

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: 103/25**

In the matter between:

**PREMIER OF THE WESTERN CAPE  
GOVERNMENT**

First Applicant

**AMABHUNGANE CENTRE FOR  
INVESTIGATIVE JOURNALISM**

Second Applicant

and

**SPEAKER OF THE NATIONAL ASSEMBLY**

First Respondent

**CHAIRPERSON OF THE NATIONAL  
COUNCIL OF PROVINCES**

Second Respondent

**MINISTER OF FINANCE**

Third Respondent

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**FIRST AND SECOND RESPONDENTS' WRITTEN SUBMISSIONS**

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## INTRODUCTION

1. The applicants seek an order, inter alia –
  - 1.1. Declaring that Parliament failed to comply with its constitutional obligations to act reasonably in carrying out their duties to facilitate public involvement in the legislative process as required by section 59(1)(a) of the Constitution, before passing the Public Procurement Act 28 of 2024 (**“Procurement Act”**); and
  - 1.2. Declaring that, as a consequence, the Procurement Act was adopted in a manner that is inconsistent with the Constitution and is declared to be invalid.<sup>1</sup>
2. Their challenge is based on the two grounds:
  - 2.1. First, that the National Assembly’s Standing Committee on Finance (**“Standing Committee”**), before it reported the Bill to the National Assembly (**“NA”**), nor the NA, before it

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<sup>1</sup> Notice of motion, vol 1, pp 1 – 2, paras 1 – 2.

adopted the Bill, considered all of the comments received;  
and

2.2. Second, in its report to the NA, the Standing Committee proposed a material amendment to the Bill as introduced, and the NA adopted the Bill as so amended without it first being republished for comment by the NA and without the NA or the Standing Committee otherwise receiving any public comments on it.

3. A proper assessment of these grounds can only take place against the following backdrop:

3.1. The Procurement Act does not introduce an entirely novel framework according to which goods and services are to be procured by organs of state. Prior to its enactment, the framework for the procurement of goods and services was fragmented and inconsistent across organs of state. The Procurement Act is intended to draw those existing fragments together to create a single cohesive framework applicable to all organs of state.

3.2. The preferential procurement provisions in particular, contained in Chapter 4 of the Procurement Act, consist of principles that are fundamentally similar to those contained in the regulations promulgated pursuant to the Preferential Procurement Policy Framework Act 5 of 2000 (“**PPPFA**”). They are not new and unprecedented concepts. Not only have they already been a feature of the statutory framework governing procurement, but they have also been the subject of a comprehensive public participation process.

3.3. The Procurement Act is also not the last word on the procurement of goods and services by organs of state: while it provides a framework according to which organs of state are to procure goods and services, the implementation of this framework, and the detail thereof, will be contained in regulations to be made by the Minister in terms of section 63. Those regulations will be preceded by their own comprehensive public participation process, during which stakeholders will have the opportunity to engage comprehensively with the manner in which the procurement of goods and services will operate in practice.

4. Accordingly, and in the light of our submissions at paragraphs 3.1 to 3.3 above, the reasonableness of the public participation process does not stand to be assessed over the period between 30 June 2023 (when the Procurement Bill was introduced into Parliament)<sup>2</sup> and 23 July 2024 (when the President assented to the Procurement Bill).<sup>3</sup> Members of the public had been afforded an opportunity to engage with the underlying principles prior to June 2023, and will continue to be afforded that opportunity as the framework created by the Procurement Act is given operational content.
5. It is with these considerations in mind that we address each of the grounds of attack advanced by the applicants. Before doing so, we outline the general principles according to which the reasonableness of the public participation process is to be measured.
6. In the light of the intervention by the second applicant as a party to this application, the respondents do not persist with the argument that the first applicant ought to have exhausted the mechanisms for the resolution of intergovernmental disputes prior to the launch of

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<sup>2</sup> Annexure “AA2”, vol 7, pp 790 – 794.

<sup>3</sup> Annexure “AA30”, vol 12, p 1235.

this application. Parliament accepts that whether or not the first applicant is bound by these procedures, the second applicant is not an organ of state and would therefore not be required to exhaust the intergovernmental dispute resolution mechanisms before asking the Court to intervene. They therefore do not pursue this argument.

## **THE STANDARD AGAINST WHICH THE PUBLIC INVOLVEMENT PROCESS IS TO BE MEASURED**

7. The applicants' case is built on section 59(1)(a),<sup>4</sup> This provision impose the obligation on the NA to "facilitate public involvement". It does not prescribe what such process entails.
8. In *Mary Patricia King and others v Attorneys Fidelity Fund Board of Control and another*<sup>5</sup> the Supreme Court of Appeal held as follows:

*'Public involvement' is necessarily an inexact concept, with many possible facets, and the duty to 'facilitate' it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the*

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<sup>4</sup> Section 59(1)(a) of the Constitution provides that the National Assembly must "*facilitate public involvement in the legislative and other processes of the Assembly and its committees*".

<sup>5</sup> 2006 (1) SA 474 (SCA) para 22.

*submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it. Whether or not the National Assembly has fulfilled its obligation cannot be assessed by examining only one aspect of 'public involvement' in isolation of others, as the appellants have sought to do here. Nor are the various obligations s 59(1) imposes to be viewed as if they are independent of one another, with the result that the failure of one necessarily divests the National Assembly of its legislative authority.*

9. Sachs J made a similar observation in *New Clicks*:<sup>6</sup>

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<sup>6</sup> *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) para 630.

*The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. Prudence allied to principle indicates that this is an area where the law should develop in a fact-sensitive and incremental way.*

10. Sachs J also held that –

*An appropriate balance will need to be struck between facilitating meaningful public access to the process and achieving economic use of time and resources, indeed, it should be borne in mind that endless consultation can be as paralysing to democratic decision-making as insufficient consultation.<sup>7</sup>*

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<sup>7</sup> Id para 629.

11. What follows from this is that there is no one-size-fits-all approach to be adopted. On the contrary, each case is to be decided on the basis of the case-specific facts.<sup>8</sup> This Court has, however, enumerated the following factors that are relevant in assessing the reasonableness of the public involvement process adopted:

*Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay*

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<sup>8</sup> *Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development* 2004 (6) SA 505 (CC) para 49.

*particular attention to what Parliament considers to be appropriate public involvement.*<sup>9</sup>

12. Similarly, in *LAMOSASA*,<sup>10</sup> the Court identified the following relevant factors in assessing reasonableness:

*So, the standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public. Relevant factors that Parliament ought*

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<sup>9</sup> *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416 (CC) para 128.

<sup>10</sup> *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC) paras 60 – 61.

*to consider when determining how it will involve the public in its legislative process include: the rules it has adopted for this purpose; the nature of the legislation in question; and any need for its urgent adoption. These too bear relevance to the Courts' determination of the reasonableness of Parliament's conduct.*

13. There is accordingly a high degree of deference to Parliament as to the appropriate process to follow in the circumstances of each case. While we appreciate that this does not afford Parliament *carte blanche* to facilitate or not to facilitate any public involvement process at all, it does mean that this Court ought not to interfere with the public involvement process adopted by Parliament in the absence of clear evidence that the process followed was unreasonable.
  
14. We submit that, when regard is had to the public participation process adopted by Parliament against the factors enumerated above, the process followed was reasonable in the circumstances. We demonstrate this by dealing with each ground of attack raised by the applicants.

## CONSIDERATION BY PARLIAMENT OF COMMENTS RECEIVED

15. Both the Premier and amaBhungane contend that Parliament did not give due considerations to all comments submitted as part of the public participation process.
  
16. The manner in which the submissions received from stakeholders were assessed and responded to in the NA is recorded as follows:

*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, 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 on 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 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.<sup>11</sup> (our emphasis)*

17. The Premier infers from this that the NA did not consider all of the comments received. AmaBhungane frames the complaint in stronger terms, asserting that there was a “wholesale disregard” of the submissions received.
18. These inferences are unsupported. Although the NA did not provide detailed responses to all stakeholders, its report reflects that it did engage with the concerns raised by stakeholders, and effected amendments to the Procurement Bill where appropriate.
19. We note that the test as to whether submissions received from stakeholders were duly considered, is not whether the Procurement

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<sup>11</sup> Annexure “FA8”, vol 2, p 165, para 3.1.

Bill was ultimately amended in line with the comments received. This Court held as follows in *Merafong*:

*But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.*<sup>12</sup>

20. Similarly, in *Mogale*, the Court held that affording the public a reasonable opportunity to know about the issues and have an adequate say “does not mean that the legislature must

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<sup>12</sup> *Merafong Demarcation Forum and others v President of the Republic of South Africa and others* 2008 (5) SA 171 (CC) para 50.

*accommodate all demands arising in the public participation process, even if they are compelling. The public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public's views. Even if the lawmaker ultimately does not change its mind, it must approach the public involvement process with a willingness to do so.*"<sup>13</sup>

21. We submit that the account provided at paragraph 15 above demonstrates compliance with this obligation. There was reasonable consideration of the comments received.

#### **THE NA WAS NOT REQUIRED TO CONSULT FURTHER FOLLOWING THE AMENDMENTS TO CHAPTER 4**

22. There are three reasons why we respectfully submit that the Premier's public-participation challenge with respect to part and future regulations falls to be rejected:

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<sup>13</sup> *Mogale and others v Speaker of the National Assembly and others* 2023 (6) SA 58 (CC) para 35.

- 22.1. The first reason is addressed at paragraphs 83 to 89 of the answering affidavit in the City of Cape Town application.<sup>14</sup> It is that chapter 4 did not introduce a materially new subject matter such as to require a further round of consultations. We do not address this ground further below as it is fully addressed in the answering affidavit.
- 22.2. Even if we may be wrong in this first submission, the submissions below render the consultation process in the peculiar circumstances of this case reasonable.
- 22.3. The second reason, which is independent from the first but augments it is, in summary, that the scheme contemplated by the Procurement Act is yet to be completed. It will only be completed once the regulations contemplated under section 63 of the Procurement Act have been promulgated. There is no dispute that this is yet to occur.
- 22.4. The third and alternative reason from the first and the second why we submit that the Premier's public-participation

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<sup>14</sup> Respondents' AA to the City of Cape Town pp 677-679.

challenge lacks merit concerns the public-participation process that has already been followed in relation to the substance of Chapter 4 of the Procurement Act.

***The public participation to be facilitated in respect of the Regulations to be promulgated in terms of the Procurement Act in due course***

23. The Procurement Act expressly contemplates that it will not be made from original legislation alone. Instead, and in conformity with the “*framework*” required by section 217(3) of the Constitution, it contemplates that it will comprise a combination (among other things) of original and delegated, or executive-made, legislation. This is why the Procurement Act describes itself , and its objects, in the following way:

23.1. ***‘this Act’*** *includes the regulations, codes of conduct, instructions and notices made or issued in terms of this Act*.<sup>15</sup> (our emphasis)

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<sup>15</sup> Section 1 of the Procurement Act.

23.2. The “objects” of the Procurement Act are to “introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems as envisaged in section 217(1), read with section 216(1), of the Constitution”, and to “determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution”.<sup>16</sup>

24. It is submitted that the Procurement Act’s definition of itself and its objects are emblematic of the flexibility and adaptability which align with the objectives which it intends to achieve. In this way, and “*recognising that legislation regulating procurement by organs of state is fragmented and ... constrains justified advancement of persons or categories of persons*”,<sup>17</sup> as the Procurement Act explicitly does, it is designed, simultaneously, to protect and safeguard the autonomy and independence of individual organs of state, introduce a measure of uniformity by the setting of firm legislative parameters and better-achieve the Constitution’s transformational objectives.

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<sup>16</sup> Section 2 (1) of the Procurement Act.

<sup>17</sup> Preamble to the Procurement Act.

25. The applicants have (correctly) refrained from submitting that the Procurement Act is intended to serve anything but a legitimate constitutional purpose. Its enactment has been described in the academy as “a *momentous occasion*”.<sup>18</sup> Prof Quinot has provided the following commentary in this regard:

*[T]he promulgation of the Public Procurement Act is itself a momentous occasion in South African procurement law, ... despite the fact that there are still a number of outstanding questions that must be resolved, and a lot of work still to be done before the [A]ct can be fully implemented, not the least of which is the creation of extensive regulations to give content to the system.*

....

*The next priority must be the drafting of regulations, ... which will help to arrive at more specific operational details such as permissible procurement methods or thresholds. ... Those are important practical aspects that I hope we will get some sight of very soon, because for many procuring institutions, the*

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<sup>18</sup> See “New Procurement Law aims to put money where it is most needed”, Corruption Watch, 2 August 2024, available at: <https://www.corruptionwatch.org.za/new-public-procurement-law-aims-to-put-money-where-it-is-needed/> (accessed 13 March 2026).

changes that those detailed operational rules will bring about are going to be very important in terms of their own planning, operational systems, and standard operating procedures.<sup>19</sup>

26. It is submitted that Prof Quinot’s commentary in this regard is clearly correct. Before the provisions of the Procurement Act can meaningfully be “[r]eview[ed]” by the Minister in terms of section 68 of the Procurement Act, the provisions of the Procurement Act which anticipate that regulations must be promulgated in order to be operationalised include the following provisions of Chapter 4:

26.1. Section 16(1) of the Procurement Act;

26.2. Section 16(3), which requires that the Minister prescribe the manner in which procuring institutions must record and report on any inability to comply with sections 17, 18 or 19 of the Procurement Act;

26.3. Sections 16(4) and (5), which require the Minister to prescribe “*thresholds*” and “*conditions*” for the purposes of

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<sup>19</sup> Id (our emphasis).

the operationalisation of sections 17 to 19 of the Procurement Act;

26.4. Section 17(2), which requires the Minister to “*prescribe targets for set-aside referred to in subsection (1)*” of section 17 of the Procurement Act;

26.5. Section 18(1), which requires the Minister to prescribe “*thresholds and conditions*” for the purpose of prequalification criteria;

26.6. Sections 19(1) and (5) of the Procurement Act, which require the Minister to prescribe criteria for the evaluation of bids in respect of which subcontracting is permitted;

26.7. Section 21 of the Procurement Act, which requires the Minister to prescribe conditions within which measures taken to advance sustainable development may be implemented; and

26.8. Section 22 of the Procurement Act, which requires the Minister to prescribe conditions within which measures taken

for beneficiation and innovation, advancing the creation of jobs, intensification of labour absorption and development of small enterprises within a particular geographical area may be implemented.

27. In addition to the Minister's own regulation-making responsibilities, section 20 of the Procurement Act requires the publication of various standards and thresholds by the "*Minister responsible for trade industry and competition*".

28. In regard to the "*regulations*" which the Procurement Act anticipates, the respondents have made the following relevant submissions, in their answering affidavits:<sup>20</sup>

28.1. The Procurement Act is yet to come into effect.

28.2. The date of the commencement of the Procurement Act will be proclaimed upon the finalisation of the regulations which are contemplated by Regulation 63 of the Procurement Act (**"the Procurement Regulations"**).

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<sup>20</sup> See, for example, the Respondents' AA to the City of Cape Town, at para 78.

28.3. The scheme of the Procurement Act is such that it cannot achieve its purpose in the absence of the Procurement Regulations. So much so that, as the respondents have submitted, explicitly, the Procurement Regulations are “*necessary for the effective implementation of the Procurement Act*”.<sup>21</sup> In other words, the respondents have averred that they understand the promulgation of the Procurement Regulations to be a necessary condition, which must be satisfied prior to the operationalisation of the Procurement Act, in order for there to be a realistic prospect that the objectives contained in the Procurement Act will be achieved.

28.4. Prior to the promulgation of the Procurement Regulations, a process facilitating the participation of the public will be facilitated:

*Following the inter-governmental consultation process  
(which is the process contemplated in section 63(2) of*

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<sup>21</sup> Respondents’ AA to the Premier, at para 62.

*the Procurement Act), the draft regulations will be published for comment as contemplated in section 63(3). They will then be submitted to Parliament for parliamentary scrutiny, in accordance with the requirements of section 63(4) of the Procurement Act.*  
(Emphasis added).

29. The Premier, correctly, makes no attempt to dispute to dispute that any of these submissions. It follows that the following is common cause between the parties:

29.1. It is undisputed that the Procurement Regulations are a necessary and component part of the Procurement Regulations, without which the Procurement Act cannot properly function.

29.2. Appropriate public participation will be facilitated, in conformity with the requirements of the Constitution, prior to the promulgation of the Procurement Regulations.

30. For these reasons, the Premier's constitutional challenge on the basis of an alleged absence of adequate facilitation of public

participation with respect to the Procurement Act is premature, and the Premier's constitutional challenge falls to be dismissed on this basis alone.

***Public participation in respect of Regulations promulgated pursuant to the PPPFA***

31. Our submissions concerning the regulations promulgated in 2017, pursuant to the provisions of the PPPFA ("**the 2017 PPPFA Regulations**") are advanced out of caution, and in the alternative to our submissions above in relation to the Procurement Regulations, in case the Court differs with our submissions in relation to the Procurement Regulations.
  
32. The respondents have submitted that the 2017 PPPFA Regulations are conceptually similar to the content of Chapter 4 of the Procurement Act,<sup>22</sup> in that the 2017 PPPFA Regulations made provision for –

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<sup>22</sup> Respondents' AA to the Premier, at para 9.2.2.

- 32.1. pre-qualification criteria to advance certain designated groups (regulation 4);
- 32.2. mandatory sub-contracting (regulation 9); and
- 32.3. local production and content (regulation 8).
33. The Premier has not denied the respondents' submissions in this regard. Yet, the Premier contends that the 2017 PPPFA Regulations "*are legally irrelevant*",<sup>23</sup> "*[t]he more so since the regulations in question were held by this Court to be ultra vires their enabling Act*".<sup>24</sup>
34. The fact that the "*regulations in question were held by this Court to be ultra vires*", in submission, has been sufficiently addressed in the respondents' answering affidavit to the Premier.<sup>25</sup> We submit that it takes the Premier's constitutional challenge no further.

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<sup>23</sup> Premier's HoA at para 91.

<sup>24</sup> Ibid.

<sup>25</sup> Respondent's AA to the Premier, at para 9.2.3.

35. We submit that the Premier’s remaining contentions in relation to the 2017 PPPFA Regulations are without merit, for the following reasons:

35.1. The Premier does not deny that the 2017 PPPFA Regulations were conceptually similar to the content of Chapter 4 of the Regulations, nor does it deny that a public-participation process was followed in relation to the 2017 PPPFA Regulations, prior to the promulgation of the 2017 PPPFA Regulations.

35.2. Upon promulgation of the 2017 PPPFA Regulations, they became “*national legislation*”, as defined by the Constitution.<sup>26</sup> On a proper interpretation of the Constitution, they were subsumed with the provisions of the PPPFA themselves, at the time of their promulgation.

35.3. In circumstances where (a) the Premier does not deny that the 2017 PPPFA Regulations were conceptually similar to Chapter 4 of the Procurement Act; and (b) cannot deny that

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<sup>26</sup> Section 239 of the Constitution.

the 2017 PPPFA Regulations constituted “*national legislation*” in terms of the Constitution, it does not avail the Premier, in respect of its argument that there was insufficient public participation, to contend that public-participation processes followed in respect of the 2017 PPPFA Regulations are “*legally irrelevant*”.

36. It follows from our submissions above that the Premier’s contention that the 2017 PPPFA Regulations are “*legally irrelevant*” is incorrect, and we submit that it falls to be rejected.

## **CONCLUSION**

37. We submit that the challenges advanced by the Premier and amaBhungane are not substantiated by the record of the public participation process. Parliament maintains that it facilitated a reasonable opportunity for members of the public to engage with the Procurement Bill and to influence its content.
38. Arising from the above, we submit that the application ought to be dismissed with costs, including the costs of three counsel.

**NGWAKO MAENETJE SC**

**MKHULULI STUBBS**

**NIKKI STEIN**

13 March 2026

## LIST OF AUTHORITIES

### Cases

1. *Cool Ideas 1186 v Hubbard and Another* 2014 (4) SA 474 (CC)
2. *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416 (CC)
3. *Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development* 2004 (6) SA 505 (CC)
4. *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC)
5. *Mary Patricia King and others v Attorneys Fidelity Fund Board of Control and another* 2006 (1) SA 474 (SCA)
6. *Merafong Demarcation Forum and others v President of the Republic of South Africa and others* 2008 (5) SA 171 (CC)
7. *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC)
8. *Mogale and others v Speaker of the National Assembly and others* 2023 (6) SA 58 (CC)
9. *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC)

## Articles

10. “*New Procurement Law aims to put money where it is most needed*”, Corruption Watch, 2 August 2024, available at: <https://www.corruptionwatch.org.za/new-public-procurement-law-aims-to-put-money-where-it-is-needed/> (accessed 13 March 2026).