

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT251/25

In the matter between:

BOARD OF HEALTHCARE FUNDERS NPC

Applicant

And

**SPEAKER OF THE NATIONAL ASSEMBLY
AND TWENTY-THREE OTHERS**

Respondents

THIRD AND FIFTH RESPONDENTS' WRITTEN SUBMISSIONS

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OVERVIEW

1. The National Health Insurance Act (“**NHI Act**”) is a transformative legislative measure aimed at achieving universal health coverage (“**UHC**”) in South Africa, as mandated by section 27 of the Constitution and consistent with South Africa’s obligations under international law. This Act seeks to address the deep structural inequalities and inefficiencies that have long characterised the South African healthcare system, by integrating public and private healthcare and establishing a single purchaser and payer of health services.¹ Thus, improving access to healthcare for all South Africans equally.²
2. The Board of Healthcare Funders (“**BHF**”) brings this application in terms of section 167(4)(e) of the Constitution contending that Parliament (both the National Assembly (“**NA**”) and the National Council of Provinces (“**NCOP**”)) failed to comply with its constitutional obligations in passing the NHI Act. While BHF seeks to invoke this Court’s exclusive jurisdiction by portraying this application as a challenge to the NHI Act based on Parliament’s alleged failures in the public participation process,³ in substance BHF challenges the outcome of the public participation process, rather than the process itself:

¹ Third and Fifth Respondent’s Answering Affidavit (“**Department’s AA**”), at paras 70 to 102. CL: 017-85 to 017-94.

² Department’s AA, at paras 111 & 221. CL: 017-96 to 017-123.

³ BHF’s written submissions CL019-5 para 11

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2.1. First, BHF alleges that Parliament failed to *properly* consider the comments and submissions received during the public participation process. While BHF acknowledges the intense and extensive public engagement in all provinces⁴, it contends that these hearings were effectively meaningless for the purposes of fulfilling constitutional public participation obligations because (i) Parliament failed to provide the public with adequate information and (ii) Parliament did not have an open mind when it engaged in that process.⁵

2.2. Second, BHF raises a rationality challenge – arguing that Parliament ignored calls for information including updated cost projections. It also alleges that Parliament failed to address concerns about excessive delegation to the Minister and bodies created by the NHI Act, and did not tailor the Bill to known capacity shortfalls.⁶ BHF submits that these failures render the adoption of the NHI Bill irrational.⁷

3. In raising these issues, BHF misconceives the nature and scope of a legitimate public participation challenge in that:

⁴ BHF FA CL 003-48 para 57.4

⁵ BHF FA, at para 12. CL: 003-16 to 003-17.

⁶ BHF FA, at paras 213 and 227. CL: 003-185 and 003-189.

⁷ BHF FA, at para 12. CL: 003-16.

3.1. BHF has failed to identify a flaw in the process followed by the National Assembly and the NCOP. Instead it bases its entire challenge on the nebulous and unsubstantiated contention that Parliament was “simply going through the process”⁸ and that there was no “meaningful and effective public involvement”.⁹

3.2. BHF complains that information demanded by it from the Department was not considered necessary by Parliament for purposes of considering and adopting the Bill. It also complains that the Act lacks crucial information needed to properly implement it. These complaints amount to an attack on the merits of the NHI Act and the policy choices underpinning the Act. At its core, BHF’s case is not that it—or the public—was denied a genuine opportunity to participate in the legislative process. Rather, it’s true grievance is that the Act adopted is irrational and inconsistent with BHF’s policy choices.

4. However, this Court’s jurisprudence establishes that the constitutional standard for public participation in the lawmaking process is one of reasonableness, not unanimity or consensus.¹⁰ Parliament is not obliged to adopt every proposal or

⁸ BHF written submissions, 019-20 para 53

⁹ BHF written submissions 019-14 para 37

¹⁰ *Doctors for Life International v Speaker of the National Assembly and Others* - 2006 (6) SA 416 (CC) (“**Doctors For Life**”) at paras [126] to [127]. *Mogale and Others v Speaker, National Assembly*

submission made during this process but it should provide the public with a reasonable opportunity to influence the decision to be taken.

5. Through its judgments, this Court has developed indicators for *unreasonableness* including: (i) if the content of a public hearing could not possibly affect Parliament's deliberations on the legislation (ii) if the hearing was not effectively or timeously advertised (iii) if people were unable to attend the hearing, or (iv) if the submissions made at the hearing were not transmitted or were not accurately transmitted to the legislature.¹¹

6. None of these indicators of unreasonableness are present in the present matter. BHF does not dispute:

6.1. the extensive public participation process undertaken by Parliament or the vast number of submissions received.¹²

6.2. that the parliamentary hearings were well publicised and well attended.¹³

and Others (2023 (6) SA 58 (CC) ("*Mogale*") at paras [34] to [37]. Land Access Movement of South Africa and Others V Chairperson, National Council of Provinces and Others 2016 (5) SA 635 (CC) ("*LAMOS*A") at para [60].

¹¹ *Mogale supra* (fn 9) at paras [34] to [37].

¹² BHF's RA ("*BHF RA*"), at paras 30 to 35 & 105.2. CL: 108-31 to 108-34 & 108-68.

¹³ BHF's RA CL 018-8 para 14

6.3. Parliament not only deliberated on submissions but also sought legal advice on the issues raised.¹⁴

6.4. Further deliberations followed which focussed on the advice received; the responses by the Department; and on a clause by clause analysis of the NHI Bill.¹⁵

7. The uncontested facts demonstrate that all interested parties, including BHF, were afforded a reasonable and meaningful opportunity to actively participate in and potentially influence the legislative process.

8. BHF deliberately ignores all these critical features of the public participation process undertaken by Parliament and maintains its dogmatic and unsubstantiated stance that, although there was consultation, it was not 'meaningful'. In doing so, BHF does not attempt to define the benchmark for when consultation becomes 'meaningful'. The high watermark of its case appears to be that the submissions and policy positions of those who oppose the NHI were not adopted by Parliament. However, this is not evidence of a lack of meaningful engagement. Nor is it demonstrative of a flawed public participation process. As this Court has repeatedly held, Parliament is not bound by the submissions or comments it

¹⁴ BHF's RA CL 018-28 para 73

¹⁵ BHF's RA CL 018-8 para 92

receives. It merely has to demonstrate a preparedness to be guided by the public-involvement process.

9. To make matters worse, the rationality challenge raised by BHF attacks the rationality of the NHI Act itself. BHF argues that the final Bill adopted by Parliament demonstrates that the submissions made were not taken seriously, and that Parliament did not have necessary information to make a rational decision.¹⁶ This is a direct attack on the rationality of the legislation. In the absence of an application for direct access, this challenge is not properly before this Court for determination.
10. For these reasons, this application should be dismissed.
11. In what follows, these written submissions address:

- 11.1. BHF'S inclusion of new and objectionable matter in its replying affidavit;

- 11.2. This Court lack of jurisdiction to determine certain central aspects of BHF's application;

¹⁶ BHF's FA, at paras 188 to 191. CL: 003-177 to 003-178.

- 11.3. The legal framework governing public participation;
- 11.4. The factual record of the public participation process in relation to the NHI Act;
- 11.5. The question of just and equitable remedy; and
- 11.6. Condonation.

NEW MATTER IN REPLY

12. Prior to addressing the merits of BHF's application, we address new matter impermissibly raised by the BHF in its replying affidavit. This new matter is not only irrelevant to the issues before this Court but appears to have been opportunistically introduced by BHF solely to discredit the Department and the NHI. It includes:

- 12.1. Allegations in respect of the Director General's suspension¹⁷ which BHF alleges is indicative of the Departments "failures and malfeasance" that have contributed to the dysfunctional public healthcare system;

¹⁷ RA, para 6.5.6-6.5.8

- 12.2. Allegations of new developments in the High Court litigation which has little relevance to the current proceedings¹⁸;
- 12.3. A new constitutional argument on the regression of socio-economic rights by the NHI scheme, in particular the reduction of choices available to members of the public in respect of the healthcare they currently enjoy.¹⁹ Such an argument has no place in a public participation challenge;
- 12.4. Speculative and baseless allegations of political expediency on the part of members of Parliament which, BHF alleges, materially affected the legislative process and the passing of the NHI Act;²⁰
- 12.5. A new irrationality challenge alleging that Parliament acted irrationally without clarity on the basket of services, costing, funding model and the implementation of the NHI Act within the existing fiscal constraints²¹; and

¹⁸ RA, para 73.1-73.8

¹⁹ RA, para 90.1-90.5

²⁰ RA, para 109.1-109.2

²¹ RA, para 119.1-119.4

12.6. A new summary on the number of substantive challenges to the NHI Act and the conclusion that the appropriate remedy is to invalidate the NHI Act.²²

13. The new matter is plainly irrelevant and prejudicial and should be disregarded by this Court.

LACK OF JURISDICTION

14. BHF contends that the NHI Act is irrational on the basis that it lacks adequate and reliable costing, is uncertain in its implementation, leaves material issues to future regulation, and was adopted in the absence of what is said to be sufficient information. These complaints are however not directed at the process followed by Parliament in adopting the NHI Act, but at the content and desirability of the legislation itself.

15. Thus BHF's rationality challenge is a direct attack on the constitutionality of the legislation itself and not a public participation challenge. It seeks to make out the case that the adoption of the NHI Bill by the NA and the NCOP was irrational in that "the legislature pushed through a transformative measure without ensuring

²² RA, para 138.4-138.6

there was a rational relationship between the Bill's laudable purpose (universal healthcare coverage) and the actual mechanisms put in place."²³

16. This is quintessentially a rationality challenge.
17. BHF contends that issues pertaining to "financial opacity, superficial consultation, legislative vagueness, potential constitutional infractions and overshadowing of provincial roles"²⁴ all show that the NHI Act is irrational. While the Minister and Parliament raised concerns in their answering affidavits about the inclusion of a rationality challenge in these proceedings, in its written submissions, BHF doubles down on maintaining its rationality challenge by stating that "*Instead the BHF points to how this irrationality was raised repeatedly over the years - not only by the BHF, but by countless participants in the public participation process. The fact that Parliament nonetheless adopted the NHI Bill shows it rigidly ignored the submissions made to it. It is evidence of a public participation process that was an empty ritual. Parliament could never reasonably or rationally have assented to the NHI Bill if it had engaged meaningfully with the submissions made repeatedly to it and the department.*"²⁵

²³ BHF FA CL 003-192 para 212

²⁴ BHF FA CL 003-192 para 212

²⁵ BHF's written submissions CL 019-12 para 29

18. In support of its assertion that it is competent to include a rationality challenge of this nature in a public participation challenge, BHF relies on this Court's decision in *Mogale*²⁶. However, in *Mogale*, this Court found that the substance of the application before it centred on the adequacy of Parliament's public participation process in passing it. It found that the applicant's complaints about the substance of the Act were raised for the purpose of demonstrating the nature of the issues at stake, and thus the extent of public participation required.²⁷
19. BHF does not make an argument on the nature of the public participation process required by Parliament. Instead, it raises a substantive argument that Parliament acted irrationally in not considering certain issues in passing the Bill. As this Court noted in *Mogale*, issues about the substance of the legislation does not fall within this Court's exclusive jurisdiction under section 167(4)(e) of the Constitution, which is limited to whether Parliament adequately facilitated public participation in passing the Act in question.²⁸
20. BHF's substantive attack on the rationality of the NHI Act thus falls outside of this Court's exclusive jurisdiction.

²⁶ *Mogale and Others v Speaker, National Assembly and Others* 2023 (6) SA 58 (CC)

²⁷ *Mogale*, para 16

²⁸ *Mogale*, para 17.

THE OBLIGATION TO FACILITATE PUBLIC PARTICIPATION

21. Under section 167(4)(e) of the Constitution, this Court has exclusive jurisdiction to decide whether Parliament has failed to fulfil a constitutional obligation. Sections 59(1)(a) and 72(1)(a) impose an obligation on Parliament to reasonably facilitate public involvement in its legislative processes.
22. This obligation has been described as a crucial part of participatory democracy.²⁹ The purpose is to afford the public the opportunity to influence the decision of the lawmakers³⁰ and requires that lawmakers provide opportunities for the public to be involved in meaningful ways. Not only must the legislature afford the public an opportunity to the views and opinions, it must consider these in its decision-making.³¹
23. The Constitution affords Parliament a significant measure of discretion in determining how best to fulfil its duty to facilitate public involvement in the law-making and other processes and those of its committees.³² What is required to discharge these obligations will vary from case to case. Ultimately, what matters is

²⁹ *Mogale*, para 32

³⁰ *Mogale*, paras 35.

³¹ *Matatiele II*, para 97.

³² This is in line with the separation of powers doctrine and that the Court will not easily intervene in how a legislature chooses to comply with its constitutional obligation. See *Doctors for Life* para 200.

that a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. Thus, the standard of reasonableness is central.³³

24. There are at least two aspects of the duty to facilitate public involvement.³⁴

24.1. The first is the duty to provide meaningful opportunities for public participation in the lawmaking process. This includes the legislature providing notice of and information about the legislation under consideration and the opportunities for participation that are available; and creating conditions that are conducive to the effective exercise of the right to participate in the law-making process.³⁵ A prerequisite for effective public participation is public access to information which is sufficient and of a character that allows the public to deliberate on and make informed submissions

³³ *Doctors for Life*, paras 26, 123-126 (quoting *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) (*New Clicks*), para 630) and para 145; *Land Access Movement of South Africa and Others v Chairperson, National Council of Provinces and Others* [2016] ZACC 22; 2016 (10) BCLR 1277; 2016 (5) SA 635 (CC) (*LAMOS*), paras 59-60; *Mogale and Others v Speaker, National Assembly and Others* [2023] ZACC 14; 2023 (9) BCLR 1099; 2023 (6) SA 58 (CC) (*Mogale*), paras 34-35; *Corruption Watch*, para 29.

³⁴ *Doctors for Life*, para 129; *Mogale*, para 34; *Corruption Watch*, para 29.

³⁵ *Doctors for Life*, paras 130-134.

about the subject-matter of the consultative process.³⁶ What ultimately matters is that Parliament acts reasonably in the manner that it facilitates public involvement in the particular circumstances of each case.³⁷

24.2. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. The conventional method of public participation in the law-making process is through the submission of written or oral representations on the Bill under consideration by the legislature or through a combination of both written and oral submissions.³⁸

25. Whether, in all the circumstances, a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors viewed in totality³⁹ including:

25.1. The nature and importance of the legislation and the intensity of its impact on the public.

³⁶ *Corruption Watch*, para 46.

³⁷ *Matatiele II*, para 67.

³⁸ *Doctors for Life*, para 142; *Matatiele II*, para 68.

³⁹ *Doctors for Life*, para 165.

25.2. If a legislature has decided on a particular mode of involving the public in its legislative process and has communicated its decision to do so to interested parties, it must be held to its decision unless there is sufficient explanation for failure to give effect to that decision.

25.3. It would be an impossible standard for Parliament to comply with if a single flaw in a single hearing rendered the entire public participation process unreasonable. This Court has held that the assessment involves a consideration of the cumulative consequences of the entire process.⁴⁰

25.4. Practicalities such as time and expense, which relate to the efficiency of the law-making process, must be taken into account, but:

25.4.1. the saving of money and time in itself does not justify inadequate opportunities for public involvement;⁴¹ and

⁴⁰ *Mogale*, para 60.

⁴¹ *Doctors for Life*, para 128.

25.4.2. The timetable is to be subordinated to the right to public participation guaranteed in the Constitution, and not the other way around.⁴²

BHF'S CHALLENGE

26. BHF contends that there are four “primary areas” in which Parliament’s public participation process was flawed:

26.1. First, it contends that, despite the lengthy public participation process, there were “*no changes of significance*” between the 2018 Bill and the 2019 Bill.⁴³

26.2. Second, it argues that lawmakers refused to source and provide the public with sufficient information to enable them to make meaningful and effective input. This information pertains to the absence of a defined benefit package; how the system would operate; costing and funding of the NHI system.⁴⁴

⁴² *Doctors for Life*, para 194.

⁴³ BHF Written submissions 019–4 para 5.

⁴⁴ BHF Written submissions 019–4 para 6.

26.3. Third, it contends that Parliament had a closed mind and an unwillingness to be persuaded. This however appears to be a restatement of BHF's lack of information complaint.⁴⁵

26.4. Fourth, it argues that Parliament did not comply with the Legislative Sector Public Participation Framework.⁴⁶

27. Each of these complaints, considered more fully below, are unfounded.

BHF's complaint that there are no changes of significance in the Bills

28. BHF loses sight of the fact that the 2018 Bill and the 2019 Bill were prepared by the Department. Parliament cannot be held responsible for the fact that there were no changes of significance between the two.

29. In any event, the uncontested evidence before this Court demonstrates that, once tabled in Parliament, the NHI Bill underwent an extensive, multi-year public engagement process, including:

⁴⁵ BHF Written submissions 019–4 para 7.

⁴⁶ BHF Written submissions 019–5 para 9.

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- 29.1. During July 2019, the NHI Bill was introduced by the Minister of Health to the NA;⁴⁷
- 29.2. Multiple rounds of written submissions and public hearings at both NA and NCOP levels between 30 August 2019 to February 2022;⁴⁸
- 29.3. Between 26 October 2019 and 24 February 2020 the NA's Portfolio Committee held public hearings in all nine provinces. This involved some thirty-three (33) hearings with up to four in a Province. Over 11 500 people attended and over 950 oral submissions were presented.
- 29.4. As a result of the covid pandemic, the NA's Portfolio Committee held 29 virtual meetings at which a wide range of some 114 stakeholders made oral submissions (together with written presentations) from May 2021 to February 2022.
- 29.5. The Portfolio Committee received approximately 338 891 written submissions from the public; ⁴⁹ hearings were attended by 11 564 members of the public and stakeholders across 33 municipal

⁴⁷ Department's AA, at paras 129-130. CL: 017-101.

⁴⁸ Department AA, at paras 133, 142 & 146. CL: 017-102 to 017-107.

⁴⁹ Department AA, at para 135. CL: 017-102.

districts;⁵⁰ 961 oral submissions were heard by the Portfolio Committee;⁵¹ 29 virtual meetings were held by Portfolio Committee at which 114 stakeholders made oral submissions.⁵²

- 29.6. Multiple rounds of written submissions and public hearings at both NA and NCOP levels between 30 August 2019 to February 2022;⁵³
- 29.7. All received written public submissions were captured into the metadata, categorised and analysed;⁵⁴
- 29.8. The Portfolio Committee held 12 meetings at which a clause by clause analysis of the NHI Bill took place;⁵⁵
- 29.9. The Department on various occasion responded to the issues raised during the public hearings and submissions before the Portfolio Committee;⁵⁶

⁵⁰ Department's AA, at para 142. CL: 017-104.

⁵¹ Department's AA, at para 143. CL: 017-105.

⁵² Department's AA, at para 146. CL: 017-107.

⁵³ Department AA, at paras 133, 142 & 146. CL: 017-102 to 017-107.

⁵⁴ Department's AA, at para 140. CL: 017-104.

⁵⁵ Department's AA, at para 152. CL: 017-109.

⁵⁶ Department's AA, at paras 139, 151 to 153. CL: 017-103, 017-108 to 017-109.

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29.10. Parliament confirms that the Department made a presentation to it which provides a detailed consideration of the responses received as well as a thematic response to the concerns received. Parliament also confirms that it considered the Departments responses.⁵⁷

29.11. The Portfolio Committee considered its consolidated matrix on the consolidated public submissions and proposed amendments to the NHI Bill;⁵⁸

29.12. The Portfolio Committee received legal advice on issues raised during public hearings and deliberated on the advice received;⁵⁹

29.13. During 2023 the Portfolio Committee held meetings to discuss final amendments, deliberated and adopted amendments to the NHI Bill.⁶⁰

⁵⁷ First and Second respondents Answering Affidavit ("**Speaker & NA AA**"), at paras 171 to 173. CL: 017-565 to 017-568.

⁵⁸ Department's AA, at para 153. CL: 017-109.

⁵⁹ Department's AA, at para 154. CL: 017-109.

⁶⁰ Department's AA, at paras 155 to 157. CJ: 017-109.

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- 29.14. During May 2023, Portfolio Committee prepared a report on the NHI Bill, its legislative process, deliberations and party positions.⁶¹
- 29.15. After spending almost 4 years (from August 2019 to June 2023) in processing the NHI Bill and consulting with the public, the plenary session of the NA decided, on 13 June 2023, to refer the revised NHI Bill to the NCOP for its concurrence.
- 29.16. June 2013 the Bill was referred to the NCOP and public submissions were called for and made, and 60 public hearings were held in all nine provinces;⁶²
- 29.17. The Department numerous times responded to issues raised during public hearings and made presentations;⁶³
- 29.18. The Select Committee provided a report and explained therein that all submission received were captured and sent to the Department and parliamentary legal advisor and State Law Advisor.

⁶¹ Department's AA, at para 158. CL: 107-110.

⁶² Department's AA, at paras 163 & 181. CL: 017-111 to 017-115.

⁶³ Department's AA, at paras 169 to 182, & 189. CL: 017-112 to 017-115.

29.19. Select Committee considered the negotiating mandates and final mandates submitted by provinces. In the end eight provinces supported and one province opposed the revised NHI Bill.⁶⁴

30. Parliament's public participation process resulted in 35 changes to the NHI Bill as well as changes to schedule 1.⁶⁵
31. In any event, it is irrelevant whether the extensive and intensive parliamentary process resulted in amendments to the Bill given that Parliament is not obliged to adopt the submissions and comments received. Ultimately the question is not whether Parliament accommodated comments and submissions by making changes to the Bill but whether Parliament discharged its obligation to facilitate a reasonable public participation process. The uncontested facts demonstrate unequivocally that it did.

The complaint of inadequate information

32. The undisputed facts demonstrate that the public was consistently informed about the NHI Bill since August 2011 with the publication of the Green Paper by the Department.

⁶⁴ Department's AA, at paras 190 to 198. CL: 017-117 to 017-18.

⁶⁵ Department's AA, at para 156. CL 017-109.

33. BHF contends that Parliament failed to inform the public of the costing of the NHI scheme as well as the basket of services to be covered by the NHI. It relies on rule 279(1)(c)(iii) of the NA Rules to argue that, when a Bill is introduced, the supporting documents must give an account of the financial implications of the Bill.
34. However, BHF overlooks the fact that the duty to inform as well as rule 279(1)(c)(iii) were properly complied with. When the Bill was first introduced to Parliament, it was accompanied, inter alia, by a document prepared by the Department titled “*A Memorandum on the Objects of the National Health Insurance Bill, 2019*”.⁶⁶ This document set out the following:

34.1. Paragraph 1.1 recognised that Cabinet approved the NHI for the transformation of the health care system to achieve universal coverage for health services;⁶⁷

34.2. Paragraph 2.1.1 recognised the need for reform of both the health care financing and service delivery systems so that all South Africans have access to quality and affordable healthcare;⁶⁸

⁶⁶ Annexure “**BHF14**” to FA, CL003–832.

⁶⁷ CL003–832

⁶⁸ CL003–832

- 34.3. Paragraph 2.1.4 recognised the need for the reconfiguration of the institutions and organisations involved in the funding, pooling, purchasing and provision of health care services;⁶⁹
- 34.4. Paragraph 2.2 set out the implementation of reforms over six phases. The sixth and final phase listed in paragraph 2.2.6 envisages expanding coverage and the gradual increase of the range of services to which there is a benefit entitlement.
- 34.5. Section 8 of the Memorandum set out “Financial Implications for the State” and dealt with out how the Fund will be financed in the various interrelated phases.⁷⁰ The memorandum expressly recognises that this will be done “in consultation with National Treasury”.⁷¹
35. The Memorandum must be considered with the contents of the Bill itself. Chapter 10 of the NHI Act deals with Financial Matters and sets out the sources of funding for NHI.

⁶⁹ CL003–833

⁷⁰ CL003–843

⁷¹ CL003–833

36. In addition, it is not disputed by BHF that the funding and fiscal implications of the Bill were debated extensively during the parliamentary processes.⁷² The Parliamentary Committee was aware of the criticisms raised during the parliamentary process about the feasibility of the Bill, but it also considered the responses to these criticisms. It also had before it the Memorandum, which included the consideration of new taxation options⁷³ as well as the Bill which identified sources of funding.
37. Central to a discussion about funding of the NHI is an appreciation of the phased in approach to the implementation of the NHI. This is reflected in the Memorandum and the Bill which provide that:
- 37.1. The NHI will be implemented in two phases over time;
- 37.2. The basket of services to be covered by the NHI will be determined incrementally over time by the Benefits Advisory Committee (“BAC”) depending on the availability of resources.
38. This was accepted by Parliament and is reflected in section 57(1)(a) to (b) of the NHI Act which requires that implementation must be phased, progressive and

⁷² Minister’s AA, CL 017-595 para 246.2.1

⁷³ Minister’s AA, CL 017-596 para 246.2.4

gradual. It further states that implementation is subject to financial resource availability:

“57(1)(a) Despite anything to the contrary in this Act, this Act must be implemented over two phases.

(b) National Health Insurance must be gradually phased in using a progressive and programmatic approach based on financial resource availability”. (emphasis added)

40. In relation to the basket of services, section 25(5) of the NHI Act provides that

“(5) The Benefits Advisory Committee must determine and review-

(a) the health care service benefits and types of services to be reimbursed at each level of care at primary health care facilities and at district, regional and tertiary hospitals;

(b) detailed and cost-effective treatment guidelines that take into account the emergence of new technologies; and

(c) in consultation with the Minister and the Board, the health service benefits provided by the Fund.”

39. As submitted by the Department to Parliament during the public participation process, it is these flexible features of the NHI scheme that would make it futile to cost a prolonged project of implementation given that both the basket of services and the pace of implementation are not predetermined and are subject to financial resource availability.⁷⁴ Indeed that Department was advised by economists, and the World Health Organisation that it would be a futile exercise to try and cost a 25 year-long project of this nature.⁷⁵
40. Inexplicably, BHF contends that the information pertaining to the costing and funding of the NHI “could readily have been sourced and furnished” and ought to have been considered by Parliament.⁷⁶ However, this could never be case given that the Bill did not determine the basket of services. BHF does expand on this apparently readily available financial modelling and what basket of services it considered; when such basket of services would be made available; and to whom such services would be provided.
41. BHF recognises that ultimately, Parliament applied its mind to the issue of funding of NHI and that it concluded on the basis that detailed costing, feasibility and funding questions need not be resolved at the legislative phase.⁷⁷ It accepts that

⁷⁴ Minister’s AA, CL 017-594 para 246.1.3

⁷⁵ Minister’s AA, CL 017-594 para 246.1.3

⁷⁶ BHF written submissions CL 019-33 para 84

⁷⁷ BHF written submissions CL 019-31 para 79

“a majority of lawmakers accepted the Department’s position that it would be a ‘futile’ exercise to undertake a feasibility exercise.”⁷⁸

42. Despite this, BHF contends that:

42.1. Parliament’s position was “internally inconsistent”⁷⁹ because it relies “ex post facto” on the Memorandum. However, BHF admits that the Memorandum was before Parliament and was considered by it during the public participation process. It is therefore unclear on what basis this amounts to an ex post facto justification by Parliament.

42.2. The Constitution requires that Parliament confront the question of the cost of implementing legislation at the inception of the proposed law.⁸⁰ There however is no authority for this proposition - not a single case decided by this Court lays down this principle. This is unsurprising given that the state will almost never be in a position to fully and accurately estimate the cost of implementing any legislation at the point of adoption of the law by Parliament. There are far too many variables at play. These issues are best

⁷⁸ BHF written submissions CL 019-31 para 80.2

⁷⁹ BHF written submissions CL 019-31 para 80

⁸⁰ BHF written submissions CL 019-23 para 64.1

interrogated during the relevant budgetary processes and when the relevant Money Bills which include measures to raise funds for implementation of the legislation are considered by Parliament.

What is in the basket of services

43. BHF raises the point that there is no legislative guidance to the BAC in its determination of the basket of services available under the NHI Act.⁸¹ It argues in this regard that the Act endows the BAC with “wide and untrammelled powers”.⁸² However the presence or absence of legislative guidance is an issue which goes to the constitutionality of the NHI Act.⁸³ It thus falls outside the ambit of a public participation challenge.
44. In any event, it is not disputed that the question of whether the NHI Act should list NHI benefits was debated extensively during the public participation process.⁸⁴ The Department shared its view that the basket of services required flexibility given that:

⁸¹ BHF written submissions CL 019-36 para 96

⁸² BHF written submissions CL 019-37 para 97

⁸³ See *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC)

⁸⁴ Parliaments AA CL 017-600 para 246.6.2

- 44.1. They may need to be changed rapidly;⁸⁵
- 44.2. Choosing the specific package of care is difficult because of the complexity of the burden of disease in the country⁸⁶;
- 44.3. It was better to have a structure and scope of services to be covered by the NHI Fund which is based on levels of care with a broad indication of the type of service to be covered at each level than to explicitly state the package that will be covered by the NHI. This is because of the rapidly changing health technology including the epidemiology of diseases dealt with.⁸⁷

45. This issue was discussed extensively during the public participation process. Ultimately Parliament decided to adopt the flexible model proposed by the Department. BHF complains that this demonstrates that Parliament was not open to persuasion. However, as explained above, the matter was debated at length by Parliament. The fact that Parliament did not ultimately adopt BHF's viewpoint does not mean that it acted unreasonably or unlawfully.

⁸⁵ Parliaments AA CL 017-600 para 246.6.2

⁸⁶ Parliaments AA CL 017-600 para 246.6.2

⁸⁷ Parliaments AA CL 017-600 para 246.6.2

BHF has failed to demonstrate that Parliament had a closed mind

46. BHF does not dispute that the public was invited to submit written representations and petitions in response to the Green Paper, the White Paper as well as the revised Green Paper. In addition, once presented to Parliament, the public was given sufficient time to consider the NHI Bill and to submit their representations.
47. They also do not dispute that Parliament underwent an intensive and extensive public participation process.
48. Despite this, BHF makes the baseless allegation that Parliament approached the process with a closed mind. It alleges that Parliament blindly adopted legislation without knowing what the result would look like, how much it would cost, or if it would help or hinder access to healthcare is completely without foundation.⁸⁸
49. These propositions invite the Court to engage in an evaluation of economic models; an assessment of policy completeness; and a scrutiny of legislative design which are all part and parcel of a substantive merits enquiry.

⁸⁸ BHF FA, paras 175-175.3, 188-191. CL: 003-173 & 003-177 to 003-178.

50. However, in **Matatiele(2)**⁸⁹ this Court emphasised that the public participation obligation on Parliament is limited to affording the public a reasonable opportunity to participate effectively, not to guarantee an outcome.
51. BHF's own analysis of the changes to the National Health Insurance Bills⁹⁰ demonstrates that Parliament was actively engaged with considering the Bill and the extensive comments made in relation thereto. The following examples are taken from the analysis which covers several themes and demonstrates that there was indeed meaningful public participation and engagements with the NHI Bills:

51.1. Under the theme "*Money Bill*" BHF alleges that the 2018 NHI Bill contained provisions for a source of income of the Fund to be from money appropriated by Parliament.⁹¹ Section 46 in the 2018 NHI Bill provides that the Minister must, in consultation with the Minister of Finance, determine the budget and allocation of revenue to the Fund on an annual basis. In the 2019 NHI Bill, there were changes to the provision to reflect that the Fund is "entitled" to such appropriated money and it provides that the money must be appropriated from tax revenue. BHF alleges that the Money Bill remains a concern in the 2023 NHI Bill. BHF alleges that the

⁸⁹ *Matatiele Municipality v President of the RSA (No 2) 2007 (6) SA 477 (CC)*. ("**Matatiele 2**").

⁹⁰ BHF FA, annexure "**BHF16**". CL: 003-907.

⁹¹ BHF FA, para 139.3. CL: 003-151.

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appropriation of funds as provided for in the NHI Bills constitutes a “Money Bill” for the purposes of section 77(1) and (2) of the Constitution and that the NHI Bill had to follow the procedure established in section 75 of the Constitution.⁹² This is incorrect because the Minister of Health together with the Minister of Finance no longer determine the budget and allocation of the Fund. The 2018 NHI Bill was amended in the May 2019 Bill, and this is evidence that Parliament considered submissions regarding this provision.

51.2. Under the theme “Challenges: right to have access to health care services, including reproductive health care (section 27(1)(1) of the Constitution”, BHF alleges that there are drafting and terminology inconsistencies in the 2018 NHI Bill. Despite its allegation that drafting and inconsistencies remained in the 2019 NHI Bill and the 2023 NHI Bill, from its own analysis, it is clear that amendments were indeed made⁹³, including amendments to the provisions that BHF raised concerns about.

51.3. Under the theme “*Impact of healthcare professionals*” BHF alleges that in the 2018 NHI Bill, providers are required to be certified and

⁹² BHF FA, annexure “**BHF16**”. CL: 003-907 - 908.

⁹³ BHF FA, annexure “**BHF16**”. CL: 003-908 - 935.

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accredited in terms of section 36 the National Health Act, which section is not in force. However, in the 2019 NHI Bill, the reference to the certificate of need in terms of section 36 of the NHA was removed.⁹⁴ In the May 2019 Bill there were changes to the provisions of section 39 in respect to the accreditation of service providers. This clearly points to the fact that Parliament was swayed by BHF's submissions.

51.4. Under the theme *"The NHI Bill impairs existing access to healthcare services (limiting role of medical schemes)"* there are clear amendments to the provisions that BHF had issues with leading ultimately to additions of a new section 33 in the 2019 NHI Bill and an amendment to section 8(2) in the 2023 NHI Bill.⁹⁵ Again, although it did not affect all the amendments that BHF proposed, this demonstrates that Parliament considered the submissions that it received.

51.5. Under the heading *"Intrusion into national and provincial legislative competence"* BHF raised concerns that the Bill does not mention ambulance services specifically. In the 24 May 2023 Bill there was a definition of ambulance services and amendments to the

⁹⁴ BHF FA, annexure "**BHF16**". CL: 003-938 - 945.

⁹⁵ BHF FA, annexure "**BHF16**". CL: 003-945 - 947.

provisions of section 35 dealing with emergency medical services.⁹⁶ This clearly demonstrates that Parliament considered the submissions regarding the provincial legislatures.

52. BHF's complaint that Parliament approached its functions with a closed mind thus has basis whatsoever. This despite the gravity of its allegation, namely that for political reasons, members of Parliament failed to properly carry out their constitutional obligations. In this regard, BHF alleges:

*"ANC-dominated Parliament was never going to change its mind and it failed in its obligation to approach the Public Participation process with a willingness to do so... did not approach the issue with an open mind, had no intention of accommodating any changes, and provided no information nor alleviated or addressed any concerns that were articulated. Indeed, Parliament could not address the concerns raised, because it never considered those concerns or the issues underlying them. They simply deferred them to another day and to be dealt with by the Minister and third parties."*⁹⁷

53. These allegations are serious and impugn the integrity of members of Parliament. Despite this, BHF sees it fit to make wanton allegations without a shred of evidence in support thereof.

⁹⁶ BHF FA, annexure "**BHF16**". CL: 003-949 – 950.

⁹⁷ BHF FA, at paras 70 to 71. CL: 003-44.

54. Public participation, properly understood, does not require Parliament to resolve all policy questions, eliminate uncertainty, or legislate only once every regulatory detail has been finalised. The constitutional requirement is that Parliament must reasonably facilitate the involvement of the public. It is not required to concur in the submissions received.

55. In *Merafong*⁹⁸ this Court in its discussion of the public participation obligation on Parliament held that:

*“But being involved does not mean that one’s views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views.”*⁹⁹

56. In *Poverty Alleviation*¹⁰⁰ the Court held:

“As I understand their contentions, the applicants’ argument suggests that compliance with the Constitution depends on the outcome of the participation,

⁹⁸ *Merafong Demarcation Forum v President of the RSA* 2008 (5) SA 171 (CC) (“**Merafong**”).

⁹⁹ *Ibid* at para [50].

¹⁰⁰ *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010) (“**Poverty Alleviation.**”)

which must have an impact on the final decision. Although due cognisance should be taken of the views of the populace, it does not mean that Parliament should necessarily be swayed by public opinion in its ultimate decision. Differently put, public involvement and what it advocates for do not necessarily have to determine the ultimate legislation itself.

The fact that the process of engagement is not reflected in a change to the legislation, or in the accommodation of the representations submitted to Parliament, does not necessarily mean that reasonable public participation did not take place or that the views of the public were not considered..."

57. If the final adopted NHI Bill does not reflect BHF's concerns, it does not automatically mean that the public participation process was flawed or fractured.¹⁰¹ In order for BHF to successfully impugn Parliament's process it needed to place facts before this Court which demonstrates that Parliament acted unreasonably. It has however failed to do so. Instead, it has made baseless allegations that Parliament deliberately ignored its constitutional obligations in favour of passing the NHI Act.

¹⁰¹ Departments AA, at para 63. CL: 017-82.

NHI's operating model

58. BHF claims that the NHI Act is vague on how the model will operate.¹⁰² However, a challenge to the constitutionality of legislation based on vagueness is a substantive one. It is not a challenge to the public participation process followed by Parliament and thus falls outside this Court's exclusive jurisdiction.
59. In any event, as BHF itself accepts, each of the issues raised under this theme were extensively discussed during the public participation process.

The Public Participation Framework

60. BHF contends that Parliament did not comply with three of the four levels set out in the Public Participation Framework. These include: level one (to inform the public); level three (to provide the public with the opportunity for dialogue and interaction) and level four (to provide the public with an opportunity to partner or work jointly with decision-makers).
61. However this point regurgitates the argument by BHF that the public was not provided with necessary information in order to participate effectively in the public participation process and Parliament approached the matter with a closed mind.

¹⁰² BHF's written submissions CL 019-42 para 113

62. As indicated above, the facts demonstrate that the public had the necessary information and that Parliament went through an elaborate process to elicit and consider submissions from the public.
63. For these reasons, this application should be dismissed.

JUST AND EQUITABLE REMEDY

64. Section 172(1)(b) of the Constitution empowers this Court, when deciding a constitutional matter within its power, to make any order that is just and equitable.¹⁰³
65. This Court has emphasised that remedies must be crafted with due regard to:¹⁰⁴
- 65.1. The separation of powers;
 - 65.2. The nature and extent of the constitutional defect;
 - 65.3. The need to respect Parliament's primary role in law-making; and

¹⁰³ *Doctors For Life supra* (fn 9) at para [214].

¹⁰⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (2 December 1999) at para [66]. ("**National Coalition.**") *Mahlangu and Another v Minister of Labour and Others* (2021 (2) SA 54 (CC) at paras [121] to [125]. ("**Mahlangu.**")

65.4. The potential impact on the public and the progressive realisation of rights.

66. On the facts, it is clear that Parliament fulfilled its constitutional obligations to facilitate public involvement in the legislative process.¹⁰⁵ However, should the Court find a procedural defect in the public participation process, a just and equitable remedy would be to remit the NHI Act to Parliament to cure the procedural defect identified, with directions as to the facilitation of further public involvement, to the extent necessary.¹⁰⁶

CONDONATION

67. To the extent that the Minister's answering affidavit was filed out of time, it is humbly submitted that it is in the interests of justice for this Court to condone the delay in filing.

¹⁰⁵ Department's AA, at paras 21, 36, 56, 200 to 207, 341 to 342. CL: 017-71 to 017-75, 017-81, 017-120, 017-145 to 017-146.

¹⁰⁶ Department's AA, at para 340. CL: 017-145.

CONCLUSION AND COSTS

68. BHF has failed to establish that Parliament did not fulfil its constitutional obligation to facilitate public participation in the legislative process leading to the adoption of the NHI Act. This application should accordingly be dismissed with costs.
69. In *Biowatch*,¹⁰⁷ this Court made clear that the principle that, in genuine constitutional litigation between a private party and the State, if the private party loses it should ordinarily not be ordered to pay the State's costs, while if the private party succeeds the State should ordinarily pay. The latter principle is however not absolute. It does not protect a litigant whose conduct is frivolous, vexatious, manifestly inappropriate, or otherwise deserving of censure. This Court also stressed that merely labelling litigation "constitutional" or making specious references to the Constitution is not enough, the issues must be genuine, substantive and truly constitutional.
70. That qualification is significant here. For the reasons advanced elsewhere in these submissions, substantial parts of the BHF's case do not constitute a true public-participation challenge, but instead amount to an attack on the merits, wisdom and workability of the NHI Act itself. BHF's complaints about costing, implementation, the basket of services, delegation, and institutional capacity are, in substance,

¹⁰⁷ *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009).

directed at the content of the legislation and the policy choices underpinning it, rather than at any constitutionally cognisable defect in Parliament's public-participation process.

71. To the extent that BHF seeks to dress up merits-based and rationality complaints as a procedural challenge in order to found this Court's exclusive jurisdiction, the application falls outside the class of genuine constitutional litigation that *Biowatch* is intended to protect. As *Biowatch* itself makes plain, the principle is not engaged by the mere invocation of constitutional language where the real dispute is otherwise.
72. In addition, BHF has introduced impermissible new matter in reply, including new allegations concerning the Director-General's suspension, developments in separate litigation, an alleged socio-economic rights regression argument, political-expediency allegations, and an expanded irrationality challenge. Those matters are not only irrelevant to the issues properly before this Court, but are also prejudicial and opportunistic. Conduct of that kind is not protected by *Biowatch* and may properly justify an adverse costs order, at least in relation to the objectionable material.
73. The same applies to those aspects of the case that this Court may find to be jurisdictionally incompetent. BHF has persisted in advancing issues that do not fall within this Court's exclusive jurisdiction, or that should have been pursued, if at all, through direct access or in other proceedings, that is a material consideration on

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costs. *Biowatch* is aimed at shielding *bona fide* litigants who seek to vindicate constitutional rights, not litigants who formulate their case in a manner that improperly enlarges this Court's jurisdiction or forces the respondents to meet matters not properly before the Court.

74. Furthermore, this is not a case in which BHF can plausibly claim to be a vulnerable or disinterested constitutional litigant seeking only to vindicate rights in the public interest. Although party status is not determinative, the character of this litigation remains relevant. BHF is an organised industry body advancing objections that are closely bound up with its members' institutional and commercial interests in the existing dual healthcare funding landscape.
75. The application is ill-considered and falls outside the protection afforded by *Biowatch*. In the premises, the application should be dismissed with costs, including the costs of three counsel.

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7 April 2026

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