

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: **CCT 103/25**

In the matter between:

**PREMIER OF THE WESTERN CAPE
GOVERNMENT**

First Applicant

**AMABHUNGANE CENTRE FOR
INVESTIGATIVE JOURNALISM NPC**

Second Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES**

Second Respondent

MINISTER OF FINANCE

Third Respondent

FIRST APPLICANT'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. This is an application directly to this Court in terms of s 167(4)(e) of the Constitution of the Republic of South Africa, 1996 (**the Constitution**) for an order declaring that Parliament failed to comply with a constitutional obligation imposed on it.¹

2. More specifically, the first applicant (**the Premier (WC)** or the Premier) contends that the National Assembly (**NA**) failed to comply with the obligation imposed on it by s 59(1)(a) of the Constitution to facilitate public involvement in its legislative process and that of its relevant committee, being the NA's Standing Committee on Finance (**the NA Committee**), before passing the Public Procurement Act 28 of 2024 (**the Act**), in that after publishing the relevant Bill, as introduced in the NA by the third respondent (**the Minister of Finance**), for public comment:
 - 2.1. neither the NA Committee, before it reported on the Bill to the NA, nor the NA, before it adopted the Bill, considered all of the written comments received in response to such publication (**the first challenge**);² and

¹ Notice of Motion 1: 1-2: 1. The number before the first colon is the volume number. The number/s before the second colon is/are the page number/s. The number/s or letter/s after the second colon, if any, is/are the paragraph number/s or letter/s.

² Founding Affidavit 1: 8: 4.2.

- 2.2. in its report to the NA, the NA Committee proposed a material amendment to the Bill as introduced, i.e. the NA Committee presented to the NA a version of the Bill containing that material amendment, and the NA adopted the Bill as so amended without it first being republished for public comment by the NA and without the NA or the NA Committee otherwise receiving any public comments on it (**the second challenge**).³
3. In what follows, we shall:
 - 3.1. make brief submissions on this Court's jurisdiction to entertain this application as a court of first and final instance in terms of s 167(4)(e) of the Constitution;
 - 3.2. make submissions regarding Parliament's preliminary point that the Premier (WC) is to be non-suited because he failed to comply with s 41 of the Constitution by engaging with the respondents before bringing this application;
 - 3.3. briefly summarise the legal principles applicable to the two challenges;

³ Founding Affidavit 1: 7-8: 4.1.

- 3.4. set out the relevant sequence of events, starting with the introduction of the Bill in the NA by the Finance Minister and culminating in the final decision of the NA to adopt the Bill and the resulting Act being assented to and published by the President;
- 3.5. make submissions regarding the first challenge;
- 3.6. make submissions regarding the second challenge; and
- 3.7. make submissions regarding the remedy.

JURISDICTION

4. This application is brought directly in this Court under its exclusive jurisdiction in s 167(4)(e) of the Constitution,⁴ which provides that only this Court may decide that Parliament or the President has failed to fulfil a constitutional obligation. In *Doctors for Life*,⁵ this Court held that it alone has jurisdiction to determine whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative process. As that is the main substantive issue raised for decision by the present application, this Court has exclusive jurisdiction to entertain it.

⁴ Founding Affidavit 1: 7: 3.

⁵ *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) paras 27-28.

CO-OPERATIVE GOVERNANCE

5. In her answering affidavit on behalf of Parliament (i.e. the NA and the National Council of Provinces (**NCOP**)), the first respondent (**the Speaker**) contends that the Premier (WC) should be non-suited because, in breach of Chapter 3 of the Constitution (more specifically, ss 41(1)(h)(vi)⁶ and (3)⁷), he launched this application without first engaging any of the first to third respondents (i.e. the Speaker, the Chairperson of the NCOP (**the NCOP Chair**) or the Minister of Finance) and without exhausting all other remedies.⁸
6. For the following reasons, this point is not well taken.
7. First, the Act of Parliament envisaged by s 42(2) of the Constitution⁹ – the Intergovernmental Relations Framework Act 13 of 2005 (**IRFA**) – defines ‘*intergovernmental disputes*’ in a way¹⁰ that excludes disputes arising from

⁶ Section 41(1)(h)(vi) provides that all organs of state within each sphere of government must co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another.

⁷ Section 42(3) provides that an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches a court to resolve the dispute.

⁸ Speaker’s Answering Affidavit 7: 732: 7-8 and 7: 737-739: 12-15.

⁹ Section 42(2) provides that an Act of Parliament must (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

¹⁰ Section 1(1) of IRFA provides “‘*intergovernmental dispute*’ means a dispute between different governments or between organs of state from different governments concerning a matter- (a) arising from (i) a statutory power or function assigned to any of the parties; or (ii) an agreement between the parties regarding the implementation of a statutory power or function; and (b) which

a constitutional (as opposed to a statutory) power or function assigned to any of the parties. The present dispute concerns an allegation that the NA failed to comply with a constitutional obligation imposed on it.

8. Second, s 2(2)(a) of IRFA provides that it does not apply to Parliament.
9. Third, and alternatively and in any event, a defence based on non-compliance with s 41 of the Constitution and the IRFA is not a basis for the dismissal of the present application. Where a court finds that the extra-judicial remedies reasonably required of an organ of state have not been utilised and exhausted, it may either refer the dispute back to the parties or, consistently with the discretion conferred on the court by the word ‘*may*’ in s 41(4) of the Constitution, it may nevertheless decide to hear and determine the matter if in all the circumstances it considers doing so would best serve the interests of justice.¹¹
10. For the following reasons, we submit the facts of the present matter support the latter course of action.

is justiciable in a court of law, which is justiciable in a court of law, and includes any dispute between the parties regarding a related matter.’

¹¹ *City of Cape Town v Premier, Western Cape, and others* [2008] ZAWCHC 52; 2008 (6) SA 345 (C) paras 15-18. (An unrelated finding in this judgment was found in *MEC for Local Government WC v Matzikama Local Municipality and Others* 2023 (3) SA 521 (SCA) to be wrong.)

11. As appears from the replying affidavit on behalf of the Premier:¹²
- 11.1. on 27 May 2024, shortly after the Bill had been passed by the NA on 16 May 2024, the Premier wrote to the President¹³ setting out his concerns with both the substance of the Bill and the process followed by the NA, and requested that the President refer the Bill back to the NA in terms of s 79 of the Constitution; but
- 11.2. on 18 July 2024, the President nevertheless assented to the Bill.
12. As further appears from the replying affidavit:¹⁴
- 12.1. on 25 July 2024 the Premier wrote to the President¹⁵ requesting urgent consultations with the provinces and municipalities about the constitutionality of the Act, and further requesting that the President delay putting the Act into operation pending those consultations; but
- 12.2. on 23 August 2024 the President responded,¹⁶ saying he did not perceive any constitutional problems and, further, that he had

¹² Replying Affidavit 13: 1270: 8.1 and 8.2.

¹³ Annexure RA 1, 13: 1289-1294.

¹⁴ Replying Affidavit 13: 1270: 8.3 and 8.4.

¹⁵ Annexure RA 2, 13: 1295-1299.

¹⁶ Annexure RA 3, 13: 1300.

forwarded the Premier's letter to the Minister of Finance who was considering it and would revert to the Premier.

13. As further appears from the replying affidavit:¹⁷

13.1. On 10 September 2024 the Premier wrote to the Minister of Finance,¹⁸ referring to his exchange of correspondence with the President, requesting that the National Treasury (NT) meet with the provinces and local government as soon as possible to consult regarding the Premier's constitutional concerns and also requesting that the preparation of the regulations to be made under the Act be suspended until the concerns were resolved; but

13.2. the Minister of Finance did not respond to the Premier's correspondence.

14. We submit that what these facts show is that, in line with s 41(1)(h)(vi) and (3) of the Constitution, the Premier tried to co-operate with the national sphere of government by avoiding legal proceedings and he made every reasonable effort to settle the dispute before approaching this Court to resolve it.

¹⁷ Replying Affidavit 13: 1271: 8.5 to 8.8.

¹⁸ Annexure RA 4, 13: 1301-1303.

15. Finally, as to the alternative course of action open to this Court – referring the dispute back to the parties – the gulf between the parties’ positions which appears from the papers filed of record points to a slim likelihood of them coming to terms.

APPLICABLE LEGAL PRINCIPLES

16. That brings us to the merits of the present application.
17. The legal principles governing cases of this sort are well-established and appear particularly from judgments in or by this Court in *New Clicks* (per Sachs J),¹⁹ *Doctors for Life* (per Ngcobo J and Sachs J),²⁰ *Matatiele II* (per Ngcobo J),²¹ *Merafong Demarcation Forum* (per Van der Westhuizen J),²²

¹⁹ *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) paras 621-627 (dealing primarily with how the participatory aspect of our constitutional democracy should manifest in the making of subordinate legislation).

²⁰ Above n 5, especially paras 29, 46, 62-65, 118-146, 165 and 193 (dealing with an alleged failure by the NCOP and provincial legislatures to facilitate public involvement in their legislative processes).

²¹ *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 12; 2007 (1) BCLR 47; 2007 (6) SA 477 (CC) paras 50-68 (dealing with an allegation a provincial legislature whose approval for amendment of the Constitution was required had not facilitated public involvement in their relevant legislative processes).

²² *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (10) BCLR 969 (CC); 2008 (5) SA 171 (CC) paras 26-27, 49-51 and 73 (a case dealing with an allegation similar to that in *Matatiele II*).

Poverty Alleviation Network,²³ *Moutse*,²⁴ *LAMOSAS*,²⁵ *SA Veterinary Association*,²⁶ *Mogale*,²⁷ *SA Iron and Steel Institute*²⁸ and *Corruption Watch*²⁹ (which contains a short, general summary of the principles³⁰).

18. We highlight the following principles which we submit are relevant to the challenges at hand.

19. First, our democracy contains both representative and participatory elements which are not mutually exclusive but rather support and buttress one another.

Public participation is a crucial part of participatory democracy and the

²³ *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) paras 33-36, 55-56, 60, 62-63 and 81 (dealing with an alleged failure by the NA, NCOP and a provincial legislature to facilitate public involvement in their legislative processes).

²⁴ *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* [2011] ZACC 27; 2011 (11) BCLR 1158 (CC) paras 48-49, 61-62 and 68-75 (a case dealing with an allegation similar to that in *Matatiele II*).

²⁵ *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) paras 56-62 (dealing with an alleged failure by the NCOP and provincial legislatures to facilitate public involvement in their legislative processes).

²⁶ *South African Veterinary Association v Speaker of the National Assembly* [2018] ZACC 49; 2019 (2) BCLR 273 (CC); 2019 (3) SA 62 (CC) paras 17-46 (dealing with an alleged failure by the NA, NCOP and provincial legislatures to facilitate public involvement in their legislative processes).

²⁷ *Mogale and Others v Speaker, National Assembly and Others* [2023] ZACC 14; 2023 (9) BCLR 1099; 2023 (6) SA 58 (CC) paras 32-37 (dealing with an alleged failure by the NA and provincial legislatures to facilitate public involvement in their legislative processes).

²⁸ *South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others* [2023] ZACC 18; 2023 (10) BCLR 1232 (CC) paras 28-32 and 40-49 (dealing with an alleged failure by the NA and NCOP to facilitate public involvement in their legislative processes).

²⁹ *Corruption Watch (RF) NPC v Speaker of the National Assembly and Others* [2025] ZACC 15; 2025 (10) BCLR 1117 (CC); 2026 (1) SA 327 (CC) paras 26-67 (dealing with an alleged failure by the NA to facilitate public involvement in its process concerning appointments to an institution established by Chapter 9 of the Constitution)

³⁰ *Corruption Watch*, above n 29, paras 35-36.

lawmaking process, as it affords the public a meaningful opportunity to participate in the legislative process and strengthens the legitimacy of legislation in the eyes of the people. The political rights in the Constitution facilitate both the election by the people of representative leaders and a continuing entitlement by the people to be involved in political decision-making.³¹

20. Second, section 42(1) of the Constitution provides that Parliament consists of the NA and the NCOP. If, in relation to a Bill, either the NA or the NCOP fails to fulfil its respective constitutional obligation to facilitate public involvement in its legislative process, including those of their committees,³² the result is that Parliament has failed to fulfil that obligation.³³
21. Third, although the Constitution affords Parliament and the provincial legislatures a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement in their legislative and other processes and those of their committees, and what will be required will vary

³¹ *Doctors for Life*, above n 5, paras 115 and 228-235; *Matatiele II*, above n 21, paras 57-60; *LAMOSAs*, above n 25, para 57; *Mogale*, above n 27, para 33; *SA Veterinary Association*, above n 26, para 18; *Corruption Watch*, above n 29, paras 26-29, 31-32 and 58-59.

³² Section 59(1)(a) of the Constitution provides the NA must facilitate public involvement in the legislative and other processes of the NA and its committees; and s 72(1)(a) of the Constitution provides that the NCOP must facilitate public involvement in the legislative and other processes of the NCOP and its committees. Section 118(1)(a) of the Constitution imposes similar obligations on the provincial legislatures.

³³ *Doctors for Life*, above n 5, para 29; *LAMOSAs*, above n 25, para 6; *SA Veterinary Association*, above n 26, para 17.

from case to case, what matters is that at the end of the day a reasonable and meaningful opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say.³⁴ A legislature must take reasonable steps to ensure that its mode of public involvement does not inhibit public participation (e.g. requiring that written submissions be made using an online platform inherently excludes participation by those who have little or no access to the technology needed to participate).³⁵

22. Fourth, the purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the lawmakers before the final decision is taken. This requires the lawmakers to consider the representations made and thereafter make an informed decision. Lawmakers must provide opportunities for the public to be involved in meaningful ways, to listen to their views and opinions and to consider these in shaping their decisions and policies. The views and opinions expressed by the public must filter through for there to be proper consideration by the lawmakers. Summaries of written submissions may be provided to the lawmakers; and if that is not done, the members must come to know the content of the written submissions by reading or discussing them

³⁴ *Doctors for Life*, above n 5, paras 123-125 (quoting *New Clicks*, above n 19, para 630) and para 145; *LAMOSAs*, above n 25, paras 59-60; *Mogale*, above n 27, paras 34-35; *Corruption Watch*, above n 29, para 29.

³⁵ *Corruption Watch*, above n 29, para 64.

at a legislative meeting. There must be reports to lawmakers summarising comments made by attendees at public hearings which all some of the lawmakers did not attend; and the reports must be accurate. Although a legislature is not obliged to be swayed by public opinion when reaching its ultimate decision, the lawmakers must be open to persuasion by the views expressed and they should demonstrate a preparedness to be guided by the public involvement process. Were it to be otherwise, the duty to facilitate public participation would have no meaning.³⁶

23. Fifth, thus construed, there are at least two aspects of the duty to facilitate public involvement.³⁷

23.1. The first aspect is the duty to provide meaningful opportunities for public participation in the law-making 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.³⁸

A prerequisite for effective public participation is public access to

³⁶ *Matatiele II*, above n 21, para 97; *Merafong*, above note 22, paras 49-51 and 73; *Poverty Alleviation Network*, above n 23, paras 60 and 62; *Moutse*, above n 24, paras 62 and 68-75; *LAMOSIA*, above n 25, para 71; *Mogale*, above n 27, paras 35, 56 and 76-80; *Corruption Watch*, above n 29, para 36.

³⁷ *Doctors for Life*, above n 5, para 129; *Mogale*, above n 27, para 34; ; *Corruption Watch*, above n 29, para 29.

³⁸ *Doctors for Life*, above n 5, paras 130-134.

information which is sufficient and of a character that allows the public to deliberate on and make informed submissions about the subject-matter of the consultative process.³⁹ What ultimately matters is that the legislature act reasonably in the manner that it facilitates public involvement in the particular circumstances of each case.⁴⁰

23.2. 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.⁴¹

24. Sixth, 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.⁴²

24.1. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant.

³⁹ *Corruption Watch*, above n 29, para 46.

⁴⁰ *Matatiele II*, above n 21, para 67.

⁴¹ *Doctors for Life*, above n 5, para 142; *Matatiele II*, above n 21, para 68.

⁴² *Doctors for Life*, above n 5, paras 128 and 146; *LAMOS*, above n 25, paras 60-61; *Mogale*, above n 27, para 37.

- 24.2. Particular attention must be paid to the rules, if any, adopted by the legislature to facilitate public participation;⁴³ and what the legislature itself considered to be appropriate public involvement in the light of the particular legislation's content, importance and urgency.
- 24.3. Once 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.⁴⁴
- 24.4. Practicalities such as time and expense, which relate to the efficiency of the law-making process, must be taken into account, but:
- 24.4.1. the saving of money and time in itself does not justify inadequate opportunities for public involvement; and

⁴³ Rule 170 of the Rules of the NA, which applies to committees generally, provides: '*Committees must ensure public involvement in accordance with the provisions of the Constitution and these rules*'.

Rule 235 of the Rules of the NA, which applies to the Standing Committee on Finance specifically, provides: '*The committee must ensure public involvement in accordance with the provisions of the Constitution and the Money Bills Amendment Procedure and Related Matters Act, 2009*'.

⁴⁴ *Doctors for Life*, above n 5, para 165.

- 24.4.2. problems encountered in speeding up a sluggish legislative timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable had to be subordinated to the right to public participation guaranteed in the Constitution, and not the other way around.⁴⁵
- 24.5. Circumstances of emergency may require urgent legislative responses and short timetables, but those must be demonstrated by the legislature.⁴⁶ In the absence of an explanation as to why the legislative process could not have been initiated at an earlier stage, self-created urgency is no excuse.⁴⁷
- 24.6. A desire by a legislature to finalise a Bill before the end of its term, which will cause the Bill to lapse, is insufficient. To demonstrate that a Bill is urgent, the legislature must show the Bill itself is objectively (really) urgent and why it could not allow the Bill to lapse and, after the elections, invoke its power to reinstate the Bill under its rules.⁴⁸

⁴⁵ *Doctors for Life*, above n 5, para 193.

⁴⁶ *Doctors for Life*, above n 5, para 193.

⁴⁷ *Corruption Watch*, above n 29, para 62.

⁴⁸ *LAMOSAs*, above n 25, paras 65-66 and 70.

25. Seventh, a legislature may not adopt a Bill containing material amendments to an earlier version in respect of which the legislature facilitated public participation, unless the legislature has facilitated further public involvement regarding the amendments.⁴⁹

CHRONOLOGY

26. The relevant sequence of events is as follows.
27. On 10 May 2023 Cabinet approved the Public Procurement Bill for introduction in Parliament.⁵⁰
28. On 23 May 2023 the NT gave to the NA Committee an informal briefing on a draft version of the Public Procurement Bill.⁵¹
29. On 30 June 2023 the Public Procurement Bill (the **B18-2023 Bill**)⁵² was introduced in the NA for publication and public comment.⁵³
30. On 18 August 2023 the NA Committee published, in all official languages, in print media and on Parliament's website, a call for written public comments on the B18-2023 Bill with a deadline for submissions of

⁴⁹ *SA Veterinary Association*, above n 26, paras 24-28; *SA Iron and Steel Institute*, above n 28, paras 40-49.

⁵⁰ Founding Affidavit 1: 29: 53.3; Speaker's Answering Affidavit 7: 752: 36.

⁵¹ Speaker's Answering Affidavit 7: 753: 38; Replying Affidavit 13: 1284: 52 (admitted).

⁵² Annexure FA1, 1: 48-91.

⁵³ Founding Affidavit 1: 12: 13; Speaker's Answering Affidavit 7: 752: 36.

11 September 2023.⁵⁴ The notices also invited those wishing to make oral submissions on the B18-2023 Bill to request that they be permitted to do so at two public hearings scheduled for 12 and 13 September 2023.⁵⁵

31. On 5 September 2023 the NT gave the NA Committee a formal briefing on the B18-2023 Bill.⁵⁶ It included a PowerPoint presentation outlining the aims of the Bill and its various chapters.⁵⁷ The presentation explained that the proposed Procurement Act would replace approximately 34 Acts and their regulations, thereby rationalising and defragmenting the existing legislative framework.⁵⁸ During the meeting, members of the NA Committee discussed the Bill and raised various issues arising from its provisions and the presentation.⁵⁹
32. At the first public hearing, held on 12 September 2023, 14 organisations made submissions on the B18-2023 Bill, including the second applicant **(amaBhungane)**.⁶⁰

⁵⁴ Speaker's Answering Affidavit 7: 753: 39; Annexures AA4 and AA5, 7: 798-809.

⁵⁵ Speaker's Answering Affidavit 1: 753: 39; Annexures AA4 and AA5, 7: 798-809.

⁵⁶ Founding Affidavit 1: 19: 30; Annexure FA4, 2: 129-133; Speaker's Answering Affidavit 7: 753: 38 and 7: 769: 97 (admitted); Annexure AA3, 7: 795-797.

⁵⁷ Founding Affidavit 1: 19: 30; Annexure FA2, 92-127; Speaker's Answering Affidavit 7: 769: 97 (admitted).

⁵⁸ Founding Affidavit 1: 19: 30; Annexure FA2, 92-127; Speaker's Answering Affidavit 7: 769: 97 (admitted).

⁵⁹ Founding Affidavit 1: 19: 30; Speaker's Answering Affidavit 7: 769: 97 (admitted).

⁶⁰ Founding Affidavit 1: 19: 31; Annexure FA5, 2: 134-140; Speaker's Answering Affidavit 7: 755: 41 and 7: 769: 97 (admitted); Annexure AA6, 7: 810-812.

33. At the second public hearing held on 13 September 2023, a further 17 organisations made submissions, including representatives of community-based organisations, labour unions, business, and government entities.⁶¹
34. After the public hearings, the NT collated the written comments and prepared responses.⁶²
35. At a meeting of the NA Committee held on 17 November 2023 the NT presented several documents to the committee, including the following:⁶³
- 35.1. a report on the public comments;⁶⁴
 - 35.2. a presentation setting out the NT's responses to the comments;⁶⁵
 - 35.3. a **revised Chapter 4** dealing with preferential procurement, i.e. a chapter aimed at replacing the whole of Chapter 4 in the B18-2023 Bill;⁶⁶

⁶¹ Founding Affidavit 1: 19: 32; Annexure FA6, 2: 141-155; Speaker's Answering Affidavit 7: 755: 41 and 7: 769: 97 (admitted); Annexure AA7, 7: 813-815.

⁶² Founding Affidavit 1: 20: 34; Speaker's Answering Affidavit 7: 769: 97 (admitted).

⁶³ Founding Affidavit 1: 20: 34; Speaker's Answering Affidavit 7: 769: 99-100.

⁶⁴ Founding Affidavit 1: 20: 34.1; Annexure FA 8, 2: 163-177; Speaker's Answering Affidavit 7: 769: 99-100 (not disputed).

⁶⁵ Founding Affidavit 1: 20: 34.2; Annexure FA 9, 2: 178-191; Speaker's Answering Affidavit 7: 769: 99-100 (not disputed).

⁶⁶ Founding Affidavit 1: 20: 34.3; Annexure FA 10, 2: 192-196; Speaker's Answering Affidavit 7: 755: 43-44 and 769: 99-100 (not disputed).

- 35.4. an Excel spreadsheet summarising the comments received, together with the NT's responses to some of the comments and proposed amendments arising from those comments;⁶⁷ and
- 35.5. a list of stakeholders.⁶⁸
36. During the NA Committee meeting on 17 November 2023 it emerged that the NT had not compiled responses to the majority of the written comments received.⁶⁹ This was confirmed by the NT's report on the public comments,⁷⁰ which recorded:

"A total of 112 Stakeholders submitted approximately a total of 2 200 excel rows of comments classified from chapter 1 to 7, including general comments. Due to the 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 provide 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

⁶⁷ Founding Affidavit 1: 21: 34.4; Speaker's Answering Affidavit 7: 769: 99-100 (not disputed).

⁶⁸ Founding Affidavit 1: 21: 34.5; Annexure FA12, 2: 202-2026; Speaker's Answering Affidavit 7: 769: 99-100 (not disputed).

⁶⁹ Founding Affidavit 1: 21: 34.4; Speaker's Answering Affidavit 7: 764 - 766: 78-85 and 769: 100 (although the Speaker disputes this, the fact is the 17 November 2023 version of the Excel spreadsheet contained responses to 25 of the 122 comments received).

⁷⁰ Annexure FA8, 2: 165.

were reported on in the comments matrix, which is also attached to the report as ‘Annexure B’” (underlining added).

37. During that meeting the failure by the NT to consider all public comments was criticised by members of the NA Committee, including ANC committee member Mr G Masualle who “*found it worrisome that only 20% of the public submissions had been responded to*”.⁷¹ This concern was echoed by several stakeholders in attendance, including amaBhungane and COSATU.⁷²
38. Some of the external stakeholders in attendance also complained that they had been afforded insufficient time to consider the documents presented at the meeting.⁷³ These complaints arose because the stakeholders in attendance were required to respond, in an allotted two minutes each, to the complex amendments introduced by the NT, including the proposed new Chapter 4.⁷⁴

⁷¹ Founding Affidavit 1: 21-22: 36 and 36.1; not addressed in the Speaker’s Answering Affidavit; Annexure FA7, 2: 161 (Mr Masualle’s full statement is noted by the Parliamentary Monitoring Group (PMG) as being: “*Mr G Masualle found it worrisome that only 20% of the public submissions had been responded to. He sought clarity on how responses to the remaining submissions would be remedied. He was concerned that allowing voices to be ignored could place doubt on the legitimacy of the process. He agreed that the Committee should allow for reflection on Chapter 4*”).

⁷² Founding Affidavit 1: 22: 36.2; not addressed in the Speaker’s Answering Affidavit.

⁷³ Founding Affidavit 1: 22: 36.3; not addressed in the Speaker’s Answering Affidavit.

⁷⁴ Founding Affidavit 1: 22: 36.3; not addressed in the Speaker’s Answering Affidavit.

39. The Chairperson concluded the meeting on 17 November 2023 by indicating that the NT would address the outstanding issues at the next meeting scheduled for 24 November 2023.⁷⁵ In addition, the Chairperson indicated that the NA Committee would be “*considering the Bill on a clause-by-clause basis from 28 to 29 November 2023*”.⁷⁶
40. On 24 November 2023 the NA Committee met for a further briefing by the NT on its responses to the public comments. Certain external stakeholders were again in attendance and were afforded an opportunity to respond to the responses by the NT.⁷⁷
41. The updated report provided by the NT at this meeting was virtually identical to the report presented the previous week.⁷⁸ It again recorded that the NT had been unable to respond to all comments received,⁷⁹ as follows:⁸⁰

“A total of 112 Stakeholders submitted approximately a total of 2200 excel rows of comments classified from chapter 1 to 7, including general comments. Subsequent to the Committee’s meeting of 17 November 2023,

⁷⁵ Founding Affidavit 1: 23: 36.4; not addressed in the Speaker’s Answering Affidavit.

⁷⁶ Founding Affidavit 1: 23: 36.4; not addressed in the Speaker’s Answering Affidavit.

⁷⁷ Founding Affidavit 1: 23: 37; Speaker’s Answering Affidavit 7: 756: 45.

⁷⁸ Founding Affidavit 1: 24: 39; Annexure FA14, 2: 213-232; not addressed in the Speaker’s Answering Affidavit.

⁷⁹ Founding Affidavit 1: 24: 39; Speaker’s Answering Affidavit 7: 764-766: 78-85 and 769: 100 (although this is disputed by the Speaker, her version is inconsistent with the relevant part of the National Treasury’s report).

⁸⁰ Annexure FA14, 2: 215

additional written comments were received which increased the number to approximately 2300. Due to time constraints, we could not respond to all comments received; however, we were able to consider the principal concerns including revision of 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 in the comments matrix, which is also attached to this report as ‘Annexure B’. Where a response was not warranted, the comment was simply noted. A methodology was agreed to by the team to standardise the assessment of the comments. The team also applied their experience to assess or gain the essence of the comment so that all comments are given due consideration and reflection and provided with a well-considered response” (underlining added).

42. The updated comments and responses matrix (Excel spreadsheet) presented at the meeting reflected that the NT had considered and responded to an additional 16 of the 112 comments received,⁸¹ bringing to 41 the total number of comments which the NT had considered and responded to.

⁸¹ Founding Affidavit 1: 24-25: 40.2; Annexure FA15, 2: 233-235; Speaker’s Answering Affidavit 7: 764-766: 78-85 and 769: 100 (the Speaker does not dispute this figure).

43. As he had done during the previous meeting, Mr Masualle raised the issue of the NT not reviewing all of the submissions. The PMG's summary of this meeting summarises what Mr Masualle said, as follows:⁸²

“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.”

44. The PMG's summary of the response by Mr Mathebula of the NT includes the following:⁸³

“Mr Mathebula replied that National Treasury had noted the comments from stakeholders and Members of the Committee to review all the submissions received. 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

⁸² Founding Affidavit 1: 23: 37; Annexure FA13, 2: 207; not addressed in the Speaker's Answering Affidavit.

⁸³ Founding Affidavit 1: 23: 38; Annexure FA13, 2: 207-208; not addressed in the Speaker's Answering Affidavit.

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'" (underlining added).

45. Instead of making a presentation on the written comments received and, where applicable, the NT's responses thereto, at the meeting on 24 November 2023 the NT proceeded instead with a chapter-by-chapter presentation on the proposed amendments to the B18-2023 Bill.⁸⁴
46. Certain of the stakeholders who were present attempted to respond to proposed amendments, with one of them noting that it had "*not had the opportunity to fully view the changes. The most significant change was the detail on provincial procurement in Chapter 4*".⁸⁵

⁸⁴ Founding Affidavit 1: 26: 45; Speaker's Answering Affidavit 7: 756: 45 and 7: 769: 99-100 (in which the Speaker does not address this point).

⁸⁵ Annexure FA13, 2: 209; Speaker's Answering Affidavit 7: 756: 45 and 7: 769: 99-100 (where the Speaker does not dispute the points made in the italicized quotation from the PMG report).

47. On 28 November 2023 the NA Committee met to deliberate on the proposed amendments to the Bill on a clause-by-clause basis.⁸⁶ To this end, the NT's Chief Director: Legislation, Adv. Empie van Schoor, took the committee through the amendments.⁸⁷
48. It appears from the meeting report that no external stakeholders were in attendance and that no further documents were tabled by the NT⁸⁸ (e.g. the NT did not provide an updated comments matrix with responses to the written comments made by the 71 commentators to which it had not previously responded in the Excel spreadsheets⁸⁹). The meeting report further reflects no discussion of, or presentation by the NT or anyone else regarding, the written comments made by the public.⁹⁰
49. On 29 November 2023 the NA Committee reconvened to complete its clause-by-clause deliberations on the amendments to the B18-2023 Bill.⁹¹

⁸⁶ Founding Affidavit 1: 27: 48; Speaker's Answering Affidavit 7: 756: 45.

⁸⁷ Founding Affidavit 1: 27: 48; Speaker's Answering Affidavit 7: 769: 99-100 (not disputed).

⁸⁸ Founding Affidavit 1: 27: 49; Annexure FA17, 4: 394-401; Speaker's Answering Affidavit 7: 769: 99-100 (not disputed).

⁸⁹ Founding Affidavit 1: 27: 49; Speaker's Answering Affidavit 7: 769: 99-100.

⁹⁰ Founding Affidavit 1: 27: 49; FA17, 4: 394-401; Speaker's Answering Affidavit 7: 769: 99-100 (not disputed).

⁹¹ Founding Affidavit 1: 27: 50; Speaker's Answering Affidavit 7: 756: 46 and 769: 99-100 (not disputed).

50. As with the meeting on the previous day, it appears that no stakeholders were in attendance and no further documents were tabled by the NT.⁹² The meeting summary again reflects no discussion of, or presentation on, the written comments made by the public. Nor did the NT provide an updated comments matrix.⁹³
51. The only other document tabled at the meeting contained the amendments proposed by Treasury, which were either accepted, rejected or further amended by the NA Committee during the meeting.⁹⁴
52. According to that document, the replacement of Chapter 4 with the revised Chapter 4 suggested by the NT was accepted by the NA Committee during the meeting.⁹⁵
53. Following the deliberations on 28 and 29 November 2023 the NA Committee adopted an ‘A-list’ of amendments to the B18-2023 Bill. According to Parliament this list was informed by the written comments received from members of the public, as well as by the NA Committee’s

⁹² Founding Affidavit 1: 27: 50.1; Annexure FA18, 4: 402-416; Speaker’s Answering Affidavit 7: 769: 99-100 (not disputed).

⁹³ Founding Affidavit 1: 27: 50.2 to 50.3; Annexure FA18, 4: 402-416; Speaker’s Answering Affidavit 7: 769: 99-100 (not disputed).

⁹⁴ Founding Affidavit 1: 28: 51; Annexure FA19, 4: 417-444; Speaker’s Answering Affidavit 7: 756: 46.

⁹⁵ Founding Affidavit 1: 28: 51; Annexure FA19, 4: 426-435; Speaker’s Answering Affidavit 7: 769: 99-100 (not disputed).

own deliberations, and it gave rise to the provisions ultimately contained in Chapter 4 of the Public Procurement Act.⁹⁶

54. The NA Committee met again on 1 and 4 December 2023 to adopt its report on the B18-2023 Bill,⁹⁷ which it did on 4 December 2023 along with a revised version of the Bill (the **B18B-2023 Bill**).⁹⁸
55. The B18B-2023 Bill was presented to the NA.⁹⁹
56. On 6 December 2023 the NA passed the B18B-2023 Bill and transmitted it to the NCOP for consideration and concurrence,¹⁰⁰ which referred the Bill to the NCOP Select Committee on Finance (**the NCOP Committee**).¹⁰¹
57. Upon receipt of the B18B-2023 Bill, the NCOP Committee invited the nine provincial Select Committees on Finance to attend a briefing on the Bill by the NT on 6 February 2024 as well as all subsequent meetings of the NCOP Committee.¹⁰²

⁹⁶ Speaker's Answering Affidavit 7: 757: 46.

⁹⁷ Founding Affidavit 1: 28: 52-53; Annexure FA21, 4: 449-460; Speaker's Answering Affidavit: 756: 47.

⁹⁸ Annexure AA14, 9: 918-961.

⁹⁹ Founding Affidavit 1: 30: 57; Speaker's Answering Affidavit 7: 769: 99-100 (not disputed).

¹⁰⁰ Founding Affidavit 1: 30: 57; Speaker's Answering Affidavit 7: 757: 49.

¹⁰¹ Speaker's Answering Affidavit 7: 757: 49; Replying Affidavit 13: 1286: 57.

¹⁰² Speaker's Answering Affidavit 7: 757: 50.

58. On 23 February 2024 the NCOP Committee held public hearings, at which it received a total of 33 submissions, comprising 12 oral submissions and 21 written comments.¹⁰³
59. The NT responded to these submissions at an NCOP Committee meeting held on 19 March 2024, at which stakeholders were afforded an opportunity to reply to the NT responses.¹⁰⁴
60. At that meeting members of the NCOP Committee expressed concerns regarding the NT's responses to stakeholders and requested that the NT convene further meetings with stakeholders to discuss critical aspects of the B18B-2023 Bill.¹⁰⁵ These meetings were convened between 8 and 10 April 2024 and were reported on by the NT to the NCOP Committee on 17 April 2024.¹⁰⁶
61. It bears mentioning that given the depth and scope of the issues raised, the NCOP Committee applied for, and was granted, an extension of time beyond the usual eight-week cycle to process the Bill.¹⁰⁷ It was accordingly afforded an additional five to six weeks for its deliberations.¹⁰⁸

¹⁰³ Speaker's Answering Affidavit 7: 757-758: 51; Annexure AA16, 9: 971.

¹⁰⁴ Speaker's Answering Affidavit 7: 758: 52.

¹⁰⁵ Speaker's Answering Affidavit 7: 758: 53; Annexure AA17, 10: 1024-1027 and Annexure AA18, 10: 1028-1040.

¹⁰⁶ Speaker's Answering Affidavit 7: 758: 53; Annexure AA19, 10: 1041-1043.

¹⁰⁷ Speaker's Answering Affidavit 7: 759: 57.

¹⁰⁸ Speaker's Answering Affidavit 7: 759: 57.

62. On 23, 25 and 26 April 2024 respectively, the NCOP Committee considered the public submissions received and responses from the NT.¹⁰⁹
63. On 30 April 2024 the NCOP Committee considered the provinces' negotiating mandates regarding the B18B-2023 Bill.¹¹⁰
64. On 2 May 2024 the NCOP Committee convened to deliberate on the B18B-2023 Bill on a clause-by-clause basis.¹¹¹
65. On 7 May 2024 the NCOP Committee adopted a report on the B18B-2023 Bill¹¹² which, among other things, suggested certain amendments to the Bill, the amended version of the Bill approved by the NCOP Committee being marked **B18C-2023**¹¹³ – received the support of all the provinces other than the Western Cape Province.
66. After the amendments in the B18C-2023 Bill had been incorporated in a **B18D-2023 Bill**,¹¹⁴ on 9 May 2024 the NCOP adopted the B18D-2023 Bill, which was thereupon sent to the NA.¹¹⁵

¹⁰⁹ Speaker's Answering Affidavit 7: 758: 54; Annexure AA20-AA22, 10: 1044-1053.

¹¹⁰ Speaker's Answering Affidavit 7: 758: 55; Annexure AA23, 10: 1054-1057.

¹¹¹ Speaker's Answering Affidavit 7: 758: 55; Annexure AA24, 10: 1058-1062.

¹¹² Speaker's Answering Affidavit 7: 759: 56-58.

¹¹³ Speaker's Answering Affidavit 7: 759: 59; Annexure AA27, 11: 1109-1156.

¹¹⁴ Speaker's Answering Affidavit 7: 759: 60; Annexure AA29, 11: 1187-1234.

¹¹⁵ Founding Affidavit 1: 38: 71.1; Speaker's Answering Affidavit 7: 759: 60.

67. The B18D-2023 Bill was referred to the NA Committee, which met on 10 May 2024 to consider it.
68. During this meeting the adequacy of the NA’s public participation process was discussed.¹¹⁶ Dr George, a committee member, 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 NCOP on these matters*”.¹¹⁷ Mr Mathebula of the NT and Adv. Jenkins, a Senior Parliamentary Advisor, responded by saying that the public participation process had been reasonable, notwithstanding that there was no further opportunity for public submissions to the NA after the amendments effected by the NA Committee.¹¹⁸
69. Following this meeting, the NA Committee reported to the NA that it supported the B18D-2023 Bill.¹¹⁹

¹¹⁶ Founding Affidavit 1: 38: 71.2; Speaker’s Answering Affidavit 7: 770: 105 (in which the Speaker admits that when the NCOP sent the Bill back to the NA, the NA did not provide a further opportunity for public participation on the basis that the Constitution does not make provision for this. According to the Speaker, there is no provision or requirement in the Constitution for the NA at that stage to invite further submissions from members of the public and/or to make any further amendments to the Bill).

¹¹⁷ Founding Affidavit 1: 38: 71.3; Annexure FA23, 5: 507; Speaker’s Answering Affidavit 7: 770: 105 (see footnote 132).

¹¹⁸ Founding Affidavit 1: 38: 71.4; Annexure FA23, 5: 505; Speaker’s Answering Affidavit 7: 770: 105 (see footnote 132).

¹¹⁹ Speaker’s Answering Affidavit 7: 759: 60; Annexure AA28, 11: 1167-1180.

70. On 16 May 2024 the NA accepted the NCOP's amendments by voting to adopt the B18D-2023 Bill.¹²⁰
71. The Bill, as adopted by the NA on 16 May 2024, was then referred to the President for his assent.¹²¹
72. The President assented to the Bill and the resulting Public Procurement Act 28 of 2024 was published in the *Government Gazette* on 23 July 2024.¹²²
73. The President has not yet put the Act into operation because the regulations necessary for that are still being drafted.¹²³

THE FIRST CHALLENGE

74. It will be recalled that the first challenge to the Act is that neither the NA Committee, before it reported on the Bill to the NA, nor the NA, before it adopted the Bill, considered all of the written comments received in response to the publication of the Bill for written comment.¹²⁴

¹²⁰ Founding Affidavit 1: 38: 71.2; Speaker's Answering Affidavit 7: 759: 60.

¹²¹ Founding Affidavit 1: 38: 71.2; Speaker's Answering Affidavit 7: 759: 60.

¹²² Speaker's Answering Affidavit 7: 760: 61; Annexure AA30, 10: 1235.

¹²³ Speaker's Answering Affidavit 7: 760: 62.

¹²⁴ See para 2.1 above.

75. It will also be recalled that the principles laid down by this Court in its judgments on ss 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution include the following:¹²⁵

75.1. the purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the lawmakers before the final decision is taken;

75.2. lawmakers must consider the representations made and thereafter make an informed decision;

75.3. the views and opinions expressed by the public must filter through for there to be proper consideration by the lawmakers; and

75.4. summaries of written comments may be provided to the lawmakers, and if that is not done, the members must come to know the content of the written comments by reading or discussing them at a legislative meeting.

76. What happened in the NA in this case is the following:

76.1. on 18 August 2023 the NA Committee published a call for written comments on the Public Procurement Bill, as introduced in

¹²⁵ See para 22 above.

Parliament (i.e. the B18-2023 Bill), with a closing date for such comments of 11 September 2023;¹²⁶

- 76.2. instead of providing the 112 written comments to the members of the NA Committee, the NT reproduced them in a comments and responses matrix in the form of an Excel spreadsheet;¹²⁷
- 76.3. at a meeting of the NA Committee on 17 November 2023 the NT presented to the committee the first version of the spreadsheet, which contained responses to 25 of the written comments;¹²⁸
- 76.4. at a meeting of the NA Committee on 24 November 2023 the NT presented to the committee a second version of the spreadsheet, which contained responses to a further 16 of the 112 written comments, bringing to 41 the number of written comments to which it had responded¹²⁹ – i.e. the NT reviewed and responded to 36.6% (one third) of the written public comments received;
- 76.5. in the NT’s report to the NA committee at that meeting, it explained that due to time constraints it could not respond to all comments received, and the comments matrix in the Excel spreadsheet

¹²⁶ See para 30 above.

¹²⁷ See para 35 above.

¹²⁸ See para 35.4 and footnote 69 above.

¹²⁹ See para 42 above.

contained the NT team's responses to "[t]he comments that the review team were able to consider";¹³⁰

76.6. at that meeting Mr Mathebula of the NT explained that, due to the volume of written comments, in the time available it was not possible for the NT team to review all of them;¹³¹

76.7. instead of making a presentation to the NA Committee at that meeting on the written comments received (and, where applicable, the NT's written responses thereto), the NT proceeded to a chapter-by-chapter presentation on the amendments it proposed be made to the B18-2023 Bill;¹³²

76.8. although the NA Committee met again regarding the Bill on 28 and 29 November 2023 and on 1 and 4 December 2023, at none of those meetings was there any discussion of, or presentation on, the written comments on the B18-2023 Bill, nor did the NT provide an updated comments and responses matrix (Excel spreadsheet);¹³³

¹³⁰ See para 41 above. A similar statement was made in the NT's report to the NA Committee at the 17 November 2023 meeting – see Annexure FA8, 2: 165.

¹³¹ See para 44 above.

¹³² See para 45 above.

¹³³ See paras 47 to 54 above.

- 76.9. there is no evidence that the NA itself considered the written comments on the B18-2023 Bill when on 6 December 2023 it considered the NA Committee’s report and voted to adopt the amended version of the Bill proposed by the committee (i.e. the B18B-2023 Bill);¹³⁴ and
- 76.10. after the Bill with further amendments had been adopted by the NCOP (i.e. the B18D-2023 Bill) and returned to the NA, neither the NA Committee (which met on 10 May 2024 to consider the B18D-2023 Bill) nor the NA (which on 16 May 2024 adopted the B18D-2023 Bill) considered any written comments on the Bill.¹³⁵
77. We submit the relevant facts show that neither the NA Committee nor the NA itself considered all of the written comments received in response to the publication of the Bill for written comment.
78. We further submit that the Speaker’s answer to this challenge – being to the effect that “*the primary issues raised by stakeholders ... were considered and addressed in line with the relevant provisions of the Constitution*”¹³⁶ – is misconceived.

¹³⁴ Compare para 57 above.

¹³⁵ See paras 68 to 71 and footnote 122 above.

¹³⁶ Speaker’s Answering Affidavit 7: 766: 83.

78.1. The objective evidence shows that the NT, which briefed the NA Committee on the public written comments received, did not have the time to consider 67.4% of the comments – that being the case, how could the NT know that it responded to “*the primary issues raised by stakeholders*”.

78.2. There is no evidence to suggest that the members of the NA Committee, let alone the members of the NA as a whole, came to know the content of the public written comments by reading or discussing them at a legislative meeting. No doubt, if such evidence existed, it would have been put up by the Speaker and loomed large in her response to this challenge.

79. We consequently submit the first challenge should be upheld.

THE SECOND CHALLENGE

80. It will be recalled that the second challenge to the Act is that, in its report to the NA, the NA Committee proposed a material amendment to the Bill as introduced, i.e. the NA Committee presented to the NA a version of the Bill containing that material amendment, and the NA adopted the Bill as so amended without it first being republished for public comment by the NA

and without the NA or the NA Committee otherwise receiving any public comments on it.¹³⁷

81. It will also be recalled that the principles laid down by this Court in its judgments on ss 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution include that a legislature may not adopt a Bill containing material amendments to an earlier version in respect of which the legislature facilitated public participation, unless the legislature has facilitated further public involvement regarding the amendments.¹³⁸
82. It is common cause that the NA Committee's 18 August 2023 call for written comment on the B18-2023 Bill was the only opportunity provided by the NA for public comment in writing on any version of the Bill before the B18D-2023 Bill was passed by the NA on 16 May 2024.¹³⁹
83. Chapter 4 of the B18-2023 Bill¹⁴⁰ which was published for public comment by the NA Committee on 18 August 2023 read as follows:

‘CHAPTER 4

PREFERENTIAL PROCUREMENT

Preferential procurement policy

¹³⁷ See para 2.2 above and footnote 3.

¹³⁸ See para 25 above and footnote 49.

¹³⁹ Founding Affidavit 1: 20: 33; Annexure FA1, 1: 48-91; Answering Affidavit 7: 769: 98.

¹⁴⁰ Annexure FA1, 1: 48-91.

17.(1) When 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,*

a procuring institution must do so in accordance with the objects of this Act, this Chapter and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003).

(2) The policy envisaged in subsection (1) must include—

- (a) one or more preference point systems and thresholds;*
- (b) measures regarding preference for—*

- (i) a category or categories of persons or enterprises or a sector;*
- (ii) goods that are produced in the Republic; and*
- (iii) services provided in the Republic;*

(c) measures—

- (i) to set aside the awarding of bids to promote any of the preferences referred to in paragraph (b);*
- (ii) to set subcontracting as a bid condition to promote any of the preferences referred to in paragraph (b);*
- (iii) for subcontracting by suppliers awarded bids that promote any of the preferences referred to in paragraph (b);*
- (iv) to advance transformation, beneficiation, industrialisation, innovation, creation of jobs, intensification of labour absorption and economic development;*

- (v) *to balance the economic impacts of imported goods or services, unless the procuring institution is exempted by the Minister; and*
 - (vi) *to advance a sustainable environment.*
- (3) *Regulations—*
 - (a) *must be made regarding the application of subsection (2)(a) and (b)(ii) and (iii); and*
 - (b) *may be made regarding any other provision of this Chapter.*
- (4) *Without limiting the generality of subsection (1)(b), the policy must include preferences for—*
 - (a) *citizens and permanent residents of the Republic;*
 - (b) *small enterprises, as defined in section 1 of the National Small Enterprise Act, 1996 (Act No. 102 of 1996);*
 - (c) *enterprises based in townships, rural or underdeveloped areas or in a particular province or municipality.*
- (5) *Persons referred to in subsections (1)(b) and (2)(b)(i) include, but are not limited to—*
 - (a) *black people, as defined in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);*
 - (b) *women;*
 - (c) *people with disabilities, as defined in the Employment Equity Act, 1998 (Act No. 55 of 1998); and*
 - (d) *youth, as defined in section 1 of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008).*

- (6) *Before making a regulation under this Chapter, the Minister must consult with the Ministers responsible for trade, industry and competition, small business, women, people with disabilities and youth and any other relevant Minister whose portfolio is affected by the draft regulation.*
- (7) *Any Minister, referred to in subsection (6), may submit a request to the Minister of Finance to make regulations under this Chapter regarding a matter pertaining to the portfolio of the relevant Minister.’*

84. We submit that:

- 84.1. the B18B-2023 Bill,¹⁴¹ which the NA Committee presented to the NA together with its report on 4 December 2023, and which the NA adopted on 6 December 2023; and
- 84.2. the B18D-2023 Bill,¹⁴² which, after being returned by the NCOP to the NA, was passed by the NA on 16 May 2024 and submitted to the President (who assented to it and on 23 July 2024 published the resulting Public Procurement Act 28 of 2024 in the *Government Gazette*),

were materially different to the B18-2023 Bill which was published for public comment.

¹⁴¹ Annexure AA14, 9: 918-961.

¹⁴² Annexure AA29, 11: 1187-1234.

85. Among the material differences is the replacement of the single-section Chapter 4 (clause 17) in the B18-2023 Bill with a nine-section Chapter 4 (clauses 16-23, including a clause 21A),¹⁴³ which is too long to quote here.
86. The material differences between the version of Chapter 4 in the B18-2023 Bill and the version of Chapter 4 in the B18D-2023 Bill are manifest even on a cursory comparison of the two. They include, but are not limited to, the introduction of new ss 16, 17 and 18 which, together, make it compulsory for procuring institutions to implement the following procurement mechanisms:¹⁴⁴
- 86.1. Section 16(2) provides that the procurement policy of a procuring institution must provide for setting aside bids in accordance with s 17 and, if such setting aside is not possible, pre-qualification in accordance with s 18.
- 86.2. Section 17(1)(a) provides that a procuring institution must set aside a bid for a category of persons provided for in s 17(3) in accordance with prescribed thresholds and conditions.
- 86.3. Section 17(1)(b) provides that those prescribed conditions must include a minimum of potentially qualifying suppliers.

¹⁴³ Annexure AA29, 11: 1200-1204.

¹⁴⁴ Founding Affidavit 1: 33: 65.

- 86.4. Section 17(2) obliges the Minister to prescribe targets for set asides.
- 86.5. Section 17(3) contains a closed list of the categories of persons for whom bids are to be set aside, being: **(a)** black people; **(b)** black women; **(c)** women; **(d)** black people with disabilities; **(e)** people with disabilities; **(f)** military veterans; **(g)** persons referred to in any of (a) to (f) within a geographical area; **(h)** small enterprises owned by persons falling within certain specified categories; **(i)** and small enterprises within a particular geographical area; **(j)** small enterprises; **(k)** co-operatives which consist of members who are black people; **(l)** co-operatives; and **(m)** co-operatives referred to in (k) or (l) within a particular geographical area.
- 86.6. Section 17(4) requires the Minister to prescribe ownership-related percentages for most of the categories listed in s 17(3).
- 86.7. Section 17(5) provides a bid set aside in terms of s 17(1) must be evaluated in terms of the prescribed criteria.
- 86.8. Section 18 introduces a mechanism whereby prequalification criteria to promote preferences in the allocation of contracts, in accordance with prescribed thresholds and conditions, are to be applied.

- 86.9. Section 18(1)(a) and (b) specify the prequalification criteria, in a similar (but not identical) manner to s 17(3) does.
- 86.10. Section 18(1) and (2) require the Minister to prescribe thresholds and conditions applicable to the prequalification criteria, including a minimum of potentially qualifying suppliers to the bidders in question.
- 86.11. Section 16(4)(a) requires that the threshold prescribed for s 18(1) be higher than the threshold prescribed for s 17(1).
- 86.12. Section 18(3) requires the Minister to prescribe ownership-related percentages for most of the prequalification criteria listed in s 18(1).
- 86.13. Section 18(5) provides that a bidder who or which fails to meet the prequalification criteria is to be disqualified.
87. We submit that these and the other changes to the B18-2023 Bill brought about by the B18D-2023 Bill are material, i.e. they are not merely semantic, grammatical or technical edits;¹⁴⁵ and, further, the new Chapter 4 will have lasting effects on all state procuring institutions and on anyone who or which intends bidding for public procurement contracts (and they may limit the ability of some potential bidders to do so).¹⁴⁶

¹⁴⁵ Founding Affidavit 1: 36: 66.

¹⁴⁶ Founding Affidavit 1: 40: 75.1.

88. Parliament's response to this challenge is misconceived.
89. It contends, firstly, that the preferential procurement provided for in Chapter 4 were all "*foreshadowed in clause 17*" of the B18-2023 Bill, and that the purpose of the revised Chapter 4 is to "*unpack and elaborate upon the provisions that had initially been included in clause 17 of the Bill*".¹⁴⁷ However, this is patently incorrect. While clause 17 empowered State parties to include mechanisms such as set asides, subcontracting and pre-qualification criteria, in their procurement policies, it did not prescribe that such mechanisms were compulsory.¹⁴⁸ In any event, the "foreshadowing" of these concepts within what was largely a permissive enabling framework (the B18-2023 Bill) is not sufficient to meet the constitutional public consultation obligation in the context of a change to a far more prescriptive regime (the B18D-2023 Bill).
90. Parliament contends, secondly, that the PPPFA regulations (2017) made under the PPPFA (1) contain concepts which are "*fundamentally similar*" to those in the Procurement Act; and (2) were "*the product of an extensive research and consultation process*".¹⁴⁹ Hence, so the argument proceeds, the public participation process followed in making the PPPFA regulations

¹⁴⁷ Answering Affidavit 7: 732: 9.1.

¹⁴⁸ Founding Affidavit 1: 36: 66; Replying Affidavit 13: 1273: 13-14.

¹⁴⁹ Answering Affidavit 7: 733: 9.2 to 9.2.1.

(2017) should be considered when determining the reasonableness of the process leading to the enactment of the Procurement Act.¹⁵⁰

91. The difficulty with this contention is that what must be compared is the version of the Bill which the NA published for public comment (i.e. the B18-2023 Bill) and the version of the Bill which it ultimately adopted (B18D-2023 Bill). The fact that, in 2017, regulations with “*fundamentally similar*” concepts were made under an Act which stood to be repealed by the Bill, is legally irrelevant. The more so since the regulations in question were held by this Court to be *ultra vires* their enabling Act.

92. In conclusion on this challenge:

92.1. The amendments to the Bill published for public comment which were effected by the NA Committee and adopted by the NA were material and will have a lasting effect on both the public and all State actors that procure goods and services from the private sector.¹⁵¹

92.2. Because no reason has been proffered as to why a further round of public representations could not have been accommodated and no facts or reasons were set out for the apparent urgency with which

¹⁵⁰ Answering Affidavit 7: 734: 9.2.4 to 9.2.5.

¹⁵¹ Founding Affidavit 1: 40: 75.1.

Parliament dealt with the Bill, there is no objective basis justifying an urgent or truncated timetable for the Bill's passage.¹⁵² In short, there was no need for its urgent passing. The lack of any such justification is fatal because the Bill deals with weighty and complex issues.¹⁵³

REMEDY

93. The legal principles governing the grant of remedies in cases like the present are the following.
94. First, this Court may grant declaratory relief in respect of the proceedings of Parliament on a Bill after it has been signed by the President but before it has been brought into force. This is because a Bill which has been passed by Parliament, assented to and signed by the President, is a duly enacted Act of Parliament; and s 172(2)(a), which empowers this Court to declare Acts of Parliament invalid, does not distinguish between Acts of Parliament that have been brought into force and those which have not.¹⁵⁴

¹⁵² Founding Affidavit 1: 40: 75.3.

¹⁵³ Founding Affidavit 1: 40: 75.3.

¹⁵⁴ *Doctors for Life*, above n 5, paras 62-65, applying *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Others v Minister of Social Development and Others* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) paras 90-91.

95. Second, should this Court find that Parliament has not fulfilled its obligation to facilitate public involvement in its legislative processes, this Court will be obliged by s 172(1)(a) of the Constitution to declare that the conduct of Parliament is inconsistent with the Constitution and therefore invalid.¹⁵⁵
96. Third, because both the content of legislation and the process by which it is made must conform to the Constitution, if such a declaration is made it renders the resulting legislation invalid;¹⁵⁶ unless the failure to facilitate public involvement in the legislative process affects only a discrete and severable part of the resulting legislation, in which case that part must be severed from the remainder of the legislation.¹⁵⁷
97. Fourth, if the impugned legislation has not yet come into operation, there is no need to ameliorate the effect of the declaration of invalidity by means of a just and equitable order made in terms of s 172(1)(b) of the Constitution, such as an order providing that the declaration of invalidity will not have retrospective effect or it will be suspended for a specified period to avoid a regulatory vacuum or the welling up of repealed legislation while the legislature is considering whether to hold a new legislative process and, if it so decides, conducting that process. If Parliament wishes to proceed with the

¹⁵⁵ *Doctors for Life*, above n 5, paras 46 and 199-201.

¹⁵⁶ *Doctors for Life*, above n 5, paras 202-211; *Mogale*, above n 27, para 83.

¹⁵⁷ *SA Veterinary Association*, above n 26, paras 47-50.

impugned legislation, it may do so subject to complying with its obligation to facilitate public involvement in its legislative process.¹⁵⁸

98. In our submission, in the present case:

98.1. the Act as a whole must be declared unconstitutional and invalid because the first challenge points to a failure of a crucial aspect of the legislative process in the NA and the second challenge implicates a central part of the Act which is not discrete and severable; and

98.2. as the Act has not yet come into operation, there is no need to ameliorate the effect of the declaration of invalidity by means of a just and equitable order made in terms of s 172(1)(b) of the Constitution.

CONCLUSION

99. The Premier (WC) accordingly prays for relief in terms of the notice of motion.

¹⁵⁸ *SA Iron and Steel Institute*, above n 28, para 50.

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20 February 2026