comments received by the NCOP, it was plainly deficient. It omitted, for

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[148] Parliament AA p017-585 – 586, paras 71 – 75.

[149] "AA7" pp017-1441 – 017-1449.

[150] Parliament AA p017-586, para 73.

[151] RA p018-21, para 65.

[152] RA p018-25, para 80.

[153] "AA7" p017-1433.

example, numerous important issues that the WCG itself raised in its comments, and simply did not refer to the WCG's detailed clause-by-clause analysis.[154]

112. Lastly, it is no defence for the respondents to seek to rely on the three meetings that preceded the negotiating mandates meeting of 14 November 2023 – namely, the meetings of 31 October, 7 November and 9 November 2023.

112.1. The respondents suggest that, at those meetings, the Select Committee was able to consider all public comments in respect of the NHI Bill, including oral and written comments made to provincial legislatures.[155]

112.2. This is not correct.

112.3. When the Select Committee met on 31 October 2023, it was in order for the NDOH to make a presentation on the written comments made to the NCOP pursuant to its own call for written comments.

112.4. The purpose of the 7 November 2023 meeting was for the NDOH to make a presentation on 15 additional written comments which had not previously been sent to the NDOH (including the WCG's comments). At that stage, the NDOH had not even been given a copy of the Stakeholders Response Report.

112.5. The purpose of the 9 November 2023 meeting was for the NDOH to provide a response to the Stakeholders Response Report, which it had by then been

[154] FA p003-61, para 175.

[155] Parliament AA pp017-587 – 017-590, paras 76 – 87; p017-600 para 110.

provided. The Speaker suggests that this afforded the NDOH "*an opportunity to consider the report dealing with all public participation input, <u>including the issues arising from the provincial public participation hearings</u>*".[156] This is simply not correct.

112.6. This is another attempt to portray the Stakeholders Response Report as dealing with <u>all</u> public input. However, as explained, the Report did <u>not</u> refer to or include the outcomes of the provincial public participation hearings, and the NDOH's presentation was therefore also necessarily limited to the written comments submitted directly to the NCOP.

112.7. Therefore, Parliament's reliance on these three meetings is unsustainable.

Failure to consider all negotiating mandates together

113. The only way that the Select Committee members were able to achieve a uniform understanding of public concerns across the country prior to formulating their final mandates was to consider the negotiating mandates together.

114. The negotiating mandate meeting took place in the absence of the WCPP's negotiating mandate and public participation report. Together with the absence of the Gauteng public participation report, this made it impossible for the members of the Select Committee to consider the views of the provinces meaningfully – that is, in a manner which allowed for the potential that the views of each would be influenced by the others, both on matters of principle and on matters of detail.

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[156] Parliament AA p017-589, para 84.

115. The failure to consider all the negotiating mandates together could not be cured by the Select Committee meeting on 28 November 2023 to "deliberate" – in one meeting – on the negotiating and final mandate of the WCPP.

116. By that time, the Select Committee had already voted on the negotiating and final mandates of the other eight provinces and had tabled its report of 21 November 2023 to the NCOP. Delegates could no longer return to their provinces, in the light of the contents content of the WCPP report, for a final mandate in terms that differed from their negotiating mandate. The process, in other words, precluded the WCPP mandate from having any influence.

117. Parliament says there is a risk of a "*dangerous precedent*" if provincial legislatures are entitled to withhold their compliance with the NCOP's timetable and then rely on their non-compliance to challenge the reasonableness of Parliament's process.[157]

118. But the dangerous precedent lies in allowing the NCOP to rush through a Bill, to unreasonably refuse a carefully motivated request for an extension, to proceed to consider the negotiating mandates of some provinces, without the negotiating mandates of others, and thereby to undermine the Practical Guide – which codifies and sets the standard of the level of public involvement Parliament considers reasonable.[158]

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[157] Parliament AA p017-601, para 135.

[158] RA p018-37, para 121.

Failure to afford the WCG a meaningful opportunity

119. The manner in which the Select Committee conducted its process meant that it did not ultimately afford the WCG a meaningful opportunity to influence the legislative process, as required by *Doctors for Life*, *LAMOSA* and *Mogale*.

120. The WCG made extensive written submissions to the NCOP pursuant to the NCOP's call for comments, and to the WCPP, pursuant to the WCPP's public participation process.[159] The content of both submissions is the same.[160]

121. Given the provinces' role in providing health services, the comments made by the WCG's Department of Health (WCDOH) were highly material. The WCDOH was the only provincial government stakeholder that made comments. In these circumstances, reasonable public participation required carefully considering its comments. [161]

122. However, it is clear that these submissions did not receive meaningful consideration by the NCOP.

123. **First**, the WCG's detailed written submissions were not properly captured or dealt with in the Stakeholders Response Report or the NDOH's presentations in response to that report.

    123.1. The first part of the WCG's written submissions is a 23-page document providing detailed comments. The second part is a 55-page document

[159] FA p003-59, para 165; "FA1" pp003-65 – 003-142.

[160] FA p003-59, para 165.

[161] FA p003-63, para 180.

containing a clause-by-clause analysis, with proposals and comments. It is in tabular form.[162]

123.2. The section of the Stakeholders Response Report outlining proposed amendments does not reflect any of the contents of the WCG's clause-by-clause analysis. That analysis was simply not included.

123.3. The NDOH response to the Stakeholder Response Report provided responses to the issues noted in the proposed amendments section of the Stakeholders Response Report.[163] The omission of the WCG's clause-by-clause analysis from the Report meant that it was also omitted from the NDOH's response.

123.4. The purpose of the NDOH's presentation of 7 November 2023 was to address 15 additional written comments, including those of the WCDOH.[164] The Minister claims that the NDOH considered the WCG's written submissions in preparing its presentation of 7 November 2023[165] However, the presentation contained no actual consideration of the WCG's comments.

124. **Second**, even at a thematic level, the WCG's comments were not properly considered or addressed.

124.1. The Minister claims that the thematic issue concerning the role of provinces was dealt with in the NDOH's presentation of 31 October 2023[166] (which was

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[162] FA p003-59, para 166.

[163] "FA 6" p003-213, last para.

[164] FA p017-62, para 179; "FA2" p017-169, bullet one and bullet 2 (vi).

[165] Minister AA p017-78, para 90.

[166] Minister AA p017-97, para 90.5.

made before the NDOH had even received the WCG's written submissions).[167]

124.2. The WCG comments in relation to the role of the provinces were not meaningfully responded to either in the presentation of 31 October 2023 or 7 November 2023. It is simplistic and generalised. [168] The WCG's comments dealt with a range of issues related to the role of provinces, including that the clauses of the Bill in respect of provinces are vague.[169] The NDOH's response does not give any clarity on this.

124.3. The WCG provided detailed reasons for its disagreement with centralising power in the Minister and the governance board of the NHI. It described the implications of changing the roles of the provinces, and made a specific proposal in respect of the role of provinces in the implementation of NHI. None of this was considered or addressed. [170]

124.4. In any event, the WCG's comments were by no means limited to the role of provinces.

124.5. It also addressed, for example, governance of central hospitals, and the role of regional and specialised hospitals,[171] with reference to the particular

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[167] RA p018-38, para 126.

[168] RA p018-38, para 126; "FA 2" p003-154.

[169] RA p018-39, para 127; "FA1" pp003-67 – 003.68 section 5.1.1; pp003-71 – 003-72, section 7.1 (the role of provinces as a health care services provider).

[170] RA p018-39, para 128, "FA1" pp003-72 - 003.73.

[171] RA p018-39, para 129; "FA1" pp003-75 –003-78 (section 7.5.1 and 7.5.2); pp.003-83 – 003-84 section 7.11.

manner in which two central hospitals in the Western Cape function.[172] None of this appears to have received any consideration.[173]

124.6. The relevant minutes and NDOH presentations make clear that the Select Committee did not meaningfully engage with issues relating to funding,[174] the inefficiency of state-owned enterprises,[175] alleged violation of rights,[176] the emigration of medical professionals, the need to improve public hospitals and infringement of provincial competencies.[177]

125. Taken together, these features demonstrate that the WCG's participation in the legislative process was reduced to a hollow formality.

Failure to request or require the NDOH to propose amendments

126. At the Select Committee meeting of 9 November 2023, the NDOH stated that it was considering "*key areas where there is strong motivation for amendments to the Bill*", pertaining to governance, medical schemes, district health management offices and a technical correction.[178] It concluded in its presentation that it would consider and listen to the negotiating mandates at the meeting scheduled for 14 November 2023, and then consult its legal team on proposed wording for suggested amendments for the Select Committee's consideration.[179]

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[172] RA p018-39, para 130.

[173] RA p018-40, para 131.

[174] RA p018-71, para 268.

[175] RA p018-72, para 269.

[176] RA p018-72, para 270.

[177] RA p018-73, para 271.

[178] FA p003-50, para 135; "FA6" p003-214.

[179] FA p003-50, para 135; "FA6" p003-215.

127. The Minister, quite appropriately, anticipated that there would be debate on the negotiating mandates, including as to proposed amendments, and that he would consider whether such amendments should be made.[180]

128. But the negotiating mandates were never genuinely debated. The conditions and proposed amendments attached to those mandates were never considered and discussed. Had they been considered and discussed as they ought to have been, the Minister plainly would have been requested to propose amendments, as he had undertaken to do.[181]

REMEDY

129. If the Court concludes that the NCOP failed to fulfil its constitutional obligation to facilitate public participation, then it <u>must</u> declare the NHI Act unconstitutional and invalid. That consequence flows from section 172(1)(a) of the Constitution.[182] This is not a matter of discretion; it is a peremptory requirement.

130. The further consequences of invalidity are then to be dealt with under section 172(1)(b) of the Constitution.

131. There is no need for any suspension of invalidity in the present case, given that the NHI Act is not in force.

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[180] RA p018-32, para 96.

[181] RA p018-33, para 98.

[182] Mogale para 83; LAMOSA para 84.

132. Parliament accepts that there is no need for a suspension of invalidity if the NHI Act has still not commenced when the declaration of invalidity is made. It suggests that the issue may need to be revisited if the Act is brought into force in the interim.[183]

133. However, it is now clear that the NHI Act will not have commenced by the time this Court delivers judgment.[184] That is because, in terms of an order made by the High Court on 24 February 2026, the President and the Minister have undertaken not to bring into force or implement the Act until this Court decides the present application (and the related application brought by the Board of Healthcare Funders).[185]

134. Both Parliament and the Minister ask that if the NHI Act is declared unconstitutional and invalid, it be remitted to the NCOP for it to re-run its legislative process, but that it not be remitted to the NA. Parliament says this is "*the most efficient and effective remedy*" and will "*ensure expedition in the finalisation of legislation that is sorely required*". [186]

135. The Minister contends that an order of this kind will "*save*" the work undertaken by the NA, which would otherwise by "*wasted*", and will ensure that the important objectives of NHI and Universal Health Care are not delayed.[187]

136. The WCG disputes that this is just and equitable relief.

137. First, this Court made clear in *LAMOSA* that a failure by the NCOP to comply with section 172 of the Constitution taints the entire legislative process, and is a lapse by

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[183] Parliament AA p017-628, para 214.1.

[184] RA p018-41, para 136.

[185] RA pp018-41 – 018-42, para 137; "RA1" pp018-101 – 018-103.

[186] Parliament AA p017-628, paras 214.2-214.3.

[187] Minister AA pp017-117 – 017-118, paras 174 and 177.

Parliament as a whole.[188] This is especially so in respect of a section 76 Bill, where the involvement of the NCOP in the legislative process is heightened. The Minister's argument that the Court should seek to save that which is "*untainted*" is accordingly a non-starter. [189] The whole process is tainted.

138. The Court in *LAMOSA* was, in fact, simply giving effect to what it had held earlier in *Doctors for Life*:[190]

> "It is true, the defect lies in the conduct of the NCOP. However, the national legislative authority is vested in Parliament in terms of section 44(1). And if an Act of Parliament is declared unconstitutional, Parliament must deal with the matter. As pointed out earlier, where either the NCOP or the National Assembly fails to fulfil its constitutional obligation in relation to the law-making process, the result is that Parliament has failed to fulfil its obligation in respect of the resulting statute. The consequence is that the matter must be remitted to Parliament for it to re-enact the law in a manner that is consistent with this judgment."

139. The same is true here. If the NHI Act is declared unconstitutional, then *Parliament* has failed to fulfil its constitutional obligation, and the matter must be remitted to *Parliament* for it to re-enact the law.

140. <u>Second</u>, it is apparent from the Minister's affidavit that part of his concern is that "*there is an entirely new NA and NCOP on a new mandate by the electorate*" and that "*perhaps the current NA will not treat the NHI Bill the same way as the NA did in 2019-2023*". [191]

141. But that misconceives the matter. It will be for the current parliament, as a whole, to conduct a proper public participation process, and to decide how to *"treat"* the NHI Bill.

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[188] LAMOSA para 82.

[189] RA p018-43, para 143.

[190] Doctors for Life para 213.

[191] RA p018-43, para 145; Minister AA pp017-118 – 017-119, para 180.

Whether it does so in the same way as in 2019-2023 is for it to decide. It would be wholly inappropriate to deprive the newly elected parliament of the ability to reconsider the Bill *in toto*.[192]

142. Third, it is for Parliament (not the Speaker or the Minister) to decide whether the legislation is sorely needed and therefore requires expedition, after a properly conducted public participation process. The claim that expedition is essential is, in any event, belied by the fact that the Act has still not been brought into force, despite the fact that it was passed by Parliament in 2023.[193]

143. Fourth, it is not necessarily the case that the entire NA process will be "*wasted*". Nothing prevents Parliament from having appropriate regard to the public participation process previously conducted, in determining what constitutes reasonable public participation going forward.[194]

CONCLUSION

144. The applicant seeks the relief set out in the Notice of Motion, together with costs, including the costs of three counsel.

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23 March 2026

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[192] RA p018-44, para 146.

[193] RA p018-44, paras 146 and 147.

[194] RA p018-44, para 148.