

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT:

In the matter between:

THE CITY OF CAPE TOWN

Applicant

and

**THE SPEAKER OF THE NATIONAL
ASSEMBLY**

First Respondent

**THE CHAIRPERSON OF THE
NATIONAL COUNCIL OF PROVINCES**

Second Respondent

THE MINISTER OF FINANCE

Third Respondent

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

Fourth Respondent

**THE SPEAKER OF THE EASTERN
CAPE PROVINCIAL LEGISLATURE**

Fifth Respondent

**THE SPEAKER OF THE FREE STATE
PROVINCIAL LEGISLATURE**

Sixth Respondent

**THE SPEAKER OF THE GAUTENG
PROVINCIAL LEGISLATURE**

Seventh Respondent

**THE SPEAKER OF THE KWAZULU –
NATAL PROVINCIAL LEGISLATURE**

Eighth Respondent

**THE SPEAKER OF THE LIMPOPO
PROVINCIAL LEGISLATURE**

Ninth Respondent

**THE SPEAKER OF THE
MPUMALANGA PROVINCIAL
LEGISLATURE**

Tenth Respondent

**THE SPEAKER OF THE NORTHERN
CAPE PROVINCIAL LEGISLATURE**

Eleventh Respondent

**THE SPEAKER OF THE NORTH WEST
PROVINCIAL LEGISLATURE**

Twelfth Respondent

**THE SPEAKER OF THE WESTERN
CAPE PROVINCIAL LEGISLATURE**

Thirteenth Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the City of Cape Town applies to this Court in terms of ss 167(4)(e) and 167(6)(a) of the Constitution of the Republic of South Africa, 1996, on a date to be determined by the Registrar of this Court, for Orders in the following terms:

1. Declaring that Parliament and the Provincial Legislatures failed to comply with their constitutional obligations to act reasonably in carrying out their duties to facilitate public involvement in the legislative process as required by ss 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution, before passing the Public Procurement Act 28 of 2024.
2. Declaring that as a result, the Public Procurement Act 28 of 2024 was adopted in a manner that is inconsistent with the Constitution and is invalid.
3. Directing that the costs of this application be paid by those respondents who oppose the relief sought, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.
4. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the affidavit of **LUNGELO MBANDAZAYO** together with the annexures thereto will be used in support of the relief sought in this notice of motion.

TAKE NOTICE FURTHER that the applicant has appointed the offices of **CLUVER MARKOTTER ATTORNEYS c/o SWANEPOEL ATTORNEYS, 5TH FLOOR, SCHREINER CHAMBERS, 94 PRITCHARD STREET, JOHANNESBURG** as its attorneys of record at which it will accept notice and service of all processes herein.



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

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

Dated at **STELLENBOSCH** on this day the **27TH** of **MAY 2025**.

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THE SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Fifth Respondent
THE SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE	Sixth Respondent
THE SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Seventh Respondent
THE SPEAKER OF THE KWAZULU – NATAL PROVINCIAL LEGISLATURE	Eighth Respondent
THE SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE	Ninth Respondent
THE SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Tenth Respondent
THE SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE	Eleventh Respondent
THE SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE	Twelfth Respondent
THE SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE	Thirteenth Respondent

FOUNDING AFFIDAVIT

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I, the undersigned,

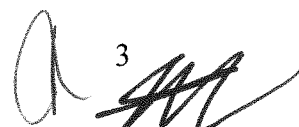
LUNGELO MBANDAZAYO

state under oath that:

1. I am the Municipal Manager of the City of Cape Town (**the City**) with my offices at the Civic Centre, 12 Hertzog Boulevard, Cape Town.
2. I am duly authorised to institute this application on behalf of the City and to depose to this affidavit on its behalf.
3. The facts set out in this affidavit fall within my personal knowledge, unless the context indicates otherwise. In instances where averments do not fall within my personal knowledge, I have relied on documentation which I believe to be true and correct.
4. Submissions of a legal nature are made on the advice of the City's legal representatives, which advice I believe to be correct.

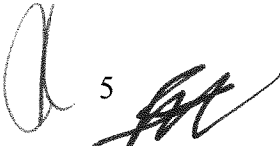
I. INTRODUCTION AND OVERVIEW

5. There is a single and fundamental issue that lies at the heart of this matter. It is that there was a woefully inadequate public participation process in the adoption of the Public Procurement Act 28 of 2024 (**the PPA** or **the Act**), as a result of which the Act was adopted in a manner that is inconsistent with the Constitution and invalid.

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6. The Act was passed by Parliament on 16 May 2024 and received the assent of the President on 18 July 2024. The Act has not yet come into operation because a commencement date is still to be proclaimed.
7. Regrettably, this is a matter in which Parliament has failed to meet the well-established threshold for public participation that the Constitution requires of it. This Court has held: (a) Parliament has a constitutional duty to facilitate public participation; (b) public participation enables citizens to know about the issues, have an adequate say, and be capable of influencing the outcome; (c) public participation is a crucial part of participatory democracy and the 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; (d) while Parliament has a discretion to determine the manner in which to fulfil the obligation to facilitate public involvement, its process must be reasonable; (e) a Parliamentary process is unreasonable if the content of a public hearing could not possibly affect Parliament's deliberations on the legislation. This may occur if, for example, the hearing is not effectively or timeously advertised, if people are unable to attend the hearing, or if the submissions made at the hearing are not transmitted or accurately transmitted to the legislature, then the hearing is not capable of influencing Parliament's deliberations.
8. The PPA is unconstitutional because it was enacted without a reasonable opportunity for public participation. Members of the public – particularly in the Western Cape – were not afforded a meaningful opportunity to participate in the law – making process. Moreover, Parliament as well as the Provincial Legislatures, did not adopt measures to ensure that members of the public could meaningfully participate in the law – making process.

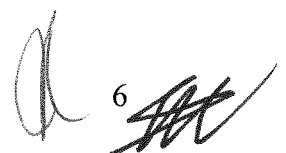
9. This is a grave shortcoming in the process followed because it is non-compliant with the procedural requirements for a lawful legislative process. This deficiency has particularly serious and far reaching consequences given the implications of the PPA for the constitutional imperatives in section 217 of the Constitution.
10. The serious inadequacies of the legislative process are apparent from both a consideration of the process followed and content of the PPA itself.
11. The haste with which the PPA was adopted was unnecessary and unconstitutional, with grave consequences for the public at large and the fiscus. More particularly:
 - 11.1. There was – and is – no lacuna in our public procurement law. The system for public procurement in South Africa would not have been dislocated had the Act not been passed.
 - 11.2. Procurement legislation is fundamentally important for several constitutional objectives. Every organ of state, service provider who tenders for State work, and every member of the public have an interest in the adoption of procurement legislation that complies with the public participation demands of the Constitution.
 - 11.3. Public procurement affects the delivery of services throughout the country, and in turn, the realisation of many socio – economic rights. It is also fundamental to the rule of law. The Courts have routinely recognised that the abuse of procurement systems fosters corruption and undermines the Constitution.

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12. The process for public participation in both the National Assembly (**NA**) and the National Council of Provinces (**NCOP**) was unreasonable and therefore unconstitutional for reasons I address in this affidavit.
13. The remainder of this affidavit is structured as follows:
 - 13.1. **PART II** identifies the details of the parties to the application.
 - 13.2. **PART III** deals with standing, jurisdiction and direct access.
 - 13.3. **PART IV** sets out the background to the application. It is divided into two sub – parts: (a) the NA process; (b) the NCOP process.
 - 13.4. **PART V** explains why the process for public participation does not satisfy the reasonableness standard.
 - 13.5. **PART VI** concludes with remedy.

II. THE PARTIES

14. The applicant is the **CITY OF CAPE TOWN** a metropolitan municipality established in terms of s 151 of the Constitution read with the Local Government: Municipal Structures Act of 1998. The City's principal place of business is at the Municipal Manager's office, the Podium Block, Civic Centre, 12 Hertzog Boulevard, Cape Town.
15. The first respondent is the **SPEAKER OF THE NATIONAL ASSEMBLY** elected in terms of s 52 of the Constitution. The Speaker is cited in her official capacity as the senior

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parliamentary office – bearer responsible for the business of the NA, including the passage of legislation such as the PPA by the NA.

16. The second respondent is the **CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES** elected in terms of s 64 of the Constitution. The Chairperson is cited in an official capacity as the senior parliamentary office bearer responsible for NCOP business, including the passage of the PPA by the NCOP.
17. The third respondent is the **MINISTER OF FINANCE (the Minister)**. The Minister is the executive functionary responsible for the PPA. The Minister is also the executive functionary responsible for National Treasury.
18. The fourth respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**. The President assented to the PPA on 18 July 2024. He is cited in this application to the extent that he has an interest herein. No relief is sought against him.
19. The remaining respondents – the fifth to thirteenth respondents are the **SPEAKERS OF THE NINE PROVINCIAL LEGISLATURES**. Each of the Speakers signed the final mandates for the Provinces which informed the proceedings before the NCOP and the adoption of the PPA.

III. STANDING, JURISDICTION AND DIRECT ACCESS

STANDING

20. The City brings this application in its own interest and in the public interest in terms of s 38(1)(d) of the Constitution.

Handwritten signature and initials, possibly 'A' and 'AA', with a small number '7' next to the signature.

21. The City has a direct and substantial interest in the constitutionality of the PPA. It procures a wide range of goods and services on a regular basis and has an obligation to do so in accordance with s 217 of the Constitution and the applicable statutory and regulatory framework.
22. The residents of the City of Cape Town also have an interest in the constitutionality of the PPA. The City procures goods and services for the benefit of its residents. The delivery of services by the City, through the goods and services that it procures, are essential to the realisation of the rights of its residents in the Bill of Rights. The Constitution places an obligation on the City to respect, protect, promote and fulfil the rights in the Bill of Rights. Procurement is an essential component of the City's ability to discharge its obligations under the Constitution.
23. I am advised that this Court has held that it may not be in the interests of justice to consider a public participation challenge where the applicant has not taken steps to participate in the process for public participation, but instead opportunistically seeks to have the legislation declared invalid on public participation grounds. This Court has also found that it may not be in the interests of justice to consider a public participation challenge where an applicant has unreasonably delayed in bringing the challenge.
24. The City submits that neither of these considerations apply in this matter:
- 24.1. The City participated throughout the proceedings leading up to the adoption of the PPA.
- 24.2. On 16 October 2023, the City submitted written comments on each of the clauses of the Bill, as then published to the NA's Chairperson of the Portfolio

A handwritten signature in black ink, followed by the number '8' and another handwritten mark.

Committee on Finance (FA1). These submissions raised the City's concerns that the Bill gave considerable subordinate law – making power to the Minister; increased the administrative burdens on municipalities; and hindered the ability of municipalities to effectively deliver services to their residents.

- 24.3. On 12 February 2024, the City also addressed written comments on the Bill to the NCOP's Select Committee on Finance (FA2). In this engagement too, the City responded on a clause – by – clause basis. Importantly, the City could only comment on the new and extensive provisions governing preferential procurement for the first time in its submissions to the NCOP. The new clauses concerning preferential procurement did not exist in the Bill that served before the NA during its process for public participation.
- 24.4. After the Bill was passed on 16 May 2024, the City wrote to the President on 20 May 2024 (FA3) and requested him to exercise his power under s 79(1) of the Constitution and refer the Bill back to the NA in light of the constitutional concerns highlighted by the City. The President did not respond to this request.
- 24.5. The President signed the PPA on 18 July 2024. Just over a week later, on 30 July 2024, the City wrote to the President again (FA4). This time it requested the President to meet with the City before making a decision to proclaim a date for the commencement of the PPA.
- 24.6. The President did not respond to this request either. Instead, he referred the request to the Minister of Finance who responded to the City on 16 September 2024 (FA5). The Minister indicated that the City's constitutional concerns were

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addressed in the legislative process and requested the City to fully participate in the implementation of the Act including the development of regulations.

25. There can therefore be no doubt that the City participated at every stage leading up to the adoption of the PPA.
26. The City has also not unreasonably delayed in bringing this challenge, and it has brought the challenge at the first available opportunity. Although the City was aware that the public participation process in the WC was defective at an early stage, it was required to obtain information concerning the public participation process in the other provinces before it could bring this application. This is because this Court has recognised that a challenge on public participation grounds requires it to take a holistic view of the entire process to determine whether the public had a reasonable opportunity to participate in the legislative process.
27. The records of most of the provincial legislatures were not readily available and enquiries were made to obtain the information about their deliberations and public participation processes.
28. There can be no suggestion that the respondents suffer any prejudice arising from the period within which the City brings this application:
 - 28.1. A date for the commencement of the PPA has not yet been proclaimed. The Act has not been implemented by organs of state, and a challenge would therefore not result in any disturbance arising from the implementation of the Act.

28.2. It is also unlikely that the Act will be implemented soon. Significant portions of the Act are only operational through the regulations made by the Minister. The Minister has not yet published draft regulations for public comment, and it is also thus unlikely that such regulations will come into effect soon.

28.3. Given the relatively short space of time involved, the respondents do not suffer any prejudice arising from missing or lost documents that informed the public participation process. They should still be able to obtain all of the necessary documents concerning the public participation process in the NA, NCOP and Provincial Legislatures.

29. Accordingly, it is submitted that the City has standing to bring this application both in its own interest and in the public interest and that the interests of justice warrant this Court determining the application.

EXCLUSIVE JURISDICTION

30. Section 167(4)(e) of the Constitution gives this Court the exclusive jurisdiction to determine whether Parliament has failed to fulfil a constitutional obligation.

31. The obligation that the legislatures failed to fulfil in this case arises from ss 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution which requires the NA, the NCOP and the Provincial Legislatures to facilitate public involvement in their legislative processes.

32. As stated, this Court has held that public involvement means a reasonable opportunity for members of the public to influence the law – making process. The failure to fulfil this obligation triggers this Court’s exclusive jurisdiction under s 167(4)(e).

33. The City's challenge is based squarely on the failure to facilitate public involvement in a reasonable manner.
34. There is, however, one issue which the City recognises may not fall within the exclusive jurisdiction of this Court. It relates to the final mandates of the provinces in terms of the Mandating Procedures of Provinces Act 52 of 2008 (**Mandating Act**). In respect of this challenge, the City submits that to the extent that it does not fall within the exclusive jurisdiction of this Court, it is nevertheless in the interests of justice for this Court to grant it direct access on this narrow issue, in terms of s 167(6)(a) of the Constitution read together with Rule 18 of this Court's Rules.

DIRECT ACCESS

35. I make clear that the City's primary submission is that the issue of the final mandates emanates from an obligation in the Constitution. Section 72(1)(a) of the Constitution requires that the NCOP must facilitate public involvement in the legislative and other processes of the Council and its committees. Section 65 of the Constitution provides that an Act of Parliament must be enacted to provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf. As such, the failure of the provinces to comply with the Mandating Act is a failure to fulfil an obligation contained in the Constitution.
36. In the event that this Court does not find that there is merit to the City's primary argument, then the City seeks direct access on the issue of final mandates. This Court has held that it will only grant direct access in exceptional circumstances and where the interests of justice favour it. Relevant to this inquiry is, *inter alia*, whether an applicant enjoys strong prospects of success in the matter; the nature and importance of the

dispute; the desirability of obtaining judgments from lower courts on the issue and the time and costs that may be saved in approaching this Court directly.

37. The City's mandate challenge arises from the rushed legislative proceedings and the failure to afford the public a reasonable opportunity to participate in the law – making process. Four of the final mandates of the provincial legislatures were signed on the very same day that the NCOP met to receive the final mandates. The City submits that this is a direct consequence of a rushed legislative process.
38. Only two provinces complied with the Mandate Act. Both KZN and North West deliberated on the final mandates before submitting their mandates to the NCOP. The remaining seven provinces did not – their Speakers have indicated previously that the provincial legislatures had deliberated on certain days, when the evidence indicates that in fact, no such deliberation took place.
39. It would not be in the interests of justice for the City to litigate the mandate challenge separately from these proceedings. The mandate issue is factually connected to the allegations made by the City concerning the inadequate public participation process. The issue is narrow and does not involve serious disputes of fact. It does not involve a complex question of law – s 6 of the Mandate Act imposes a clear obligation on “*provincial legislatures [to] confer authority on its provincial delegation to cast a vote...*”. Final mandates are conferred by provincial legislatures after deliberation – they are not conferred by Speakers, nor can they validly exist outside of a prior deliberation process.



40. It would result in the City incurring unnecessary costs and expending time litigating on a narrow issue that arises from the context of a challenge that only this Court may adjudicate – the public participation challenge.
41. For these reasons, the City submits that the interests of justice favour this Court granting direct access on the narrow issue of the mandate challenge in the event that it does not fall within the purview of this Court’s exclusive jurisdiction.

IV. THE BACKGROUND

42. Before addressing what factually occurred in this matter, I set out the legislative process that is followed:
- 42.1. The starting point is that a Bill may only be introduced in the NA if certain requirements have been met (NA Rule 276). One such requirement is that prior notice of the Bill’s introduction must be given in the Government Gazette. That notice must contain “*an invitation to interested persons and institutions to submit written representations on the draft legislation to the Speaker within a specified period*” (NA Rule 276 (1)(b) read with NA Rule 276 (4)).
- 42.2. A Cabinet Member or Deputy Minister or NA member or Committee introduces a Bill by submitting to the Speaker a copy of the Bill, an explanatory summary (in certain instances) and a supporting memorandum (NA Rule 279).
- 42.3. A First Reading of the Bill occurs in the NA which consists of an introduction of the Bill followed by a debate on the principles of the Bill as contained in its long title and as may be elaborated on in the supporting memorandum (NA Rule

282 (2)). The First Reading is conducted in accordance with NA Rule 285. Importantly, at the conclusion of the First Reading debate on the Bill, no decision on the Bill is taken by the NA but the Bill is regarded as having been read a first time.

42.4. If the Bill has been published for public comment, the Committee to which it is referred must give interested persons and institutions an opportunity to comment on the Bill. The process in the Committee is regulated by NA Rule 286. More particularly:

42.4.1. After deliberation by the Committee, it must consider a motion of desirability on the subject matter of the Bill (NA Rule 286 (4)(i)).

42.4.2. If the motion of desirability is adopted, the Committee must proceed to deliberate on the details of the legislation (NA Rule 286 (4)(j)).

42.4.3. The Committee may recommend approval or rejection of the Bill or an amended/redrafted Bill (NA Rule 286 (4)(k)).

42.4.4. The Committee must report to the NA in accordance with Rule 288 (NA Rule 286 (4)(l)).

42.5. Rule 286(6) provides that in the process of inquiring into a Bill, the Committee must, where applicable, as far as possible apply the following separate formal stages:

42.5.1. Informal discussion on the principles and subject of the Bill, including: (a) a briefing by the department concerned and, in the

- case of a member's Bill, by the member concerned; and (b) a consideration of public comments that have been received.
- 42.5.2. Adoption of a motion of desirability, relating to whether the principles of the Bill and the need for the Bill are accepted.
- 42.5.3. Invitation for further public comment and submissions on the substance of the Bill, followed by the hearing and examination of such or other oral submissions if deemed necessary.
- 42.5.4. Deliberation by members, taking into consideration proposed amendments and comments and proposals received and evidence presented.
- 42.5.5. Formal consideration of the Bill, clause by clause, including amendments as formally proposed.
- 42.5.6. Consideration and adoption of the Committee's report and adoption of the final version of the Bill as it is to be presented to the Assembly.
- 42.6. The Committee must table the following in the NA: (a) its report; (b) the Bill as agreed to in its final amended or redrafted form and as adopted by the Committee; and (c) a supporting memorandum. (NA Rule 288).
- 42.7. The debate on the Second Reading of the Bill must be conducted on the subject of the Bill (NA Rule 290 (3)). Subject to certain exceptions (which do not find application in this matter), the NA passes a Bill if it approves the Second

Reading of the Bill in accordance with sections 53(1)(a) and (c) of the Constitution. (NA Rule 290 (5)).

- 42.8. The process before the NCOP is as follows:
- 42.8.1. Once the Bill has been adopted by the NA, it is referred to the NCOP for concurrence.
 - 42.8.2. The Chairperson of the NCOP refers the Bill to the relevant Select Committee and the Speakers of the Provincial Legislatures.
 - 42.8.3. The Provincial Legislatures refer the Bill to the relevant Committee for consideration and conferral of a negotiating mandate.
 - 42.8.4. This is followed by public participation and the Committee adopts the report and confers a negotiating mandate to the Select Committee.
 - 42.8.5. The Select Committee considers the negotiating mandate and sends the minutes to the Provincial Legislature Committee for final mandates.
 - 42.8.6. The Provincial Legislature Committee reports to the House for conferral of the final mandate.
 - 42.8.7. The House confers the final mandate on the delegation to the NCOP.

- 42.8.8. The NCOP plenary considers and adopts the Select Committee report and the Bill.
- 42.8.9. The Bill is sent to the President for assent and signature.
43. The Practical Guide for Members of Parliament and Provincial Legislatures, which I attach and refer to in more detail elsewhere provides as follows in respect of public involvement guidelines for Bills affecting Provinces:
- 43.1. All Bills received by the NCOP must be widely advertised either on print or electronic or social media or in all those platforms.
- 43.2. Bills' summaries must be compiled in at least three languages spoken in a particular province.
- 43.3. The NCOP must determine whether a Bill requires public hearings. If so, the advertisement must indicate that public hearings will take place in the provinces.
- 43.4. Permanent delegates who are members of the Select Committee to which a Bill has been referred must attend the public hearings.
- 43.5. All negotiating mandates must be accompanied by reports detailing comments from the public.
- 43.6. Each proposed amendment by a provincial legislature must be considered in detail and decided on.

- 43.7. A Select Committee must ensure that all provincial legislatures submit negotiating mandates and final mandates.
- 43.8. All final mandates must be considered in detail and decided on.
- 43.9. The Chairperson of the NCOP must consider and grant all the requests for the extension of a six week cycle(Rule240(3)).

THE NA PROCESS

The Gazetted Notice

44. The NA process commenced on 22 May 2023 with the gazetting of the “*Notice of Introduction in the National Assembly of the Public Procurement Bill and Publication of Explanatory Summary of the Bill*” (FA6). Rule 276 of the NA’s Rules require that notice of a Bill be given in the Government Gazette before the Bill is introduced in the Assembly. The notice must contain an invitation to interested persons to comment on the Bill (Rule 276 (4)).
45. Notice 3442 of 22 May 2023–
- 45.1. indicates that it is given in terms of Rule 276(1)(b) and (c) of the Rules of the Assembly;
- 45.2. lists the matters that the Bill deals with; and
- 45.3. informs the public that a copy of the Bill may be obtained from Treasury’s website.

46. The notice does not comply with the requirement of Rule 276(4) which requires it to contain an invitation to the public to submit comments on the Bill.

The initial meeting before the Finance Standing Committee

47. The next day, 23 May 2023, the NA's Finance Standing Committee met. The meeting was an unusual one because there was no final Bill before the Committee. But members only discovered this fact when the officials of Treasury commenced their presentation. The meeting is publicly available on Parliament's YouTube page: https://www.youtube.com/live/OiwQYLUrJqk?si=NINBKkB_SfRwu32a

48. At the start of the presentation, Treasury indicated –

MR MOMONIAT (DDG TREASURY) [27:20]:

“Chair, let me start by saying, and just clarifying, the version of the Bill that you have – and that is why you only got it yesterday – is not going to be the version that will be tabled. When this Bill went to Cabinet, there were changes made. So, we had to go back to the State Law Advisor. And so, though Cabinet has approved the Bill, it is subject to the certification process and there will be changes made to satisfy the State Law Advisor and thereafter the Bill will be tabled. Am I right -- just to the team.? So, just to be clear chair, this is still a draft and it is not the actual Bill that will be introduced but it is largely close to what the Bill is, it's not going to change materially...”

49. After Treasury concluded its presentation, members of the Committee were afforded an opportunity to raise questions. Various members, from different political parties, questioned the purpose of the meeting in light of the fact that it did not have a final Bill before it as appears from what I set out below:

MR RYDER (DA) [1:37:44]:

“This appears to be premature – this presentation. Two slides 15 and 16 refer to the fact that, detail the processes of finalising the Bill before it came to Parliament and then we get told its not been finalised. So, I wonder if that's

normal – I don't think it is to bring a draft half – baked Bill to Parliament. I'm not sure that's normal at all."

MR SHIVAMBU (EFF) [2:04:08]:

"Chair, we are very busy in Parliament to be entertaining informal talk about legislation. Can we please postpone the meeting and only meet once the State Law Advisor has come with the proper legislation that we must deal with. Why should we sit here and deal with something that is not formal? We do not know what will be the final product of this draft Bill. How can you waste Parliament resources for an informal talk? Can we please postpone once we have got the law and then we will only discuss once the law has been presented to us. This informal talk is a waste of time; it means nothing."

MS MAHLANGU (ANC) [2:09:40]:



"Thank you Honourable Chairperson. Good morning Honourable Members. Chairperson, as and when I am listening to the inputs from members, I am asking myself 'are we taken seriously by Treasury' because the Acting DG is saying this is an informal discussion. Which means, to me, the impression I got is that we have the luxury of time. We don't have the luxury of time set aside to deal with an informal presentation... But also Momoniat, I think your presentation and your utterances are sending some signals. Were you forced or pressured to come and make a presentation to us for the sake of it? Or, maybe, as other members have asked, who requested this informal meeting because as members we were not informed we were coming to an informal meeting. We thought we were coming to a meeting where you are prepared and have processed this Bill, and ready to present to Parliament..."

50. In an attempt to address these questions raised by members of the committee, the Deputy Chairperson of the Committee, Mr Maswanganyi, explained:

MR MASWABGANI (ANC) [2:16:00]

"As to whether the Bill is formal or informal, is something else. Let me also indicate, not all the Bills are presented by the Ministers. There were many Bills -- the Minister tables the Bill in Parliament – but most of the presentations have been done by officials. And I think all of us are quite aware of that..."

I still feel very strong that this is a priority Bill. And the sooner they come back with the signed off or the certificated Bill, the better. Because we still need this Bill and process it before Parliament rises for elections next year, Chairperson."

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51. The Committee meeting of 23 May 2023 was then brought to a close on account of the fact that there was no formal Bill before the Committee.

The Tabling of the Bill before the NA

52. On 30 June 2023, the Minister of Finance tabled the Public Procurement Bill in the National Assembly (ATC Report **FA7**). The Bill was published in the Government Gazette on the same day and tagged as B 18 – 2023 (**FA8**).

53. Appended to the Bill was a “*Memorandum of Objects of the Public Procurement Bill, 2023*” which –

53.1. explained the content of the various chapters of the Bill, including the Chapters dealing with the establishment of the Public Procurement Office and the Public Procurement Tribunal;

53.2. indicated that the Bill is a s 76 Bill inasmuch as the provinces will be affected by it; and,

53.3. stated that “*no substantial financial implications for the State are envisaged*”.

54. It was on this version of the Bill that the NA invited public participation.

The NA’s call for public participation and the process attendant thereon

55. The NA’s call for public participation (**FA9**) went out on 18 August 2023.

56. On 5 September 2023 the first meeting was held by the Finance Committee. A summary of this meeting (as prepared by the Parliamentary Monitoring Group (**PMG**) appears from **FA9A**.

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57. The deadline for written submissions was 11 September 2023, and the hearings commenced the following day on 12 September 2023 and continued to 13 September 2023. I attach a summary of these hearings as **FA9B** and **FA9C** as obtained from the PMG website.
58. The hearings did not include a general right to participate. Only those who had made a specific request to participate were entitled to do so. The hearings were conducted on a virtual platform (Zoom). Only those with access to the internet and the Zoom application could therefore participate.
59. The call for written comment and the two days of public hearings were the only opportunity for public participation on Bill B 18 – 2023.
60. Over the two days of public hearings, the Committee received the submissions of 31 individuals and organisations ranging from NGOs, businesses, government departments, and labour unions. The Bill clearly attracted strong public interest.
61. Attendant on the public hearings, National Treasury responded to the public's submissions and stakeholder input. The input from Treasury was presented to the Finance Committee on 17 November 2023. The NA's Standing Committee on Finance were provided with five documents from Treasury:
- 61.1. First, a PowerPoint presentation dealing with the response to submissions **(FA10)**.
- 61.2. Second, a report by Treasury on the public's comments **(FA11)**.
- 61.3. Third, a list of the stakeholders.

- 61.4. Fourth, a spreadsheet containing the responses to the comments received.
- 61.5. Fifth, a document titled “Annexure A” which consists of entirely new provisions regulating preferential procurement (FA12).
62. The list of stakeholders and the comments are not annexed because of their length. The importance of the comments; their impact; and the consideration given to them by Treasury is evident from the meeting report of 17 November 2023 (FA13) as prepared by the PMG.
63. Moreover, Treasury prepared a Report on the Public Comments Submitted to Parliament in respect of B18-23, which I have attached as FA11. It states, *inter alia*:
- “3.1. A total of 112 Stakeholders submitted approximately a total of 2200 excel rows of comments classified from chapter 1 to 7, including general comments. Due to time constraints, we could not complete responding to all comments received, however, we were able to consider the principal concerns including chapter 4 and provided a proposal for the redrafting of chapter 4, which is attached to this report as “Annexure A”. The comments that the review team were able to consider, were responded to on the comments matrix, which is also attached to this report as “Annexure B”. 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.”*
64. Treasury’s presentation indicates that it considered the public’s submissions over two months between 14 September 2023 and 16 November 2023. More than 112 stakeholders commented on the Bill, with more than 2200 lines of commentary.
65. Treasury was unable to consider and respond to all of the comments it received. The PMG report of the meeting of 17 November 2023, notes that only 20% of comments

were responded to, and Mr Willie Mathebula, the Chief Director of Supply Chain Management Policy, National Treasury indicated that he --

“Welcomed the comments from stakeholders and members. Due to time constraints, it was not possible to thoroughly respond to all submissions. He sought guidance from the Committee on how to complete the responses to the remaining submissions. He called on the stakeholders to consult the comment matrix before following up with National Treasury. He undertook to relook the gaps in the legislation as pointed out by the stakeholder and the committee”.

66. The public hearing of 17 November 2023, where Treasury responded to public comments, was itself unreasonable. Stakeholders were favoured with a new chapter concerning preferential procurement for the very first time. They expressed their concern that there was insufficient time to consider these extensive changes, and that the two minutes given to each stakeholder to respond to Treasury was simply insufficient to meaningfully contribute to the Bill.

67. The PMG report of the meeting records the following:

“Ms Elizabeth Jansen van Rensburg, representing the Mining Equipment Manufacturers of South Africa (MEMSA), said due to time constraints MEMSA might follow up with a written response. The redraft of Chapter 4 is a key concern.



.....

Adv Ntshiluba said she needed more time to dissect the information provided to give an educated opinion.

.....

Mr Simon Eppel, the COSATU representative, said the time was not enough to make meaningful comments. Written comments will be provided in the following week. He noted that only 20% of stakeholder comments had been considered to date which raised concerns about the integrity of the process and the extent to which stakeholder participation is being considered.

.....

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Prof Ron Grace, from the National Research Foundation (NRF), said National Treasury had not received their submission because it was excluded from what had been provided. The few hours that were granted to comment on the responses from National Treasury were highly inadequate.

.....

Ms Caroline James, representing Amabhungane, echoed previous comments about having only two minutes to respond and receiving the documents late. It places difficulty on stakeholders to respond meaningfully. She asked for an opportunity to submit a written submission and analyse the feedback from National Treasury to examine how the information had been incorporated. She appreciated that Amabhungane's submission had been incorporated in National Treasury's response document but comments from other stakeholders had not been considered. She was concerned that only about 20% of submissions had been considered because it raised concerns about whether the process had been meaningfully followed. The proposal of having the information set up in regulation mode had been partly considered but public participation in drafting regulations, as set out in various transparency measures, does not seem to be enshrined in the Bill. The recognition of transparency around the drafting of regulations is welcomed but it should be formally included in the Bill. It is concerning that the weaknesses highlighted in the Bill had been further weakened, e.g. the exclusion of the automatically excluded people and other measures to ensure that the system is strongly able to respond to corruption.

.....

Mr Gabriel Crouse, representing the South African Institute of Race Relations (SAIRR), requested an opportunity to make a written submission given the time constraints. The connection between the existing procurement framework and state capture as articulated by the Zondo Commission appeared not to have been recognised.

.....

Ms Nicqui Galaktiou, from the International Women's Forum of South Africa (IWFSA), supported the other organisations in terms of the time afforded to consider the documents and the need to make further written comments on what National Treasury had provided.

.....

Prof Geo Quinot, on behalf of the APLU, echoed the previous comments that the time given since National Treasury provided the responses was inadequate specifically with reference to the Constitutional Court judgment on public participation in legislative processes. Parliament should give due consideration to the parameters within which consultation must take place. He urged the Committee to provide further opportunity to consider the feedback. The APLU

was extremely concerned that, based on the documents provided, selective attention was paid to a small number of submissions. National Treasury did not comment on the APLU submission which was raising concerns that it had not been considered. Far too much is being left to regulation. He urged the Committee and Parliament to seriously consider the role of the executive in the law-making process.

68. The Chairperson of the Committee proposed that a special meeting with National Treasury take place on 24 November 2023, in order to deal with the outstanding issues. On 24 November 2023 the Finance Committee met for a briefing with Treasury, during which other roleplayers were in attendance. A summary of this meeting from the PMG website is attached as **FA13A**. At this meeting:

- 68.1. 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. Thereafter the discussion on the approach to be followed can proceed.”

- 68.2. Mr Mathebula of Treasury 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 and 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 of the matter. Subsequent to last week’s meeting, additional written comments were received which further increased the number of submissions”

69. A further report was prepared by National Treasury titled “Version 2 of the Report on Public Comments Submitted to Parliament: Public Procurement Bill [B18-20203] (**FA13B**). Importantly, the substantive differences between the earlier report from

Treasury (FA11) and the updated report from Treasury (FA13B) were limited.

According to the updated report from Treasury:

“3.1. 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 complete responding 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.

....

Please see the proposed new chapter 4, which determines a central framework within which the procuring institutions must implement their respective procurement policies. The revised chapter 4 is the central regulatory framework envisaged by section 217(3), marked as “Annexure A” to this report.”

70. It was self – evidently the case that the public interest in the matter could not be accommodated in the limited period for the processing of the legislation. At the end of the meeting, the Chairperson indicated that the processing of the Bill would continue 4 days later on 28 and 29 November 2023. This is despite the fact that not all of the public’s comments were considered and responded to.
71. In particular, the comments of the City were not responded to at all. Its comments and proposals appear from line items 1009 – 1048 of the excel spreadsheet prepared by Treasury. Treasury’s response is recorded under the column “National Treasury

Response". It is blank in respect of each of the comments and proposals made by the City.

72. The excel spreadsheet is lengthy and best considered in electronic format. The spreadsheet may be downloaded under the "stakeholder comments submitted" tab of the Parliamentary Monitoring Group (PMG) website. The link containing the spreadsheet is : <https://pmg.org.za/committee-meeting/38083/>.



The Standing Committee's deliberations on the Bill

73. On 28 and 29 November 2023, the Standing Committee on Finance deliberated on the amendments to the Bill made by Treasury. The Committee did not have before it the public's comments and Treasury's (incomplete) responses thereto. And there was no deliberation over the contributions made by the public. At the end of the meeting on 29 November 2023, a majority of the Committee adopted the proposed amendments to the Bill.

74. On 1 December 2023, the Standing Committee on Finance convened again to consider a motion of desirability on the Bill. After deliberation, the motion of desirability was adopted by a majority vote. On 4 December 2023, the Committee adopted its report on the Bill and it was referred to the Assembly for a vote on 6 December 2023.

The NA's adoption of the Bill

75. At a plenary session on 6 December 2023, the NA adopted the Bill and transmitted it to the NCOP for its concurrence.

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THE NCOP AND PROVINCIAL LEGISLATURE' PROCESS***The Invitation for Public Comment***

76. On 30 January 2024, the NCOP's Select Committee on Finance sent out its invitation for public participation (**FA14**). The notice informed the public that they are required to send their written submissions by no later than Thursday 22 February 2024 and it indicated that *"those who want to make submissions at the public hearings on Friday 23 February 2024 should specifically request this. These hearings will be conducted by Zoom"*.
77. A week later, on 6 February 2024, National Treasury briefed the NCOP's Select Committee on Finance on the Bill. The PMG meeting report (**FA15**) reflects concerns raised by members on the timetable for the processing of the Bill and the period for public participation.
78. In relation to a specific question: *"what would be the public participation process, and when would they be able to address the provinces on this?"*, the Chairperson of the Select Committee indicated that the Committee would have to negotiate with the NA on this last question and that he was dealing with the Speaker.
79. A concern was also raised that the Bill was not translated into isiZulu. Treasury accepted that there was no such translation, and the Chairperson recognised that all the Provinces are entitled to have the Bill translated. He, however, pointed out that there were funding constraints on having the Bill translated and emphasised the importance of public participation at a provincial level to obtain the views of persons in rural areas on the Bill.

80. The Select Committee on Finance briefed 8 of the 9 provinces on the Bill between 6 February 2024 and 8 March 2024. It is not apparent from the reports of Treasury that the Committee briefed KZN on the Bill.

81. The following table indicates (a) when the provincial legislatures were briefed by the Select Committee; (b) when the provinces gave notice of public participation; (c) the deadline for written submissions; and (c) the dates of the public participation hearings:

PROVINCE	TREASURY BRIEFING	PROVINCE'S NOTICE	SUBMISSION DEADLINE	HEARING DATES
EC	20 February 2024	15 February 2024	8 March 2024	27 February – 29 March 2024
FS	9 February 2024	None	None	15, 21, 22 February 2024
GP	29 February 2024	8 February 2024	22 February 2024	19 February 2024
KZN	None	6 February 2024	8 March 2024	15 and 22 February, 1 March 2024
LP	8 March 2024	11 March 2024	Not stated in notice	15 March 2024
MP	13 February 2024	None	7 March 2024	22, 29 February, 1 March 2024
NC	27 February 2024	27 February 2024	5 March 2024	4 March 2024
NW	22 February 2024	4, 5 February 2024	Not stated in notice	6 March 2024
WC	21 February 2024	1 March 2024	8 March 2024	4 March 2024

82. The public participation hearing for the NCOP took place on a single day – 23 February 2024. Thirteen stakeholders including COSATU, SACTWU, the African Procurement Law Unit, the South African Institute of Chartered Accountants, and Corruption Watch made submissions on the Bill. The PMG meeting report (FA 16) highlights the concerns raised over the public participation of the Bill, particularly before the NA, and that there

were various requests for the Bill to go back to NEDLAC in light of the changes to Chapter 4.

83. On 14 March 2024, Treasury presented its response to the submissions on the Bill to the Select Committee. But the meeting had to be adjourned because Treasury experienced technical difficulties with their presentation. The PMG meeting report (FA17), also notes that members of the Committee received the presentation a mere two hours before the meeting could start, which hindered preparation for the meeting.
84. Treasury presented its response to the public's submissions and stakeholder engagements on 19 March 2024 and 17 April 2024. It is evident from both meeting reports (FA18 and FA19 respectively) that there remained concerns about the public participation process followed by Parliament.

The Negotiating Mandates

85. On 30 April 2024, the Committee convened to receive and consider the negotiating mandates of each of the provinces. All of the provinces except the WC supported the Bill. The negotiating mandates for each of the Provinces are annexed as **FA20.1** to **FA20.9**.

85.1. Eastern Cape:

- 85.1.1. The EC's negotiating mandate indicates that its Portfolio Committee on Finance deliberated and voted to support the Bill on 14 March 2024. The Portfolio Committee resolved to support the Bill before its public participation process was concluded. It had not yet considered the views of the residents of Mount Frere and Lusikisiki,

where public participation hearings were conducted on 28 and 29 March respectively. The negotiating mandates are meant to be informed by the public participation process. In this case, the EC ignored the views of its residents in Mount Frere and Lusikisiki.

85.1.2. The EC's negotiating mandate indicates that "*public notice and a call for written submissions on the Bill were made on Twitter and Facebook*". Both notices (FA21.1 and FA 21.2) were published on 15 February 2024.

85.2. Free State:

85.2.1. The FS's negotiating mandate does not contain any information concerning public participation. Neither the dates for public participation nor the call for public participation is contained in the report accompanying the mandate.

85.2.2. The FS Provincial Legislature has a Facebook page where it publicises the business of the legislature on a regular basis. There is no call for public participation on its Facebook page.

85.3. Gauteng:

85.3.1. The PMG's database indicates that GP's negotiating mandate served before the Select Committee on 30 April. However, there is no report on the PMG website concerning the GP's negotiating mandate.

85.3.2. The GP published their call for public participation on the provincial legislature's website on 8 February 2024 (FA22.1) and their Facebook page on 9 February 2024 (FA22.2).

85.4. Kwa-Zulu Natal:

85.4.1. KZN's report indicated support for the Bill subject to various amendments. A notice calling for public participation was published on the KZN Provincial Legislature's website on 6 February 2024, in both English and Isi-Zulu (FA23.1 and FA 23.2).

85.5. Limpopo:

85.5.1. There is no information in the report accompanying LP's negotiating mandate of when notices for public participation went out. The Facebook Provincial Legislature page for LP indicates that the first time a notice went out on this page was 11 March 2024 (FA24). But participation commenced 4 days later on 15 March 2024. There was only 1 hearing in Capricorn District.

85.6. Mpumalanga:

85.6.1. The report filed by MP indicates that "*the Bill was also published in the Lowvelder Media, Khanyisa News, Timeless News, Mpumalanga Provincial Legislature Website and social pages*". These local newspapers are not electronically accessible. However, the Bill was not published on the MP Provincial Legislature Website nor was it

published on the two social media accounts of the MP Legislature – Facebook and X (formerly twitter).

85.7. Northern Cape:

85.7.1. The NC report indicates that “*there were no inputs made by stakeholders*”. Yet, at the same time, it indicates that “*the majority of the stakeholders voted in support of the Bill on condition that their inputs are considered*”. If the stakeholders had not provided any input on the Bill, it is difficult to understand how they could have requested their input be considered.

85.7.2. The report also indicates that public participation was announced through “*posters on official social media pages of the Legislature*”. The NC provincial legislature has three social media pages – Facebook, X and Instagram. The only notice advertised was on Facebook on 27 February 2024 (FA25). This is 6 days before the hearing on 4 March 2024.

85.8. North-West:

85.8.1. NW’s report indicates that notice for public participation was given on “*North West Provincial Legislature Facebook Page, North West Provincial Legislature Twitter Handle*”. It also indicates that notice was given in three regional newspapers: The Mail, the Klerksdorp Record and Rustenburg Herald as well as various other community newspapers.

- 85.8.2. The regional newspapers indicated by the NW are all publicly available on the internet. Each month, each of these newspapers publish between 3 and 5 editions, which may be accessed under “archives” on the websites for each of these newspapers.
- 85.8.3. There was no notice for public participation in each of the three regional papers listed by the NW in its report between February and March 2024.
- 85.8.4. Additionally, the NW Provincial Legislature does not have a Twitter account, contrary to the indication in its report. It does, however, have a Facebook page. On 4 March 2024, a notice appeared on its Facebook page that there will be public hearings on the Climate Change Bill and the Public Procurement Bill on 6 March 2024 at 10h00 (FA26) The notice contained no information about the opportunity to provide written submissions on the Bill and the deadline for written submissions. On 5 March 2024, a media alert was posted to the NW’s Facebook page indicating that public hearings will be conducted on the Public Procurement Bill on 6 March 2024. At best, the NW gave the public who had access to their Facebook page 2 days’ notice of public hearings. There was no information about the venues for these hearings.
- 85.8.5. The NW’s report further indicates that it intended to conduct public participation in all 4 districts in the province, but that it was unable

to do so in the Bojanala District because of “*community unrest at the venue of the Public Hearing*”.

85.9. Western Cape:

85.9.1. The WC’s report records that it does not confer authority on its delegates in the NCOP to support the Bill. There is no indication in the report of (a) when the WC called for public participation and (b) when it conducted public participation hearings.

85.9.2. A notice was published on the WC Provincial Legislature’s website on Friday 1 March 2024 indicating that public participation hearings will take place on Monday 4 March 2024, Tuesday 5 March 2024 and Wednesday 6 March 2024 in George, Cape Town and Saldanha Bay (FA27).

85.9.3. A letter from the WC’s Provincial Minister of Finance to the Provincial Legislature’s Standing Committee on Finance dated 8 March 2024 (FA28) records that –

“The NA’s failure to solicit comments on the abovementioned changes is a defect in the public participation process which the National Council of Provinces (NCOP) cannot cure by way of its own public participation process because among other things the purpose and function of the NCOP is different from the NA, and the NCOP is a different body. Similarly, the public participation process followed by the Provincial Parliaments, as requested by or agreed with the NCOP, cannot cure the defect”.

86. Treasury's response to the negotiating mandates of each of the provinces is annexed as **FA29**. The negotiating mandates of the provinces were adopted at the meeting of 30 April 2024.
87. On 2 May 2024, the Committee deliberated on proposed amendments to the Bill (PMG Meeting Report **FA30**), and on 7 May 2024, the Committee met for the last time to receive the final mandates of Provinces, adopt the Bill and adopt the Committee Report (PMG Meeting Report **FA31**).
88. The final mandates for each of the provinces are annexed as **FA 32.1. to FA 32.9**.
89. The EC's final mandate indicates that its date of deliberation was on 30 April 2024, this is 2 days before the NCOP's Select Committee deliberated on amendments to the Bill. The EC's mandate, therefore, could not have been influenced by the meeting of the Select Committee on 2 May 2024.
90. In any event, 7 of the 9 Provincial Legislatures failed to deliberate on their final mandates altogether. Despite the final resolutions indicating that they deliberated on either 6 or 7 May 2024, there was in fact, no deliberation by these Provinces on these days.
91. Only two Provincial Legislatures – KZN and NW – deliberated on the final mandates conferred on their delegates. This is evident from the order papers of both legislatures for 7 May 2024 (**FA33.1. and 33.2.**). The remaining Provincial Legislatures did not do so.

92. The Committee adopted the final mandates, the Public Procurement Bill and its Committee Report. The Meeting Report for the session of 2 May 2024 is annexed as FA34 and the Select Committee Report is annexed as FA35.

V. THE PUBLIC PARTICIPATION PROCESS WAS UNREASONABLE

THE THRESHOLD REQUIREMENTS WERE NOT COMPLIED WITH

93. The process for public participation will only be reasonable where members of the public are afforded an adequate opportunity to know about the issues and have their say. Where the public is unable to influence the law – making process, the reasonableness standard will not be satisfied.
94. There are three factors this Court will consider when determining whether the public participation processes adopted by Parliament was reasonable:
- 94.1. First, what Parliament itself has determined as reasonable, and how it has decided to facilitate public involvement.
- 94.2. Second, the importance of the legislation and its impact on the public.
- 94.3. Third, time constraints on the passage of the Bill and the potential expense.
95. This Court has also held that the process will not be reasonable where the hearings are not effectively or timeously advertised, if people are unable to attend hearings, or if the submissions at the hearings are not transmitted to the legislature.
96. The process determined by Parliament for public participation is set out in the *Public Participation Framework for the South African Legislative Sector (FA36)* (the

Framework) and the *Practical Guide for Members of Parliament and the Provincial Legislature (FA37) (the Practical Guide)*. I have already made reference to the latter document.

97. In terms of the Framework, the NA and NCOP must send out invitations for public comment 5 weeks ahead of the public participation hearings. In terms of the Practical Guide, the Provincial legislatures are required to send out their invitations 7 days before the hearings.
98. Neither the NA nor the NCOP complied with the 5-week requirement. Both legislatures sent out their invitations for public comment 3 weeks and 3 days before the public participation hearings. Only the EC, KZN and Gauteng complied with the 7-day requirement in the Practical Guide. The remainder of the Provincial Legislatures did not.
99. As demonstrated below, there was no need for the truncated period for public participation in the NA and the NCOP. The NA only permitted 2 days for public participation and the NCOP allocated only a single day. There was clearly a considerable degree of public interest in the Bill, and various stakeholders sought to influence the law – making process because of the public importance of the Bill.
- 99.1. Public Procurement affects all South Africans. It is crucial to the delivery of services to members of the public.
- 99.2. It is also an important tool used by all spheres of government to fulfil their obligation to realise the rights in the Bill of Rights. It is thus a crucial instrument in giving effect to various constitutional rights.

99.3. Public Procurement naturally gives rise to intense public debate. The legislation informs how the State gives effect to two constitutional duties. The first, is the obligation to ensure that there is value for money when contracting for goods and services. And the second, is the use of procurement to protect and advance those who have suffered from past patterns of discrimination.

99.4. The thousands of submissions by members of the public and the request by the 11 civil society organisations and individuals for a fresh public participation process speaks to the public's intense interest in public procurement.

THE COMPLAINTS OF THE PUBLIC ON THE UNREASONABLENESS OF THE PUBLIC PARTICIPATION PROCESS WERE IGNORED

100. On 19 April 2024, 11 concerned organisations and individuals addressed a letter (FA38) to the Chairperson of the Select Committee concerning the constitutionality of the Bill as well as the public participation process followed in both the NA and the NCOP. The organisations included the African Procurement Law Unit, AmaBhungane Centre for Investigative Journalism, Corruption Watch, the Legal Resources Centre and Equal Education Law Centre.

101. The purpose of the letter was explained as follows:

“The purpose of this letter is to raise concerns regarding the constitutionality of certain provisions (or omissions) in the Public Procurement Bill and the public participation process thus far. Procurement weighs heavily in government finances and operations. In consequence, the Bill will have pervasive impacts on the state's ability to protect and advance fundamental rights. We write to place on record our view that this Bill is legally deficient, that it is highly likely to be constitutionally challenged, and its participation process has been flawed”.

102. The letter explains why the public participation processes followed by both the NA and the NCOP were flawed. It explains that there was no public participation on the ‘re-written’ version of Chapter 4 of the Bill before the NA and that –

“The National Treasury responded to public submissions and stakeholder input on 24 November 2023. Treasury only gave cursory attention to 36% of submissions and 64% had not been responded to at all. Of the 36% of submissions that were responded to, many of the most pressing comments received evasive or inadequate replies from Treasury. Many of the provisions that stakeholders were concerned about, including those which raised serious issues of formal law, were either retained or adjusted in ways that failed to address stakeholder concerns.”

103. In respect of the NCOP process, the letter highlighted the concern that Treasury’s response to many of the issues arising from the Bill was that these concerns could be dealt with by the Minister in regulations after the Bill was enacted.

“8. Most significantly, most of Treasury’s responses hinged on the proposition that many of the issues raised by stakeholders would be dealt with in the regulations. As stakeholders have not had any sight of the regulations, it is impossible to properly interrogate the effect and constitutionality of a Bill without sight of how the provisions will play out in practice. The only way to do so is either to have sight of the regulations or to have such key provisions clearly articulated in the Bill itself.

9. In the subsequent Select Committee meeting, the Chairperson again raised concerns about the public participation process, considered stakeholder submissions that the Bill be referred back to NEDLAC for proper consultation, and instead opted for a more flexible approach. Stakeholders were granted an opportunity to make supplemental submissions consolidating their central concerns. The Treasury was then required to engage in one – on – one consultations with those stakeholders and then to report back to the Select Committee on Tuesday 16 April 2024. It is significant to note that the entire process up to this point mainly entailed engagement between stakeholders and Treasury. Instead of engagement between stakeholders, Treasury and Parliament. Parliament’s views on the substantive issues raised were not expressed and so stakeholders could not meaningfully engage with those views with aims to influence and contribute to Parliament’s decision – making.”

104. In the light of the issues raised, the 11 concerned organisations and individuals requested, inter alia, *“that the parliamentary process be restarted with adequate time frames for meaningful engagement with written and oral submissions”*
105. On 23 April 2024, the Select Committee convened, and Parliament’s Senior Legal Advisor responded to the concerns raised in the letter by the civil society organisations and individuals. The PMG meeting report (FA39) reflects that the legal advisor did not believe the public participation process to be flawed. He did not, however, deal with the specific factual concerns raised in the letter. The remainder of the meeting focused on the substantive constitutional concerns raised in the letter.
106. Treasury responded to stakeholder comments at two further committee meetings on 25 and 26 April 2024 (PMG Meeting Reports FA 40 and FA 41 respectively). At the conclusion of the meeting on 26 April 2024, the Chairperson indicated that there is a possibility of voting on the Bill by 7 May 2024 if the Committee sits for longer periods over the remainder of its sessions.
107. On 30 April 2024, the Chairperson of the Select Committee on Finance also provided a formal response to the letter of the 11 concerned citizens and organisations (FA42). He explains that:

“We cannot comment on the public participation process in the Standing Committee on Finance (SCoF). None of us was present at their meeting. So, I wasn’t commenting on the ScoF process specifically in saying something like “there were flaws in the National Assembly’s public participation process. I was trying to refer generally to the Bill being tabled in the NA towards the end of the 6th term and if it had come earlier there may have been time for more public participation. But Adv Jenkins was present in all the ScoF meetings – and I refer you to his comments. He does not find the public participation process to be flawed. Normally, civil society stakeholders complaint that Parliament does not carry out its oversight and legislative roles effectively. ScoF made changes to the Bill. That is its right.”

THE NA PROCESS WAS FUNDAMENTALLY FLAWED

Challenge 1: The NA Failed to Consult on the Revised Chapter 4

108. Preferential procurement evoked the most intense debate during the public participation process.

109. In the first version of the Bill (B18 – 2023), Chapter 4 thereof which deals with preferential procurement consisted of only a single section – s 17. In terms of this section:

109.1. An organ of state was required to develop a policy for preferential procurement in order to give effect to the objectives of the Act and s 10(1)(b) of the Broad Based Black Economic Empowerment Act 53 of 2003 (**the Empowerment Act**) (s 17(1)).

109.2. The policy adopted must include –

109.2.1. One or more preference point system and thresholds.

109.2.2. Measures for the preference of (i) categories of persons, enterprises, sectors; (ii) goods produced in South Africa and (iii) services provided in South Africa (s 17(2)). The Minister is empowered to make regulations to achieve each of these measurements for preference as well as preference points and thresholds (s 17 (3)).

109.3. The preferential procurement policy must also consist of measures to --

- 109.3.1. Set aside the awarding of bids in order to promote the preferences recognised in the policy.
- 109.3.2. Set subcontracting as a condition of a bid in order to promote the recognised preferences in the policy.
- 109.3.3. Subcontracting by suppliers who are awarded bids.
- 109.3.4. Advance transformation, beneficiation, industrialisation, innovation, the creation of jobs, intensification of labour absorption, and economic development.
- 109.3.5. Balance the economic impacts of imported goods or services, unless exempted by the Minister.
- 109.3.6. Advance a sustainable environment (s 17(2) (c)).
- 109.4. Section 17(4) requires that any policy for preferential procurement must include preferences for (i) citizens and permanent residents; (ii) small enterprises; and (iii) enterprises in townships, as well as rural and underdeveloped areas.
- 109.5. Section 17(5) defines historically disadvantaged persons as: (i) black people as defined in the Empowerment Act; (ii) women; (iii) persons with disabilities as defined in the Employment Equity Act 55 of 1998 and (iv) youth, as defined in the National Youth Development Agency Act 54 of 2008.
- 109.6. In the first iteration of the Bill, there was no obligation to provide for set – asides in tender, and there was no mention of pre – qualification criteria in the

procurement of goods and services. The first version of the Bill only required organs of state to include provisions for set asides in their policy, but there was no requirement to implement it in each tender awarded.

110. The NA substantially amended this version of the Bill. Chapter 4 of the new version (18B – 2023), consisted of 9 sections. There was no opportunity for the public to comment on this entirely new chapter of the Bill.

111. Instead of providing a framework for preferential procurement (as s 217(3) of the Constitution requires), the new version of the Bill became prescriptive in several respects.

111.1. The new s 17 imposes an obligation (“*must*”) to set aside bids in accordance with categories and thresholds determined by the Minister. These set asides apply to categories of persons are prescribed and limited to:

111.1.1. black people.

111.1.2. black women.

111.1.3. women.

111.1.4. black people with disabilities.

111.1.5. people with disabilities.

- 111.1.6. small enterprises owned by black people; black women; women; black people with disabilities; people with disabilities; black people who are youth; or youth.
- 111.1.7. small enterprises within a geographical area.
- 111.1.8. small enterprises.
- 111.1.9. cooperatives who which consists of members who are black people or cooperatives.
- 111.2. S 18 imposes an obligation (“*must*”) to apply prequalification criteria in accordance with prescribed thresholds determined by the Minister, that permits bids from only certain bidders determined by s 18(1)(a) – (c) of the Bill.
- 111.3. S 19 imposes an obligation (“*must*”) to subcontract a contract above a prescribed amount, where it is feasible to do so, in order to advance categories of persons listed in subsection (2)(a) to (i).
- 111.4. S 20 gives the Minister of Trade, Industry and Competition, the power to designate sectors for local production and content.
112. There can be no doubt that the new iteration of Chapter 4 differs materially from the first version of the Bill. It establishes an obligation to apply set – asides, pre – qualification criteria and subcontracting where no such obligations existed previously. There was no mention of pre – qualification criteria at all in the first iteration of the Bill, and the first version was not prescriptive about categories of preference. It listed three categories of preference but expressly provides that a policy for preferential

procurement is not limited to those categories. The new version of Chapter does the opposite: it prescribes categories of preference and limits them to those contained in the section.

113. It is unsurprising that the new Chapter 4 evoked strong criticism throughout the public participation process. It arguably goes much further than providing a framework for preferential procurement, as required by s 217(3) of the Constitution. And it is precisely for this reason that there was a call for the public participation process to be restarted – the public simply did not have an opportunity to influence the decision – making in the NA because they could not comment on the materially different Chapter 4.
114. This Court has recognised that where there are material amendments to a Bill, and the public have not had an opportunity to comment on those amendments, the process for public participation will not be regarded as reasonable. This is evidently the case with the version of the Bill that the NA permitted public participation on, and the version of the Bill it passed and sent to the NCOP for their concurrence. This point alone, I respectfully say, ought to be dispositive of this challenge.

Challenge 2: Rule 276 of the NA's Rules were Not Complied With

115. Rule 276 of the NA's Rules form part of the rules that the NA has determined and prescribed for itself regarding public participation.
116. In terms of Rule 276(1)(b) there must be prior notice of the introduction of a Bill in the Government Gazette. And in terms of Rule 276(4)—

“If the Bill as it is to be introduced is published, the notice referred to in subrule (1) must contain an invitation to interested persons and institutions to submit

d 48 *[Signature]*

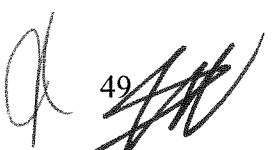
written representations on the draft legislation to the Speaker within a specified period.”

117. The notice in terms of Rule 276 was published in the Gazette on 22 May 2023. It contained an explanatory summary of the Bill. But, it said nothing about the submission of written representations to the Speaker on the Bill.
118. Compliance with Rule 276 is no small matter. The Minister is not permitted to introduce a Bill in the NA *unless* the rule has been complied with. This is clear from the wording of Rule 276(1) which provides that “*A Bill may be introduced in the Assembly only if...*”. Rule 276(4) thus establishes a mandatory requirement before a Bill is introduced in the NA. This mandatory requirement was not complied with. This point too, I respectfully say, ought to be dispositive of this challenge.

Challenge 3: The Memorandum of the Bill Contained Factually Incorrect Information

119. The Bill introduced by the Minister on 30 June 2023 contained an explanatory memorandum dealing with the contents of the Bill. The memorandum is important for at least two reasons. First, it assists members of the NA in understanding the content of the Bill and its purpose. Second, it assists members of the public with information relevant to their public participation.
120. If the information provided to the public is incorrect, they are not in a position to meaningfully participate in the legislative process.
121. Paragraph 5 of the memorandum deals with the financial implications of the Bill. It states:

“No substantial financial implications for the State are envisaged”.

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122. This was obviously false. The Bill established two new offices: the Public Procurement Office (**PPO**) and the Public Procurement Tribunal. The PPO was created to ensure compliance with the Act by organs of state. It does this by issuing binding and non – binding instructions. The Tribunal is established to determine disputes concerning tender awards. The Tribunal is headed by a Chairperson appointed by the Minister of Finance in consultation with the Minister of Justice, and the Chairperson is responsible for establishing panels to hear procurement disputes.
123. The extensive procurement litigation across the country means that the Chairperson will be required to establish a considerable number of panels across the country to hear and determine tender disputes. These panels will of course require remuneration. It is evident from the public participation process that no consideration was given to the scale of the panels required and expense of this for the State. Additionally, there was no costing done for the establishment of the PPO. These mechanisms undoubtedly give rise to substantial cost implications for the State.
124. The public could not meaningfully participate on the implications of establishing a PPO and the Tribunal where Treasury had not provided accurate information concerning the costs of both offices. The NCOP’s Select Committee Report on the Bill notes that Treasury reluctantly accepted that there are financial implications to the Bill:

*“The Committee also notes many stakeholders’ dissatisfaction about NT’s initial assertion that no additional financial resources were required to implement the Bill, **and its recent reluctant acknowledgement that while the quantum is not known, setting up the Tribunal and its panels will have financial implications.** The Committee further notes NT’s explanation that the existing pools of practitioners in the departments would help implement the Bill and there are no direct impacts on PTs. **The Committee is clear that there will be financial implications in the implementation of the Bill and cannot understand why NT could have thought there would be none.** However, NT has altered the memorandum to mention that there will be financial implications to the*

implementation of the Bill. The Committee recommends that within six months NT estimates the financial cost of the Bill and reports to the Committee on this.” (emphasis added).

125. But Treasury’s amendment to the memorandum was too little too late. It was only made in the “D” version of the Bill (B18D – 2023) dated 16 May 2024. In the amended memorandum, Treasury deals with the costs implications of the Bill as follows:

“5. Financial Implications for the State

5.1. Clause 69 of the Bill provides for the provisions of the Act to be brought into operation on different dates and on different dates for different categories of institutions and different categories of procurement. Where applicable, the availability of funds will be considered in determining the effective dates of provisions.

5.2. The costs of the information and communication technology procurement system, of which the development is subject to a due diligence, is to be developed by the Public Procurement Office progressively. Its costs are to be carried through appropriations from the National Revenue Fund.

5.3. The costs of the Tribunal are to be carried through appropriations from the National Revenue Fund and will only be proposed through the normal budget process once the estimated costs have been determined and the required readiness for the Tribunal to commence its work exists.

5.4. Capacity building to be undertaken to implement, and ensure compliance with, the Act is likely to have financial implications.

5.5. The cost implications of the regulations to be made under the Act, is enacted, will be considered during the development of the regulations.”

126. Treasury’s attitude was that the cost implications arising from the ICT procurement system, the Tribunal, the PPO and the making of regulations could be deferred until after the Bill becomes an Act. This is consistent with Treasury’s general approach to stakeholder input during the public participation process.

127. The public were not afforded an opportunity to consider the amendment to the memorandum and provide their input thereon. It was made after the NA, NCOP and Provincial Legislatures concluded their public participation. And it was made on the same day (16 May 2024) that the Bill served before the NA for its final approval.

Challenge 4: The NA Did Not Consider All Public Comments

128. There is no dispute that Treasury failed to respond to the vast majority of the comments made by the public. Out of the 112 submissions received, only 71 of the submissions were responded. The letter of the concerned civil society organisations and individuals correctly notes that –

“Treasury only gave cursory attention to 36% of the submissions, and 64% had not been responded to at all. Of the 36% of submissions that were responded to, many of the most pressing comments received evasive or inadequate replies from Treasury. Many of the provisions that stakeholders were concerned about, including those which raised serious issues of formal law, were either retained or adjusted in ways that failed to address stakeholders’ concerns.

After the National Assembly submissions and hearings, the most extreme changes were reserved for Chapter 4 of the Bill, which establishes the framework for preferential procurement. The National Treasury put forward an extensive rewrite, introducing significant and unconsulted policy positions. The Committee adopted this rewrite and proceeded to remove reference to price and a points system. This internationally novel intervention was adopted without regard for the constitutional requirement that procurement must proceed through a system that is fair, equitable, transparent, competitive and cost effective. The National Assembly proceeded to pass the Bill.”

129. Treasury itself recognises that thousands of line-item comments were not responded to. These include the comments made by the City of Cape Town. And it is not evident from the NA process that these comments – which did not receive a response – were considered by members of the Standing Committee on Finance, nor could the Committee consider Treasury’s response thereto because there was none.

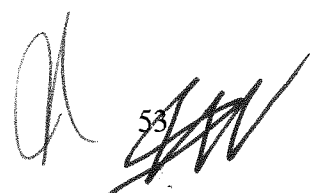
130. The seriousness of this deficiency in the process cannot be under-estimated. Its import is this: comments of the public were not considered and there was no answer given to many of the issues raised by the public. This is fundamentally destructive of the underlying purpose of public participation.
131. The unfortunate and unconstitutional result is that the vast majority of stakeholders and the public could not influence the NA public participation process. There was no basis for Treasury to proceed with the processing of the legislation without first responding to the submissions of the public. Treasury ought to have realised that a response to the vast majority of the comments was indispensable to the NA giving proper consideration to the Bill.

THE NCOP AND PROVINCIAL LEGISLATURES' PROCESSES WERE FLAWED

132. The NCOP's notice of public participation was inadequate because it did not comply with the 5 – week notice period established by Parliament itself. The NCOP recognised the importance of a proper public participation process at a provincial level precisely because many voices were left out of the public participation process in the NA and the NCOP.
133. It is for this reason that the Chairperson of the NCOP recognised at the very first meeting of the Select Committee on Finance on 6 February 2024 that –

“All provinces would have to ensure their people in rural areas were involved when there were public hearings. This could be done and was something National Treasury officials could communicate with the Committee officials.”

134. But the processes followed by the Provincial Legislatures were flawed, and the public could not reasonably influence the legislative process.

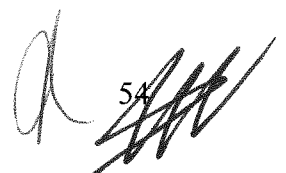
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Challenge 5: Inadequate Notice by the Provinces

135. Four Provinces did not comply with the 7 – day requirement for notice of public participation in the Practical Guide:
- 135.1. LP gave 4 days’ notice.
 - 135.2. NC gave 5 days’ notice.
 - 135.3. NW gave 2 days’ notice.
 - 135.4. WC gave 3 days’ notice which was over a weekend.
136. It is also not clear whether two Provinces (FS and MP), gave any notice at all. MP indicated that a notice was published on the social media pages, but no notice was published on their Facebook or X accounts. There was also no notice given on FS Provincial Legislature’s Facebook account.
137. Only 3 Provinces gave adequate notice: EC (11 days), GP (10 days) and KZN (8 days).
138. This is a matter of great seriousness. Not only did it constitute a serious non compliance with Parliament’s own standard for a reasonable public participation process, but it also fundamentally undermined the purpose and value of a public participation process.


Challenge 6: The Reports Accompanying the Negotiating Mandates Contained Inadequate and Incorrect Information

139. The reports of the Provincial Portfolio Committees on their negotiating mandates are essential to informing the NCOP of the views of members of the public in the different

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provinces across the country. The NCOP can only be satisfied that the views of the public across the provinces were considered where the information is accurately recorded in the reports.

140. **The report of the EC** was signed on 15 March 2024. Public participation in Mount Frere and Lusikisiki only took place on 28 and 29 March 2024. The report, therefore, does not include the views of these communities and the NCOP was deprived of an opportunity to consider the input of these residents when deliberating on the Bill.
141. Moreover, the EC's final mandate was not influenced by the deliberations of the NCOP on their negotiating mandates. It appears that the EC took no interest in whether the NCOP responded to the concerns raised by its residents during the public participation process. The date of deliberation in the EC's final mandate is 30 April 2024. The NCOP's Select Committee only finalised its deliberations on the negotiating mandates on 2 May 2024.
142. **The report of MP** did not meaningfully set out the concerns raised during the public participation process. One of the concerns raised was that "*the Bill must address the challenges faced by subcontractors*". But this statement was too vague for the Select Committee to consider and respond to. The report ought to have set out the concerns that were raised.
143. Moreover, MP's report was factually incorrect when it stated that notices for public participation were made on social media. There was no publication on the MP Provincial Legislature Facebook and X accounts calling for public participation.

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144. **The report of the NC** does not disclose any of the input made by members of the public. On the one hand, the report states that “*there were no inputs made by stakeholders*” and on the other hand, it states that “*the majority of the stakeholders voted in support of the Bill on condition that their inputs were considered*”. Both statements cannot simultaneously be true.
145. If stakeholders did provide input on the Bill, then the report is required to set their views and concerns about the Bill in the report so that they may be deliberated on by the NCOP. The report of the NC does not do this.
146. **The report of the NW** misrepresented that a call for public participation was made in regional newspapers. A consideration of the regional newspapers demonstrates that there was no publication of a notice for public participation in these newspapers. Additionally, the NW Provincial Legislature does not have a Twitter (now X) account, as it represents in its report. These statements were factually incorrect.

Challenge 7: The timeframe for public participation was inadequate, Treasury did not attend some public participation hearings and the Bill was not widely translated

147. It is evident from the calls for public participation of the Provinces and the reports filed with their negotiating mandates, that public participation in at least 3 Provinces were not adequate.
148. Despite being the most populous Province in the country, Gauteng only permitted a single day for public participation and the opportunity to participate was limited to the 1st Floor Auditorium of the Provincial Legislature. Gauteng consists of 3 metropolitan municipalities, 2 district municipalities and 6 local municipalities. Yet, public participation only took place in 1 metropolitan municipality.



149. Considering the importance of the legislation, and the impact of procurement on municipalities in Gauteng generally, the 1-day period for public participation was simply inadequate.
150. Similarly, LP also only had 1 hearing in the Capricorn District. There are 25 municipalities in LP. It is unclear why public participation was limited to a single day, and one district municipality.
151. The report of the NW records that there was no public participation in the Bojanala District because of community unrest at the venue where the public participation hearing was to take place. The report does not state the cause of the community unrest, and why it was not possible to engage in public participation at a later stage.
152. The report of the NC records that public participation took place virtually. There is no indication of how many people (if any) joined the virtual hearing in the report, bearing in mind paragraph 4.1. of the report which states that “*there were no inputs made by stakeholders*”.
153. It is also not clear why the NC Provincial Legislature elected to conduct a virtual hearing, and whether it was satisfied that members of the public had access to electronic devices and data to connect to the meeting. If there was no input by stakeholders, it is likely that the hearing was poorly attended because of the format chosen by the NC.
154. It is also evident from the deliberations before the NCOP’s Select Committee on Finance, as set out above, that the Bill was not widely translated into the official languages which would facilitate members of the public understanding the content of



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the legislation so that they may meaningfully participate in the public participation process.

155. And finally, the Select Committee on Finance recognised that Treasury did not attend the public participation hearings in KZN, and the NW.
156. Treasury itself recognised the importance of its participation in the public hearings in the Provinces because of the technical nature of the Bill. Indeed, during the Select Committee hearing on 6 February 2024, the Chairperson requested that the officials of Treasury engage with persons in rural parts of the country in their local language precisely because the Bill could not be translated into the official languages. The Chairperson indicated that Treasury could prepare an isiZulu presentation in KZN during the public participation process because the Bill was not translated into isiZulu.
157. Treasury simply did not attend the public participation process in KZN.

Challenge 8: Seven out of Nine Provinces Did Not Have Lawful Final Mandates

158. Section 3 of the Mandate Act sets out the formalities for the final mandates to be submitted by Provincial Legislatures:

“Every final mandate required in terms of this Act must be on the letterhead of the provincial legislature and must –

- (a) Indicate the name and number of the Bill voted on;*
- (b) Indicates whether the provincial legislature votes in favour of or against, or abstains from voting, on the Bill;*
- (c) Contain the signature of the Speaker or of a person designated by the Speaker to provide over that specific Bill;*



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(d) Be addressed to the chairperson of the NCOP or a person designated by the Chairperson of the NCOP; and,

(e) Follow the format prescribed in schedule 2.

159. S 6 of the Mandate Act provides –



“A provincial legislature must confer authority on its provincial delegation to the NCOP to cast a vote when the relevant NCOP select committee considers a Bill prior to voting thereon in an NCOP plenary.”

160. Both of these sections make it clear that the Provincial Legislatures are required to deliberate on whether a final mandate should be given to their NCOP delegates. There is an important reason for this: the Select Committee may decide not to give effect to the conditions in a Province’s negotiating mandate; the concerns raised in the negotiating mandate by a Provincial Portfolio Committee may go without a response in the NCOP; and the NCOP may overlook the input of the public arising from public participation across the Provinces.

161. The Provinces will then have to consider whether it should support the Bill in its current form when its concerns were overlooked.

162. Only two of the Provinces sat and deliberated on their final mandates – KZN and NW. This is clear from the order papers of these Provincial Legislatures as set out above.

163. The remaining Provinces did not sit on the days indicated as the date of their “*deliberations*” in the mandate itself. There was no deliberation by these Provinces on those dates.

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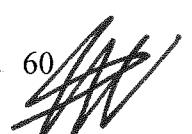
164. Some of the Provinces sought to ratify their final mandates after the fact. On 17 May 2024, a motion of ratification was brought in the LP Provincial Legislature (FA43) in order to ratify its final mandate of 6 May 2024. At this stage however, the NA had passed the Bill and transmitted to the President for his concurrence.
165. The Mandate Act does not permit ratification, and ratification defeats the purpose of the Act. Provincial Legislatures are required to give proper consideration to whether a Bill should be supported or not, having regard to the treatment of their negotiating mandates by the NCOP. If the Provincial Speakers are permitted to simply determine the final mandates themselves, without any deliberation by the Provincial Legislatures, then the purpose behind providing a final mandate is defeated.

VI. CONCLUSION AND REMEDY

166. For all of these reasons, the City submits that the following substantive orders fall to be granted:

It is declared that –

1. Parliament and the Provincial Legislatures failed to comply with their constitutional obligations to act reasonably in carrying out their duties to facilitate public involvement in the legislative process as required by ss 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution, before passing the Public Procurement Act 28 of 2024.
2. As a result, the Public Procurement Act 28 of 2024 was adopted in a manner that is inconsistent with the Constitution and is invalid.

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167. Since the PPA has not come into operation, the City submits that it is not necessary for this Court to suspend the declaration of invalidity sought, unless this changes by the time that the matter is heard.



LUNGELO MBANDAZAYO

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at CAPE TOWN on this 26th day of MAY 2025, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended by Government Notices R1648 of 19 August 1977, R1428 dated 11 July 1980 and R774 dated 23 April 1982, having been complied with.




COMMISSIONER OF OATHS

Full names:

Business address:

Designation:

Capacity:

 **Oosthuizen & Co**
 Joshua Leon Rutgers
 COMMISSIONER OF OATHS EX OFFICIO
 KOMMISSARIS VAN EDE EX OFFICIO
 PRACTISING ATTORNEY / PRAKTISERENDE PROKUREUR
 505 BUITENKLOOF STUDIOS, CNR BUITENSINGEL
 & KLOOF STREET, GARDENS, CAPE TOWN