

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:

In the matter between:

PREMIER OF THE WESTERN CAPE GOVERNMENT

Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF
PROVINCES**

Second Respondent

MINISTER OF FINANCE

Third Respondent



NOTICE OF MOTION

BE PLEASED TO NOTICE THAT the applicant intends to apply to the above Honourable Court on a date to be determined by the Registrar for an order in the following terms:

1. It is declared that Parliament had failed to comply with a constitutional obligation as envisaged in section 167(4)(e) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) in that the First Respondent failed to act reasonably in carrying out its duty to facilitate public involvement as required by section 59(1)(a)

of the Constitution before passing the Public Procurement Act 28 of 2024 (**‘the Procurement Act’**).

2. As a consequence, the Procurement Act was adopted in a manner that is inconsistent with the Constitution and it is declared to be invalid.
3. The respondents who oppose this application, are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.
4. Granting further and/or alternative relief.

BE PLEASED TO TAKE NOTICE FURTHER that the affidavit of **DEIDRÉ BAARTMAN** and the annexures thereto will be used in support of this application.

TAKE NOTICE FURTHER that the applicant has appointed the State Attorney, Cape Town, per Mr Lawrence Ngwenya, Floor 4 Liberty Life Centre, 22 Long Street, Central, Cape Town, care of State Attorney (Johannesburg), North State Building, 85 Albertina Sisulu Road, Kensington, Johannesburg as its attorneys of record at which it will accept notice and service of all processes herein, and service may be effected by email to the address Inqwenya@justice.gov.za. (Cape Town) and SBedrow@justice.gov.za. (Johannesburg).

TAKE NOTICE FURTHER that if you intend opposing this application, you are required:

- (a) within ten (10) days after lodging of this application, to deliver a notice to the applicants that you intend to oppose the application and in such notice to appoint an address at which you will accept notice and service of all process in these proceedings; and
- (b) to file your answering affidavit, if any, in accordance with the direction to be issued by the Chief Justice.

DATED AT CAPE TOWN ON THIS DAY THE 27TH OF MARCH 2025.



STATE ATTORNEY
Applicant's Attorneys

Per: Lawrence Ngwenya
Floor 4 Liberty Life Centre, 22 Long St,
Central, Cape Town
Fax: 021 421 9364
Tel: 021 441 9200 (9279)
Email: LNgwenya@justice.gov.za
Ref: 4214/24/P11

C/o: State Attorney (Johannesburg)
Ms S Bedrow
North State Building
85 Albertina Sisulu Road
Kensington
Johannesburg

Service via email at
LNgwenya@justice.gov.za and
SBedrow@justice.gov.za.

TO: THE REGISTRAR
Constitutional Court
1 Hospital Street
Constitution Hill
Braamfontein

Filed by LS Ngwenya

Email: LNgwenya@justice.gov.za

AND TO: SPEAKER OF THE NATIONAL ASSEMBLY

(First Respondent)
Parliament Buildings
120 Plein Street,
Cape Town

Care of:

Floor 4
Liberty Life Centre
22 Long St
Cape Town

AND TO: CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES

(Second Respondent)
Parliament Buildings
120 Plein Street,
Cape Town

Care of:

Floor 4
Liberty Life Centre
22 Long St
Cape Town

AND TO: THE MINISTER OF FINANCE

(Third Respondent)

Care of:

Floor 4
Liberty Life Centre
22 Long St
Cape Town

Filed by LS Ngwenya

Email: LNgwenya@justice.gov.za

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No:

In the matter between:

PREMIER OF THE WESTERN CAPE GOVERNMENT

Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF
PROVINCES**

Second Respondent

MINISTER OF FINANCE

Third Respondent

FOUNDING AFFIDAVIT

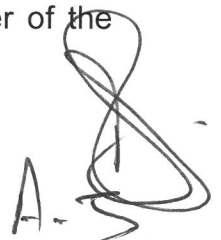
I, the undersigned,

DEIDRÉ BAARTMAN

do hereby make oath and say that:

PART A: INTRODUCTION

1. I am the Minister of Finance of the Western Cape Government. I am authorised to cause the institution of these proceedings on behalf of the Premier of the



Western Cape Government (“**the applicant**”). The executive authority of the Western Cape province vests in the Premier. I am further authorised to depose to affidavits on behalf of the applicant.

2. The facts in this affidavit are within my personal knowledge, except where the context indicates otherwise, and they are to the best of my belief both true and correct. Where I make averments not directly within my knowledge, I do so based on information ascertained from documentation under the control of the applicant. Legal submissions are made on the advice of the applicant’s legal representatives.
3. This is an application brought directly to this Court because this Court has exclusive jurisdiction under section 167(4)(e) of the Constitution of the Republic, 1996 (“the Constitution”) to determine whether Parliament has failed to fulfil a constitutional obligation. The applicant contends that Parliament has failed to fulfil such an obligation in that the First Respondent (“**the NA**”) failed to act reasonably in carrying out its duty to facilitate public involvement as required by section 59(1)(a) of the Constitution before passing the Public Procurement Act 28 of 2024 (“**the Procurement Act**”).
4. The bases of the challenge are that –
 - 4.1. First, the NA, after taking into account public comment on the 2023 version of the Public Procurement Bill B18-2023 (“**the B18-2023 Bill**”) made material and substantial amendments thereto. These amendments included the wholesale replacement of a key chapter dealing with preferential procurement, including the provisions dealing



with set-asides, prequalification requirements and mandatory subcontracting. I detail later herein the nature and extent of this amendment. The NA failed to provide the public with an opportunity to make submissions on these very material amendments to the B18-2023 Bill. Instead, it passed what I shall call the "**Amended Bill**" and then transmitted same to the NCOP for its concurrence. When the Amended Bill returned to the NA from the NCOP, the NA did not provide for any further involvement of the public before finally passing that Bill. I, interchangeably, refer to the Amended Bill as the 'B18B-2023 Bill', as this was its official label after the amendment of the B18-2023 Bill.

- 4.2. Second, the NA in any event failed to involve the public as it did not consider, alternatively did not properly consider, all of the submissions received from the public. There was no discussion or even recognition in any of the meetings of NA's Finance Standing Committee ("**the NA Finance Committee**"), which was tasked with deliberating on the B18-2023 Bill and the public comments, of multiple submissions received from the public and stakeholders, including the applicant. In fact, National Treasury, upon whom the NA Finance Committee relied to summarise, assess and respond to the submissions from the public, failed to present any such assessment or response to the NA Finance Committee in respect of more than half of the submissions, including the applicant's submissions. For practical purposes these submissions were disregarded.

A handwritten signature in black ink, consisting of a stylized, cursive name, with the initials 'AS' written below it.

5. The applicant seeks relief that declares the Procurement Act unconstitutional and invalid. The Procurement Act has not yet been brought into effect, and its ability to be implementable is dependent upon regulations which have not yet been published for comment let alone promulgated. In the meantime, the existing regulatory framework pertaining to public procurement, remain in force. Accordingly, the invalidation of the Procurement Act does not need to be suspended as invalidation will not create a lacuna.

6. In the remainder of this affidavit the following topics are addressed –

6.1. PART B – The parties involved in this application.

6.2. PART C – The context within which the Procurement Act was passed and the central role it is to play regarding public procurement.

6.3. PART D is a description of the nature of the constitutional obligations upon the houses of Parliament to involve the public in the legislation-making process.

6.4. PART E deals with the challenge relating to the NA's failure to involve the public under the following headings –

6.4.1. PART E1 – The NA's failure to provide the public with an opportunity to make submissions on the amendments that were effected by the NA Finance Committee; and

6.4.2. PART E2 – The NA's failure to consider all the submissions that it received.

A handwritten signature in black ink, appearing to be 'A.S.', located in the bottom right corner of the page.

- 6.5. PART F sets out, to the extent that the applicant can, a timeline on when the Procurement Act will be brought into force.
- 6.6. PART G explains and sustains the relief sought.

PART B: PARTIES

7. The applicant is the Premier of the Western Cape, whose offices are situated at Legislature Building, 7 Wale Street, Cape Town. The executive authority of the province vests in the Premier and he is the head of the provincial government. The provincial government consists of multiple departments and has several public entities falling under its control. Such departments and public entities regularly procure goods and services from the private sector. They do so *inter alia* to fulfil the State's constitutional mandate to deliver education, housing and health care to the people of the Western Cape.
8. The applicant therefore has a direct and substantial interest in the constitutionality of legislation governing the procurement of goods and services by the provincial government. Given that the applicant will be required to implement the Procurement Act should it come into effect, the applicant clearly has an interest in its constitutionality.
9. The first respondent is the Speaker of the NA, elected in terms of section 52 of the Constitution with her offices situated at Parliament Buildings, 120 Plein Street, Cape Town. She is cited in her official capacity as the senior parliamentary official responsible for the business of the NA and the passing of



A.S.

legislation in the NA. The Speaker is served under the care of the State Attorney, at 22 Long Street, Cape Town.

10. The second respondent is the Chairperson of the National Council of Provinces (“**NCOP**”) elected in terms of section 64 of the Constitution with her offices situated at Parliament Buildings, 120 Plein Street, Cape Town. She is cited in her official capacity as the senior parliamentary official responsible for the business of the NCOP and the passing of legislation in the NCOP. While the process at the NCOP is not impugned in this application, the NCOP is cited since it is one of the two houses of Parliament which is responsible for the passing of the legislation which is the subject matter of this application. The NCOP accordingly has an interest in the matter. The Chairperson is served under the care of the State Attorney, at 22 Long Street, Cape Town.
11. The third respondent is the Minister of Finance (“**the Minister**”) of the national government, cited in his capacity as the member of the national executive who is responsible for financial matters and who is responsible for the implementation of the Procurement Act. The Minister is served under the care of the State Attorney, at 22 Long Street, Cape Town.
12. Because the applicant is represented by the State Attorney, and the respondents are generally to be represented by the State Attorney, this application will be served upon the State Attorney’s office. It is understood that between the State Attorney and the respective respondents, the issue of legal representation and potential conflicts of interests will be addressed. If necessary, and once



A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line and a small flourish.

necessary approvals are obtained in respect of service within the Parliamentary precinct, it will also be served upon the physical addresses of the respondents.

PART C: CONTEXTUAL BACKGROUND TO THE PROCUREMENT ACT

13. The Bill was introduced in the NA on 29 June 2023 for publication and public comment. I attach copy of the B18-2023 Bill as published for public comment (version B18-2023) as “**FA1**”. The last eight pages of “**FA1**” contains the Memorandum on the Objects of the Bill.
14. Paragraph 1 of the memorandum states that the aim of the Bill is to “*regulate public procurement and to prescribe a framework within which preferential procurement must be implemented.*”
15. Paragraph 2 of the Memorandum refers to several sections of the Constitution namely –
 - 15.1. Section 195 requiring the public administration to promote the principles of professional ethics; efficient, economic and effective use of resources; and to be development-oriented, and promote accountability and transparency.
 - 15.2. Section 216(1) requiring national legislation to prescribe measures to ensure both transparency and expenditure control in each sphere of government and uniform treasury norms and standards.
 - 15.3. Section 217 which reads as follows–



A handwritten signature in black ink, appearing to be 'A.S.', located in the bottom right corner of the page.

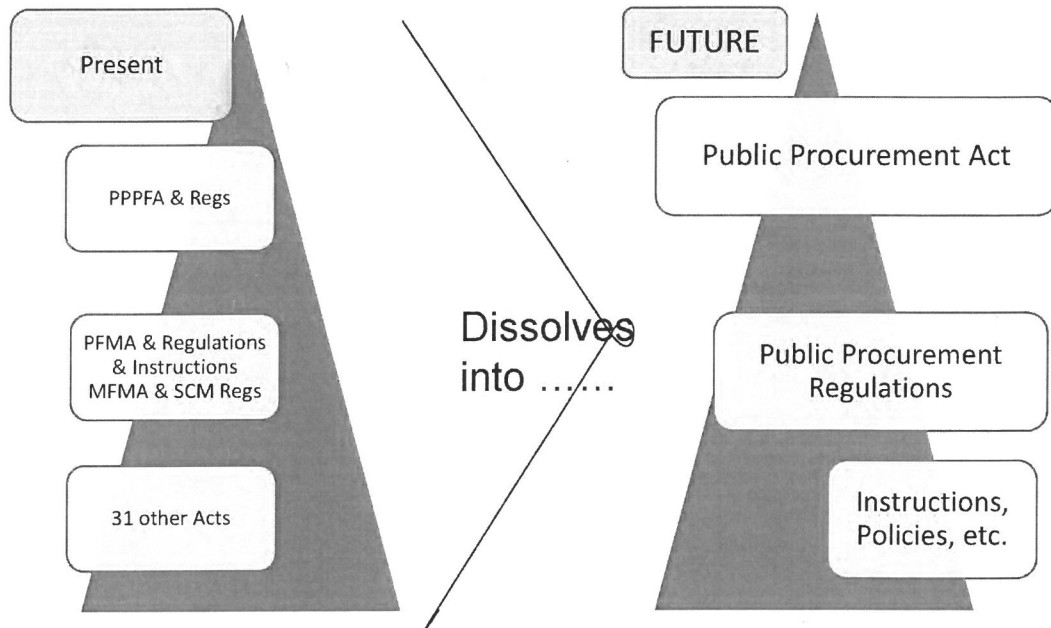
- “(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
 - (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for —
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
 - (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”
- 16. The Preferential Procurement Policy Framework Act 5 of 2000 (“**PPPFA**”) was the national legislation enacted for the purposes of section 217(3) of the Constitution. For the time being the PPPFA remains in force but it is to be repealed when the Procurement Act comes into force.
- 17. The Memorandum states that the public procurement legal regime was fragmented because public procurement is regulated by a multitude of legislation across multiple sectors that apply to the public administration. This, the Memorandum states “*results in confusion as different procurement rules apply.*” (paragraph 2.5)
- 18. The Procurement Act is aimed at rationalising the multiple legislative regimes in various Acts into a single regime that will be supplemented by regulations.
- 19. The far-reaching effect that the Procurement Act will have is illustrated by the envisaged:



- 18.1 Repeal of Chapter 11 of the Local Government: Municipal Finance Management Act, 56 of 2003 (“**the MFMA**”). Chapter 11 deals in detail with procurement of goods and services by municipalities and municipal entities. The Municipal Supply Chain Management Regulations (GenN 868 of 2005, GG 27636 of 30 May 2005) will be repealed along with Chapter 11 of the MFMA.
- 18.2 Repeal of the entire section 16A of the Treasury Regulations, adopted under the Public Finance Management Act 1 of 1999 (“PFMA”), which Regulations has been been applicable to organs of state in the national and provincial spheres of government.
- 18.3 Repeal of the whole of the PPPFA. Thus, it is to completely replace the preferential procurement framework contemplated in section 217(3) of the Constitution. This framework was in place since the year 2000.
20. To further illustrate the vast impact of the Procurement Act, I replicate below a page of a presentation made to the NA Finance Committee on 5 September 2023. It shows that no less than 34 Acts of Parliament together with their regulations were intended to be replaced by the Bill. I attach a copy of this presentation as “**FA2**”.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a vertical line and a horizontal stroke at the bottom.

STRATEGIC OVERVIEW



21. Accordingly, the Procurement Act will have a profoundly significant impact on the manner in which the State, including the provincial government and its multiple departments, procure goods and services from the private sector. In short, the Procurement Act holds great importance.

PART D: CONSTITUTIONAL OBLIGATION ON THE NA AND NCOP TO INVOLVE THE PUBLIC

22. Section 42(2) of the Constitution confers upon the NA and the NCOP, which together form Parliament, important functions in the legislation-making process. They are indeed the central entities in the passaging of legislation. As stated above, in this application, the applicant focusses on the reasonableness of the conduct of the NA.

23. In terms of section 42(3) of the Constitution, the NA is to “*represent the people and to ensure government by the people under the Constitution*” by, *inter alia*, passing legislation.

24. Critically, section 59(1)(a) of the Constitution obligates the NA to “*facilitate public involvement in the legislative and other processes of the*” NA and its committees. A failure by the NA to take reasonable steps to fulfil this obligation constitutes a failure of Parliament to fulfil a constitutional obligation.

25. This Court has previously explained the meaning of the obligation to “*facilitate public involvement in the legislative and other processes*” in **Doctors for Life International v Speaker of the National Assembly and Others** 2006 (12) BCLR 1399 (CC) and 2006 (6) SA 416 (CC) (“**Doctors for Life**”) as follows –

25.1. “*According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a).*” (**Doctors for Life**, at para 120).

25.2. Parliament has considerable discretion to determine how best to fulfil the duty to facilitate public involvement. (**Doctors for Life**, at para 122)

25.3. What is required by sections 59(1)(a) will vary from case to case. But in all events, Parliament “*must act reasonably in carrying out its duty to*

A handwritten signature in black ink, appearing to be 'A.S.', located in the bottom right corner of the page.

facilitate public involvement in its processes.” (**Doctors for Life**, para 125)

25.4. Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case – “*context is all important*”. In assessing reasonableness, the nature of the legislation under consideration and whether, for instance, the legislation needed to be enacted urgently are relevant (**Doctors for Life**, para 146).

25.5. The responsibility of Parliament may be summarised as follows –

“In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament’s duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.” (**Doctors for Life**, para 146)

“... [T]he duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them.” (**Doctors for Life**, para 145)

26. In **Mogale and Others v Speaker, National Assembly and Others** 2023 (6) SA 58 (CC) (“**Mogale**”) (para 35) this Court explained the standard of reasonableness as follows–

26.1. A reasonable opportunity to participate in legislative affairs must be an opportunity capable of influencing the decision to be taken.

26.2. An opportunity to participate is not reasonable if a public hearing is not effectively or timeously advertised.

- 26.3. If the submissions made at the hearing are not transmitted or accurately transmitted to the legislature, then the hearing is not capable of influencing Parliament's deliberations.
- 26.4. The public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public's views.
- 26.5. Even if the lawmaker ultimately does not change its mind, it must approach the public involvement process with a willingness to do so
27. Given the above, I now turn to set out the basic features of the process followed by the NA and show that the NA failed to comply with its obligation to involve the public as it (1) did not provide the public with an opportunity to comment on material amendments the NA introduced to the B18-2023 Bill advertised for public comment; and (2) did not consider or did not properly consider all comments made by the public.

PART E: PROCESS FOLLOWED BY THE NA

28. As already mentioned, the Bill as published for public comment is labelled "B18-2023". The B18-2023 Bill was introduced to the NA by the Minister on 29 June 2023 and it was published for public comment on 18 August 2023. I attach as "FA3" a copy of the notice as published on the NA's website on 18 August 2023. It called for written comment on the B18-2023 Bill by 11 September 2023. The notice further invited those wishing to make



submissions to do so at two public hearings to be held on 12 and 13 September 2023. I deal with these below.

29. During the period up to 4 December 2023, the NA Finance Committee held nine meetings, including the public hearings referred to above, to consider and deliberate on the B18-2023 Bill and comments received in respect of the Bill. I now turn to describe in broad terms what happened at these meetings.
30. On 5 September 2023 the first of these meetings was held by the NA Finance Committee. I attach as “**FA4**” a copy of the summary of this meeting as reflected on the website of Parliamentary Monitoring Group (“**PMG**”). It appears that, at this meeting, National Treasury presented the B18-2023 Bill to the NA Finance Committee. This included a PowerPoint presentation on the aims of the B18-2023 Bill and its various chapters (already attached as “**FA2**”). As mentioned, on page 18 of the presentation it explains that the Procurement Act is to replace some 34 Acts and their regulations – thereby rationalising and de-fragmenting the disjointed legislative regime. The NA Finance Committee discussed and raised various issues emanating from the B18-2023 Bill and the presentation.
31. On 12 September 2023, the NA Finance Committee held the first of its two public hearings. Fourteen organisations made their submissions on this day. I attach a summary of this hearing obtained from the PMG website as “**FA5**”.
32. On 13 September 2023, the second public hearing was held. At this hearing, approximately seventeen further organisations including some representing community-based organisations, labour unions, business and government



entities made their submissions. I attach a summary of the events at this hearing obtained from the PMG website as “FA6”.

33. The aforementioned call for written comment was the only opportunity provided by the NA for the public to comment in writing on version B18-2023 of the Bill, ie the 2023 Bill. The two meetings also constituted the only opportunity (at the hearings of 12 and 13 September 2023) for the public to make oral representations on the Bill.

34. After the public hearings, National Treasury then went about collating and responding to the submissions made by the public. National Treasury’s work was then presented to the NA Finance Committee at its meeting on 17 November 2023, which was the fourth meeting on B18-2023 Bill. I attach as “FA7” a copy of the meeting summary as reflected on the PMG website. It will be noted that National Treasury provided the NA Finance Committee with five documents at this meeting:

34.1. A report on the public comments, a copy of which I attach as “FA8”.

34.2. A presentation of the responses by National Treasury to the public comments, a copy of which I attach as “FA9”.

34.3. A new Chapter 4, which was introduced to replace the Chapter 4 that formed part of the B18-2023 Bill, which it labelled “Annexure A”, a copy of which I attach as “FA10”. I return later to the import of this new Chapter 4 and the material change that it brought about to the B18-2023 Bill.

A handwritten signature in black ink, consisting of a large, stylized loop and a smaller mark below it.

- 34.4. A spreadsheet containing a summary of all the comments received, including National Treasury's response and proposed amendments arising from the comments. This document was labelled "Annexure B". I do not attach the whole document because of its size. However, I attach extracts of this document showing that, as at 17 November 2023, National Treasury had not considered the vast majority of the comments received, nor provided any responses thereto for the consideration by the NA Finance Committee. The National Treasury responses stopped as from the comment of Johnson and Johnson. Approximately 1800 lines of comments in the Spreadsheet, remained unresponded. The document containing the extracts is attach as "**FA11**". The full document will be provided to the respondents and the Court, if required.
- 34.5. A list of Stakeholders which it labelled Annexure C, a copy of which I attach as "**FA12**".
35. National Treasury's report ("**FA8**"), stated at paragraph 3.1 that 112 stakeholders had submitted comments. The report further stated:
- "Due to time constraints, [National Treasury] could not complete responding to all comments received, however, we were able to consider the principal concerns including chapter 4 and provided a proposal for the redrafting of chapter 4 which is attached to this report as "Annexure A". The comments that the review team were able to consider, were responded to on the comments matrix, which is also attached to this report as "Annexure B"."
36. It is apparent from the above that National Treasury had not compiled responses or even considered all the comments submitted. The failure to do so was

A handwritten signature in black ink, consisting of a stylized, cursive name that appears to be 'D. S.' or similar, located in the bottom right corner of the page.

severely criticised by the NA Finance Committee on 17 November 2023. As appears from “**FA7**” –

36.1. “*Mr G Masualle found it worrisome that only 20% of the public submissions had been responded to*” and he sought clarity on how responses to the remaining submissions would be provided, and that voices should not be ignored.

36.2. This was echoed by several stakeholders who were in attendance at this meeting of 17 November 2023 including the representatives of Amabhungane and COSATU. I point out that these stakeholders were of those who had made submissions on 12 and 13 September 2023. Thus, other members of the public were not invited to attend the meeting for the purpose of making further submissions.

36.3. Stakeholders further complained that they had not been given enough time to consider the contents of the documents which were presented to the meeting. One stakeholder remarked at the meeting that the “*time afforded to consider the documents and the need to make further written comments on what National Treasury has provided*” were insufficient (see comment by Ms Nicqui Galaktiou of IWFSa in “**FA7**”). In a nutshell, stakeholders were expected to respond, in an allotted two minutes each, to complex changes introduced by the amendments effected by National Treasury. This included the wholesale replacement of Chapter 4 of the B18-2023 Bill which deals with preferential procurement.

A handwritten signature in black ink, consisting of a large, stylized 'S' shape with a loop at the top and a horizontal line at the bottom.

36.4. The chairperson of the meeting closed the meeting with the remark that National Treasury is to deal with the outstanding issues at the next meeting scheduled for 24 November 2023. Further the chairperson stated that the NA Finance Committee would be “*considering the Bill on a clause-by-clause basis from 28 to 29 November 2023*”.

37. On 24 November 2023 (at the fifth meeting) the NA Finance Committee met for a briefing by National Treasury on its responses to the public comments. Again, the external stakeholders were in attendance and given an opportunity to respond to the responses by National Treasury. I attach as “**FA13**” a copy of the summary of this meeting, as reflected on the PMG website. As in the previous meeting, Mr Masualle, a committee member, raised the issue of National Treasury’s lack of response to all the submissions. The PMG summary reflects this concern as follows –

“Mr G Masualle (ANC) said National Treasury had indicated that they were unable to review all the submissions in the time available to them. This gave the impression that not all submissions were attended to. He wanted National Treasury to respond to the matter at the outset so that any presentation is premised on their acknowledgement that they have corrected the omission on their part.”

38. The representative from National Treasury then responded, in part, as follows–

“The last four days have been used to try to catch up on submissions that were not previously considered. Although progress was made, it was not possible to review all stakeholder comments due to the volume of the submissions. The Minister might want to appraise the Committee on the matter. Subsequent to last week’s meeting, additional written comments were received which further increased the number of submissions.

...

Mr Mathebula said the pack of documents submitted to the Committee included an updated comment matrix with an updated report on public comments, a



revised version of Chapter 4, and the list of stakeholders. He gave an account of proposed changes to some of the issues and others that remained unchanged. The proposed changes are captured under the heading “additional comment”.

39. The updated report, which I attach as “**FA14**” was virtually the same as the previous report presented to the NA Finance Committee the previous week. It again stated that National Treasury was unable to respond to all comments received.

40. Furthermore, with regard to the updated comments matrix, I point out the following –

40.1. The previous comments matrix which was submitted the previous week contained responses by National Treasury to submissions up to line 445 of the Excel Spreadsheet. This included responses to the submissions by twenty five commenters being: Industrial Development Corporation, Abracon, Pharmaceutical Task Group, Sakeliga, Consulting Engineers South Africa, Dr Ncedo S. Mkondweni, Mariaan Smit, NUMSA, ST Beauties and Cosmetic (Pty) Ltd, PetroSA, COSATU/SACTWU, AmaBhungane, Black Business Council (BBC), NEHAWU, Orizur Consulting Enterprise, International Women’s Forum of SA, Group of Construction & Engineering Companies, SABTACO, Basadi Ba Molao, HP South Africa, PSAM, Transnet, BBCBE YC, IRR Legal NPC and South African Institute of Race Relations.

40.2. The updated comment matrix produced at the meeting of 24 November 2023 reflected that National Treasury had considered and responded to the submissions by an additional sixteen



commenters, being: Public Affairs Research Institute, African Procurement Law Unit, Business Unity South Africa, Construction Industry Development Board, Hall Longmore, Hot Dip Galvanizers Association, Auditor General of South Africa, Drakenstein Municipality, Mossel Bay Municipality, Saldanha Bay Municipality, eThekweni Municipality, SA Municipal Law Forum, South African National Space Agency, the Manufacturing Circle, Mr Mbusiswa Ngcobo and Professor La Chimia.

41. The comment matrix as presented to the NA Finance Committee on 24 November 2023 is a bulky spreadsheet, the relevant parts are annexed as “FA15”. The full document will be provided to the respondents and the Court, if required.
42. This means that, of the 112 commenters who made submissions, an assessment by National Treasury of only 41 found its way to the NA Finance Committee. This also means that no assessment of the remaining 71 submissions was presented to the NA Finance Committee.
43. Notably the detailed and comprehensive submission by the Western Cape Government, which appears at lines 1097 to 1372 of the comment matrix, had not been assessed by National Treasury. Accordingly, the NA Finance Committee were not provided with any assessment of the applicant’s submissions. I should point out that column D of the comment matrix contains the applicant’s submission virtually verbatim and does not include any assessment thereof by National Treasury.

A handwritten signature in black ink, appearing to be 'A.S.' with a large, stylized flourish above it.

44. I attach as “**FA16**” the full submission made by the applicant during September 2023 in response to the NA’s call for submissions. As can be gleaned from this document, it comments on the B18-2023 Bill in general and specific terms. It included a part that dealt with issues on a thematic basis, and a further part which dealt with the Bill on a clause-by-clause basis, making suggestions on how to remedy or improve any shortcomings. None of these were considered and assessed by National Treasury and no assessment thereof was presented to the NA Finance Committee.
45. This deficiency in the process was not remedied at the NA Finance Committee meeting of 24 November 2023 (the sixth meeting). This is apparent from the summary of the meeting (“**FA13**”). No presentation was made in respect of the submissions received. Certainly, the contents and purport of the submissions made by the public together with National Treasury’s response thereto were not discussed at the meeting. Instead, after National Treasury indicated at the beginning of the meeting that it had still not completed its assessment of the submissions, it dove into a chapter-by-chapter presentation of the proposed changes to the B18-2023 Bill.
46. National Treasury (i.e. Mr Mathebula) then “*advised stakeholders to consult the Comment Matrix for detailed responses*”. Of course, as explained above, the matrix only responded to 41 of the 112 submissions.
47. Nonetheless, the stakeholders who were present attempted to respond but, as also reflected in **FA13**, noted that they had “*not had the opportunity to fully view the changes. The most significant change was the detail on provincial*

A handwritten signature in black ink, consisting of a stylized 'A' followed by a large, looped 'S'.

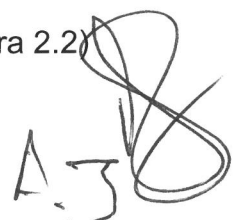
procurement in Chapter 4" (Professor Jonathan Klaaren of the Joint Strategic Resource Group).

48. On 28 November 2023, the NA Finance Committee held its next meeting (the seventh meeting). At this meeting the committee deliberated upon the proposed amendments to the Bill clause-by-clause. National Treasury's Chief Director: Legislation took the committee through the amendments.
49. I attach as "**FA17**" a copy of the summary of this meeting as provided on the PMG website. It appears that no external stakeholders were in attendance and no further documents were tabled by National Treasury. It is also apparent from the summary that there was no discussion or presentation on the submissions made by the public. Importantly, National Treasury did not provide an updated comment matrix which analysed and responded to the submissions made by the remaining 71 commenters.
50. On 29 November 2023 the NA Finance Committee met to complete its deliberation on the amendments to the Bill on a clause-by-clause basis (the eighth meeting). I attach as "**FA18**" the summary of this meeting as extracted from the PMG website. Like the meeting on the previous day:
- 50.1. It appears that no external stakeholders were in attendance and no further documents were tabled by National Treasury.
- 50.2. It is also apparent from the summary that there was no discussion or presentation on the submissions made by the public.



A. S.

- 50.3. Importantly, National Treasury did not provide an updated comment matrix which analysed and responded to the submissions by the submissions made by the remaining 71 commenters.
51. The only other document tabled at the meeting contained the amendments proposed by National Treasury. These amendments were either accepted, rejected or further amended. I attach as “**FA19**” a document presented to the NA Finance Committee which contained the proposed amendments to the B18-2023 version of the Bill. As can be gleaned from the amendments, the wholesale replacement of Chapter 4 of the Bill was accepted by the NA Finance Committee at this meeting.
52. On 1 December 2023, the NA Finance Committee adopted the Bill with the amendments reflected in “**FA19**”. The 4 December 2023 meeting was the ninth and final one. I attach the summary of the meeting of 4 December 2023 as “**FA20**”.
53. At the meeting of 4 December 2023, the draft ‘Report of the Standing Committee on Finance on the Public Procurement Bill (B18-2023)’ was tabled and adopted by the committee. I attach a copy of the report of the meeting of 4 December 2023 as “**FA21**”. I refer to paragraphs 2 and 5 of the report which set out the public participation process.
- 53.1. The report commences the chronology in 2014. Between 2014 and 2020, the report states that National Treasury “*engaged with stakeholders at the national, provincial and local levels of government, including professional bodies in auditing and accounting.*” (para 2.2)

A handwritten signature in black ink, consisting of a stylized 'A' followed by a large, looped flourish.

- 53.2. A bill was then published in 2020 for public comment and over 4000 commenters responded. A revised bill was then prepared by National Treasury.
- 53.3. After further discussions with NEDLAC and other organisations, yet further revisions were effected and eventually on 10 May 2023, *“Cabinet approved the Bill for introduction in Parliament.”* (para 2.10)
- 53.4. In paragraph 5.6 the NA Finance Committee confirmed that the adoption of the report *“signifies the conclusion of the Committee’s considerations and its readiness to present the Bill for adoption in [NA]”*.
- 53.5. In paragraph 5.7, the NA Finance Committee records that it believes that *“sufficient time for consultation was allocated for the processing of this Bill. While recognizing the importance of thorough engagement, the Committee acknowledges the necessity to balance the duration of public consultation, considering practical constraints and the need for legislative progress.”*
- 53.6. In paragraph 5.8, the following is stated: *“The Committee acknowledges that despite the allocated time for consultation, there might be a desire for more engagement from certain stakeholders. The Committee emphasizes the pragmatic understanding that public consultation and participation cannot be endless. There is a need for a balance between inclusivity and the imperative of advancing the legislative process within reasonable timeframes.”*

A handwritten signature in black ink, consisting of a large, stylized initial 'S' or 'B' with a smaller 'A' or 'D' to its left.

54. It is respectfully submitted that the consultative process conducted by National Treasury dating back several years (prior to 2023) does not form part of, nor does it discharge, the obligation upon the NA to involve the public in the legislative process. The NA engagement – in seeking to fulfil its obligation – commenced once it called for public comment in August 2023. The reasonableness of the steps taken by the NA to facilitate public involvement must be assessed from that date.
55. Other than the process as conducted by the NA Finance Committee from August 2023 to December 2023, the NA and its committee did not conduct any further public participation process in the passaging of the Bill.
56. As is apparent from paragraphs 5.6 – 5.8 of the NA Finance Committee’s report, it contends that the process it conducted meet the reasonableness standard and discharged the NA’s obligation to involve the public. For reasons set out below, I dispute such contention.
57. The Bill as approved by the NA Finance Committee on 4 December 2023 was presented to the full NA. On 6 December 2023 the NA passed the Amended Bill (i.e. the B18B-2023 Bill) and transmitted it to the NCOP for consideration and concurrence. There was no further opportunity granted to the public to comment on the Amended Bill prior to it being referred to the NCOP.



A.S

Part E1: NA – no involvement of the public after amendments to the B18-2023 Bill

58. In this section I describe the materiality of the amendments made to the B18-2023 Bill by the NA Finance Committee, and then the failure by the NA to involve the public in the legislative process after such amendments were effected.

59. The new version, as passed by the NA and transmitted to the NCOP, was labelled B18B-2023. I attach a copy of this version of the Bill as “**FA22**”.

60. As mentioned earlier, the Amended Bill included the wholesale replacement of Chapter 4 of the B18-2023 Bill (already attached as “**FA1**”). Chapter 4 of the previous version, ie the B18-2023 Bill, deals with preferential procurement and consisted of a single provision, being section 17. In addition to being replaced, Chapter 4 was substantially altered and supplemented in the Amended Bill. More particularly:

60.1. Section 17 of the B18-2023 Bill required that when a State party procures goods or services (i.e. when acting as a procuring institution) it must implement a procurement policy providing for categories of preference in allocating contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination, and it must do so in accordance with the objects of the Procurement Act, Chapter 4 thereof and the Broad-Based Black Economic Empowerment Act 53 of 2003 (“**B-BBEE Act**”).

60.2. Section 17(2)(a) and (b) of the B18-2023 Bill then required that a preference point system and thresholds be included in the procurement

A handwritten signature in black ink, appearing to be 'A. S. O.', located at the bottom right of the page.

policy. Such preference was to be granted to black people, women, people with disabilities and youth. (section 17(5))

60.3. Section 17(2)(c) of the B18-2023 Bill required that the policy includes measures –

60.3.1. To set aside contracts to promote any of the preferences referred to in section 17(2)(b) read with section 17(5);

60.3.2. To use subcontracting to promote preferences (these were either to be utilised via a bid condition (s17(2)(c)(ii)) or via the promotion of suppliers who subcontract to preference persons or groups (section17(2)(c)(iii)).

60.3.3. To provide for preferences to citizens, permanent residents; small enterprises; and enterprises based in townships, rural and underdeveloped areas (section 17(4)).

60.4. Regulations were to be made regarding the application of the preference point system, thresholds and the procurement of goods produced locally (section 17(3)).

61. Importantly, section 17 of the B18-2023 Bill did not purport to cover the areas of the procurement policy that procuring institutions were to implement. Nor did section 17 contemplate such policy to be determined by regulations. It left it to procuring institutions to formulate and adopt their own policy.



A handwritten signature in black ink, consisting of a large, stylized loop followed by the letters 'A.S.' written below it.

62. Section 17 of the B18-2023 Bill was intended to establish a framework within which procuring institutions were to adopt and implement a preferential procurement policy. While it required certain measures or procurement mechanisms to be “*included*” in the procurement policy, it did not direct how such mechanisms were to be used.
63. The B18-2023 Bill also did not prescribe that only those measures identified in section 17(2)(c) may be included in the procurement policy. In other words, there was no numerus clausus of measures. Thus, if other measures were devised, provided that they complied with section 217(1) and section 217(2) of the Constitution, they were not prohibited from being included by section 17 of the B18-2023 Bill.
64. I do not deal with the constitutionality of section 17 as it stood in B18-2023 Bill as this is beyond the scope of the challenge in this application (and given that it was jettisoned, any future constitutional challenge to the Procurement Act). What is relevant is its intended reach and scheme of the B18-2023 Bill as set out above.
65. The reach and scheme changed dramatically in the next iteration of the Bill as passed by the NA (B18B-2023) already attached as “**FA22**”. The B18B – 2023 Bill contained a new Chapter 4 in which section 17 had been replaced by nine new sections. More particularly:
- 65.1. The heading changed from “*Preferential procurement policy*” to “*Preferential framework and procurement policies*” which implied that the new iteration was a framework. It also referred to “*policies*”, which implied that each procuring institution would establish their own policy.

ASO

However, when the remainder of Chapter 4 of the B18B – 2023 Bill is considered, this was not the case because the Chapter moved in the opposite direction, more particularly it became entirely prescriptive.

65.2. New sections 17, 18 and 19 were introduced, and they made it compulsory for procuring institutions to implement certain procurement mechanisms. Section 17 now required that bids be “*set aside for a category of persons in accordance with prescribed thresholds and conditions*”. This was a major change from a permissive regime to a peremptory regime.

65.3. The categories of persons for whom bids are to be set aside are set out in section 17(3) and include black people, women, black people with disabilities, small enterprises owned by the aforementioned people and small enterprises within a particular geographical area.

65.4. Section 17(2) obliged the Minister to prescribe targets for set asides.

65.5. Section 17(5) then determined the manner in which set aside bids were to be evaluated, and if not used section 17(6) required procuring institutions to report to the Public Procurement Office on the reasons why they were unable to use the set aside mechanism.

65.6. Furthermore, section 17(6)(a) required that if set asides could not be used, then prequalification criteria as set out in section 18 must be used.



- 65.7. Section 18 introduced a mechanism whereby "*prequalification criteria to promote preferences in the allocation of contracts*" in accordance with prescribed thresholds and conditions must be applied. This is effected by inviting only bidders who (1) have a minimum B-BBEE status¹; (2) bidders who are black people, women, black people with disabilities, small enterprises owned by the aforementioned people; or (3) bidders who will be subcontracting a prescribed minimum percentage of the contract to small enterprises owned by categories of people.
- 65.8. A bidder that fails to meet the prequalification criteria is to be disqualified (section 18(7)).
- 65.9. Section 18 did not include any "*release valve*" in that there was no provision made for the procuring institution not to use the mechanism of prequalification criteria should it be completely impractical given the nature of the tender, for example. In the absence of using set asides, this mechanism of prequalification criteria must be used. This too is a drastic change from the section 17 contained in the B18-2023 Bill.
- 65.10. Section 19 also required bidders to subcontract "*a contract above a prescribed amount to advance persons or categories of persons in subsection 2(a) to (i)*". Section 19(2) listed small enterprises with

¹ Issued under the Broad Based Black Economic Empowerment Act, 2003 and its regulations and codes.

A handwritten signature in black ink, appearing to be 'A.S.', located in the bottom right corner of the page.

various categories of persons owning them. Section 19 is, admittedly prefaced with the phrase "*where feasible*".

66. What emerges from the above is that a much more stringent preemptory regime, in which specific mechanisms are made obligatory upon procuring institutions, was introduced. The previous iteration, while it was probably constitutionally questionable in itself, was much more permissive than preemptory. While the B18-2023 Bill included references to set asides, prequalification criteria and subcontracting as measures to be included in a policy, it did not prescribe that they must be used in all circumstances.
67. As stated, the new sections 17 and 18 go much further. They require the use of set asides and prequalification criteria and specify, in great detail, how these mechanisms are to be used.
68. These are material changes effected by the NA Finance Committee and passed by the NA. These are not merely semantic, grammatical or technical edits to strengthen the Bill's coherence. The B18B – 2023 Bill was a completely new ball game.
69. There are also other amendments effected by the NA Finance Committee and which remained in the version that was referred to the NCOP (B18B-2023). While many of these are technical edits, I point out the following –
- 69.1. While the B18-2023 Bill left it to regulations to identify the preference categories of persons, the B18B-2023 Bill inserted definitions of "*black*

A handwritten signature in black ink, consisting of a large, stylized loop followed by a smaller loop and a short horizontal stroke at the bottom.

people", *"military veteran"*, *"people with disabilities"*, *"small enterprise"* and *"youth"*.

- 69.2. Section 18 of the B18-2023 Bill, which required the Minister to prescribe the procurement system (insofar as it deals with matters other than preferential procurement) was significantly broadened. The B18B-2023 Bill now specified that the system must include strategic procurement of goods and services sourced in other countries and procurement which promotes innovation (section 25(1)). Furthermore, section 18 was expanded to permit the Minister to determine procurement thresholds, different thresholds applying to different categories of procuring institutions, and categories of procurement (section 25(2)).
- 69.3. Section 31 concerns the reconsideration of awards by procuring institutions. Whereas the B18-2023 Bill had a fairly simplistic dispute resolution provision in which dissatisfied bidders could apply within a specified period for the reconsideration of awards, the new section expanded the process. Such expansion included granting the Tribunal the power to reject any referral to it if it was not satisfied that the bidder had exhausted internal remedies (i.e. the reconsideration process).
70. The NA Finance Committee did not provide a further opportunity to comment on the changes which found their way into version B18B-2023.
71. The NCOP considered and ultimately passed the Bill, a process which took place over a period of several months from December 2023 to May 2024. Upon the



Bill's return to the NA for final adoption, no further opportunity was provided to the public to comment by the NA. This much is clear from the following –

- 71.1. The NCOP finalised and passed the Bill on 9 May 2024. The Amended Bill was then returned to the NA for concurrence.
- 71.2. Within a week thereafter, the NA passed the Amended Bill on 16 May 2024 for the President to assent to. I attach a copy of the minutes of the NA Finance Committee's meeting on 10 May 2024 at which the issue of public participation was raised as "**FA23**".
- 71.3. Committee member, Dr George, noted the number of "*significant changes the NCOP had made to the Bill. He questioned whether there had been adequate public participation in the NA and the NCOP on these matters.*" This is reflected in the first paragraph under the heading "*Discussion*" of **FA23**.
- 71.4. Also under the heading of "*Discussion*" of **FA23**, Mr Mathebula of National Treasury and Adv Frank Jenkins (Senior Parliamentary Advisor) stated that the public participation process had been reasonable even though no further opportunity for public submissions had been provided after the amendments were effected by the NA Finance Committee.
- 71.5. I point out that the above discussion shows that when the Bill returned to the NA from the NCOP, no further public participation process was conducted.



A. S.

- 71.6. Further the short period between 10 May 2024 and 16 May 2024 (i.e. the transmission date to the NA and the NA's final adoption of the Amended Bill), left no time for an additional round of public participation to be facilitated by the NA.
- 71.7. For the sake of completeness, I attach the minutes of the NA reflecting the formal passing of the Bill on 16 May 2024 as "**FA24**".
72. I point out that the applicant, during the public participation process conducted by the NCOP pertinently raised the fact that the NA had not solicited comment from the public after the amendments were effected in late 2023. The NCOP however deferred this issue to the NA. In this regard I attach as "**FA25**" an extract from National Treasury's responses to all comments received during the public participation process run by the NCOP, which document was presented to the NCOP Finance Committee during March 2024. As appears from paginated pages 197 – 198, the submission was "*noted. For Parliament's consideration*".
73. However, to the best of my knowledge this issue was never considered by the NA.
74. Whether the amendments to the B18-2023 Bill were desirable is not the question. The question is whether the public should have been provided with a further opportunity by the NA to comment on the changes that the NA intended to make to the B18-2023 Bill. In other words, and as contemplated by this Court in **Doctors for Life**, was it reasonable for the NA not to provide the public with an opportunity to make representations on the amended version? If not, the NA



failed to comply with its constitutional obligation to facilitate public participation in the legislative process.

75. It is my submission that –

75.1. The amendments effected by the NA Finance Committee were material and indeed drastic and will have a lasting effect on both the public and all State actors that procure goods and services from the private sector.

75.2. While the NA Finance Committee has stated in its report (“FA21”) that “*sufficient time for consultation was allocated*”, this is patently incorrect as no time was allocated by the NA Finance Committee to consulting with the public on the amendments effected to the B18-2023 Bill. I point out that the stakeholders who attended the meetings of the NA Finance Committee on 17 and 24 November 2023 were a closed group of stakeholders and members of the public were not part of such further consultation.

75.3. The report of the NA Finance Committee provided no reason why a further round of public representations could not be accommodated. Furthermore, the report did not set out any facts or reasons for the apparent urgency with which Parliament dealt with the Bill. No objective basis justifying an urgent or truncated timetable for the Bill’s passage is provided in any of the reports, nor can there be such a justification. In short there was no need for its urgent passing. The lack of any such justification is particularly concerning because the Bill deals with weighty and complex issues.

A handwritten signature in black ink, appearing to be 'A. R.', located at the bottom right of the page.

76. It is therefore submitted that the NA failed in its duty in terms of section 59(1)(a) of the Constitution and the Bill is therefore unconstitutional and invalid.
77. It is further submitted that, upon the authority of previous findings of this Court, the NA failure in its duty under section 59 is sufficient to invalidate the legislation – i.e. in this case the Procurement Act.
78. Thus, even if the NCOP conducted a comprehensive public participation process as required by section 72 of the Constitution permitting the public to comment on version B18B-2023 and subsequent iterations of the Bill this would not absolve the NA from its independent duty under section 59. This is so because different roles are played by the NA and the NCOP as contemplated in section 42(3) and (4) of the Constitution respectively. The NA represents the people while the NCOP represents the provinces in the legislative process.
79. Accordingly, it is submitted that the Procurement Act is unconstitutional and invalid.
80. For the sake of completeness – the NA passed the Amended Bill on 16 May 2024 and the President signed the Amended Bill on 18 July 2024. I attach a copy of the Procurement Act as “**FA26**”. The Procurement Act is not yet in force and will be brought into effect on a date to be proclaimed by the President.

Part E2: NA failed to consider submissions

81. As explained above, the chronology under Part E also shows that the National Treasury failed to assess and report on or respond to 71 submissions out of the



A. S.

112 submissions received. This left the NA Finance Committee only with the submissions themselves which were captured in the Excel Spreadsheet, consisting of some 2000 lines.

82. While the submissions were captured in the Comment Matrix, there was no assessment of over 63% of the submission by the NA Finance Committee (and National Treasury) and there was no discussion on such submissions at any of the committee's meetings during September, November and December 2023. The area of law is complex and fundamentally important hence the need for National Treasury to provide their input on substantive submissions such as those of the applicant. The NA Finance Committee could not be left on its own regarding the assessment of the comments. This was recognised by the National Treasury, hence it submitted its assessment of (37%) of the comments; i.e. it did what it could but it eventually ran out of time.
83. Given these facts together with the sheer volume of the submissions, the 71 unassessed submissions which were not considered or discussed at the NA Finance Committee's meetings were "*incapable of influencing the process*". Without an assessment by National Treasury and any discussion on such submissions by the committee, the submissions were for practical purposes impotent and wasted. Clearly, the submissions "*slipped through the cracks*" and were never assessed, discussed and considered by the NA Finance Committee. The affected commenters (including the applicant) were thus deprived of an opportunity to influence the NA's deliberations.



A.S

84. I reiterate, even though an assessment of the applicant's submissions was subsequently presented to the NCOP, the NA is not absolved from its duty to consider all the comments because the two Houses of Parliament have different and distinct roles in the legislation-making process.
85. Given that the NA failed to meaningfully involve the public in the process, the legislation-making process and the Procurement Act are both irredeemably tainted rendering the Act unconstitutional and invalid.

PART G: TIME LINE FOR COMMENCEMENT OF THE PROCUREMENT ACT

86. As I have mentioned earlier, the Procurement Act is not yet in force.
87. I cannot provide a definitive timeline for when the Act will commence.
88. However, given the structure and contents of the Act, it can only become implementable once regulations are made by the Minister. For instance, Chapter 4 which deals with preferential procurement relies on regulations and prescribed targets and thresholds for its efficient application.
89. National Treasury has embarked upon a programme to draft and make regulations as contemplated in the Procurement Act. In this regard and as part of the consultative process, National Treasury has invited the applicant and other provincial governments, municipalities and public entities to participate in the regulation-making process.
90. I attach as "FA27" a copy of an invitation dated 17 September 2024, which circulated Concept Papers relating to –



A.S

- 90.1. Procurement methods in public procurement;
 - 90.2. Value for money in public procurement;
 - 90.3. Green procurement; and
 - 90.4. Procurement of innovation.
91. Further, I attach as “**FA28**” a copy of the Terms of Reference of the “*reference groups*” also circulated by National Treasury during November 2024. These reference groups are to provide input into the regulation development process thematically. In paragraph 1.3 it makes it clear that the regulations are to be drafted “*as a matter of urgency*”.
92. The Western Cape Government has been participating in this regulation-making exercise albeit with reservation of its rights.. During such participation, a representative of National Treasury, Mr Willie Mathebula has intimated that the Minister intends to promulgate the regulations by July 2025. In this regard, I attach as “**FA29**”, an extract of the transcript of the “Inaugural Public Procurement Act, 2024 Reference Groups Meeting” of 29 November 2024. I attach the first page and the last five pages of the 75 page transcript. The last four pages reflect Mr Willie Mathebula intimating that -
- 92.1. The final meeting of reference groups is scheduled for 4 March 2025;
 - 92.2. The inputs from the reference groups are ‘*inform the actual drafting [of the regulations]*’;



A. S.

- 92.3. The regulations must be published for public comment by the *'first quarter of the 25/26 financial year'*;
- 92.4. So that the *"come July, that's our estimated period come July next year. At least all other processes, I mean related to this process must have been finished and including the promulgation of the regulation by the Minister, to allow the effective date of the Act of the provisions of the Act to take."*
- 92.5. *"Of course, effect in the third quarter of the 25/26 financial meaning around October."*
93. If the Procurement Act is to come into effect by October 2025, it will have to be preceded by the promulgation of the regulations. However, draft regulations must be published for public comment in terms of section 68(3) of the Procurement Act. Thereafter, the Minister must submit the regulations to be made to Parliament for parliamentary scrutiny at least 30 days before their promulgation. Presumably, after the regulations are brought into effect, a transitional period will be required before the Act itself is also brought into effect, which I assume will be in October 2025, as mentioned by Mr Mathebula.
94. While it is unclear what the content of such regulations will be, and while I am not certain when the publication date of the draft regulations will be, I believe that it will have to be within the next month or two if the Minister is to promulgate the regulations by July 2025 and bring the Procurement Act into effect by October 2025.

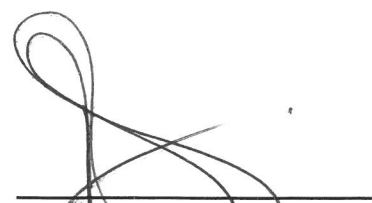


A.S

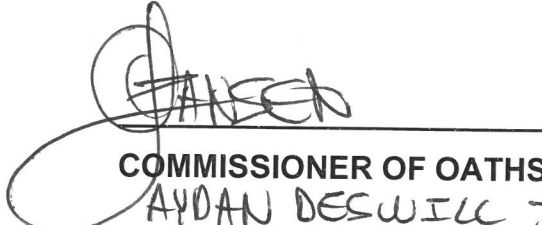
95. It goes without saying that if this Court is to adjudicate the matter prior to the Procurement Act being brought into force, and if the challenge is to succeed, it will save immeasurable costs in setting up new structures. It may further prevent procuring institutions making extensive adjustments to its procurement systems to align and comply with the requirements of a patently unconstitutional and invalid piece of legislation.
96. However, if this Court is to adjudicate the matter only after the Procurement Act is brought into effect, it may well have little choice but to suspend any order of invalidity in order to avoid any legal vacuum. This will mean that newly formed systems and structures under the unconstitutional Procurement Act will remain in place until new legislation is passed.
97. In the circumstances, I respectfully submit that it would make sense for directions to be issued which will facilitate a hearing of the matter before the Procurement Act is brought into force.

PART H: CONCLUSION

98. Accordingly, the applicants seek the relief as set out in the Notice of Motion, and costs, including that of two Counsel (at Scale C for senior counsel and Scale B for junior counsel).


DEIDRÉ BAARTMAN

I certify that the above signature is the true signature of the deponent and that she has acknowledged that she knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my presence at **CAPE TOWN** on this 24th day of **MARCH 2025**, in accordance with Government Notice No. R1258 dated 21 July 1972, as amended by Government Notice No. R1648 dated 19 August 1977, as further amended by Government Notice No. R1428 dated 11 July 1980, and by Government Notice No R774 of 23 April 1982.


COMMISSIONER OF OATHS
AYDAN DESWILL JANSEN
COMMISSIONER OF OATHS
ADVOCATE OF THE HIGH
COURT
MEMBER OF THE HIGH
COURT
FIRST FLOOR, VELOCITY HOUSE
30 KEEROM STREET
CAPE TOWN


A.S.



ORIGINAL

Our reference: 2503/1714
In the case between:

Case number: .
Printed on 02-April-2025

PREMIER OF THE WESTERN CAPE GOVERNMENT
and
MINISTER OF FINANCE

APPLICANT
3RD RESPONDENT

Address as specified:
C/O STATE ATTORNEY, 4TH FLOOR, LIBERTY LIFE CENTRE , 22 LONG STREET, CAPE TOWN

NOTICE OF MOTION , FOUNGING AFFIDAVIT & ANNEXURES

NATURE OF PROCESS: NOTICE OF MOTION , FOUNGING AFFIDAVIT & ANNEXURES

MANNER OF SERVICE/EXECUTION (on attorney of record - Rule 4(1)aA)

On 31-Mar-2025 at 15:12 I served this Process on the 3RD RESPONDENT, at the office of Attorneys for the 3RD RESPONDENT, being The State Attorney by handing to MS Elaine Capes (Secretary), ostensibly responsible and in control of the 3RD RESPONDENT, a copy thereof after exhibiting the original and explaining the nature and exigency of the said process.

The original return together with the original above mentioned process is dispatched to the mandator.

DEPUTY SHERIFF NOKWANDA

From: Sheriff Cape Town West
N.N. NTSIBANTU
PO BOX 96: DX 163
DOCEX 163 CAPE TOWN
CAPE TOWN. 8000
Tel: 021 007 4636 Fax: 086 673 2831
Email: accounts@sheriffwest.capetown
Our bank info:
FNB (CAPE TOWN)
Account: CURRENT
Account number 62471170870

To: WESTERN CAPE DIVISION
CAPE TOWN

STATE ATTORNEY CAPE TOWN

DOCEX 156 CAPE TOWN
CAPE TOWN 8000
Tel: 021 441 9263 Fax: 021 421 9364
Acc No 818

VAT number: {none}
Ref: 4214/24/p11

INVOICE NUMBER 200621

DESCRIPTION OF FEES	FEES
Registration	16.00
Return of Service	61.00
Service	99.00
E-mail Sent	10.00
Copies Made	8.00
Telephone	24.00
Same Day Service	450.00
Travelling	45.00
Handling Fees	20.00

Sub-total fees	733.00
Plus VAT	109.95
TOTAL OWING	R 842.95

Issued on 02-April-2025
VAT number: 4410262689



ORIGINAL

Our reference: 2503/1712

Case number: .

In the case between:

Printed on 02-April-2025

PREMIER OF THE WESTERN CAPE GOVERNMENT
and
SPEAKER OF THE NATIONAL ASSEMBLY

APPLICANT

1ST RESPONDENT

Address as specified:

PARLIAMENT BUILDINGS, 120 PLEIN STREET, CAPE TOWN

NOTICE OF MOTION , FOUNGING AFFIDAVIT & ANNEXURES

NATURE OF PROCESS: NOTICE OF MOTION , FOUNGING AFFIDAVIT & ANNEXURES
MANNER OF SERVICE/EXECUTION (RULE 4(A)(II))

On 31-Mar-2025 at 14:31 I served this NOTICE OF MOTION , FOUNGING AFFIDAVIT & ANNEXURES on the 1ST RESPONDENT, at PARLIAMENT BUILDINGS, 120 PLEIN STREET, CAPE TOWN, by handing a copy thereof to MR C Cuba (Legal), ostensibly responsible, not less than 16 years of age and in control of and under the employ of the 1ST RESPONDENT, after exhibiting the original and explaining the nature and exigency of the said process. Aforementioned person accepted service on behalf of SPEAKER OF THE NATIONAL ASSEMBLY.

The original return together with the original above mentioned process is dispatched to the mandator.

DEPUTY SHERIFF NOKWANDA

From: Sheriff Cape Town West
N.N. NTSIBANTU
PO BOX 96: DX 163
DOCEX 163 CAPE TOWN
CAPE TOWN. 8000
Tel: 021 007 4636 Fax: 086 673 2831
Email: accounts@sheriffwest.capetown

Our bank info:

FNB (CAPE TOWN)
Account: CURRENT
Account number 62471170870

To: WESTERN CAPE DIVISION
CAPE TOWN

STATE ATTORNEY CAPE TOWN

DOCEX 156 CAPE TOWN
CAPE TOWN 8000

Tel: 021 441 9263 Fax: 021 421 9364
Acc No 818

VAT number: {none}

Ref: 4214/24/p11

INVOICE NUMBER 200619

DESCRIPTION OF FEES	FEES
Registration	16.00
Return of Service	61.00
Service	99.00
E-mail Sent	10.00
Copies Made	8.00
Telephone	24.00
Same Day Service	450.00
Travelling	45.00
Handling Fees	20.00
Sub-total fees	733.00
Plus VAT	109.95
TOTAL OWING	R 842.95
Issued on 02-April-2025	
VAT number: 4410262689	



TAX INVOICE

Our reference: 2503/1713
In the case between:

Case number: .
Printed on 02-April-2025

PREMIER OF THE WESTERN CAPE GOVERNMENT and CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	APPLICANT 2ND RESPONDENT
Address as specified: PARLIAMENT BUILDINGS, 120 PLEIN STREET, CAPE TOWN	
NOTICE OF MOTION , FOUNGING AFFIDAVIT & ANNEXURES	

NATURE OF PROCESS: NOTICE OF MOTION , FOUNGING AFFIDAVIT & ANNEXURES
MANNER OF SERVICE/EXECUTION (RULE 4(A)(II))

On 31-Mar-2025 at 14:31 I served this NOTICE OF MOTION , FOUNGING AFFIDAVIT & ANNEXURES on the 2ND RESPONDENT, at PARLIAMENT BUILDINGS, 120 PLEIN STREET, CAPE TOWN, by handing a copy thereof to to MR C Cuba (Legal), ostensibly responsible, not less than 16 years of age and in control of and under the employ of the 2ND RESPONDENT, after exhibiting the original and explaining the nature and exigency of the said process. Aforementioned person accepted service on behalf of CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES.

The original return together with the original above mentioned process is dispatched to the mandator.

DEPUTY SHERIFF NOKWANDA

From: Sheriff Cape Town West
N.N. NTSIBANTU
PO BOX 96: DX 163
DOCEX 163 CAPE TOWN
CAPE TOWN. 8000
Tel: 021 007 4636 Fax: 086 673 2831
Email: accounts@sheriffwest.capetown
Our bank info:
FNB (CAPE TOWN)
Account: CURRENT
Account number 62471170870

To: WESTERN CAPE DIVISION
CAPE TOWN

STATE ATTORNEY CAPE TOWN

DOCEX 156 CAPE TOWN
CAPE TOWN 8000
Tel: 021 441 9263 Fax: 021 421 9364
Acc No 818

VAT number: {none}
Ref: 4214/24/p11

INVOICE NUMBER 200620

DESCRIPTION OF FEES	FEES
Registration	16.00
Return of Service	61.00
Service	99.00
E-mail Sent	10.00
Copies Made	8.00
Telephone	24.00
Travelling	45.00
Handling Fees	20.00
Sub-total fees	283.00
Plus VAT	42.45
TOTAL OWING	R 325.45
Issued on 02-April-2025	
VAT number: 4410262689	