

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**CASE NO: 144/25**

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**

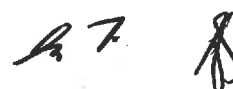
Sixth Respondent

**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

**ANSWERING AFFIDAVIT OF THE FIRST, SECOND, FIFTH, SIXTH, TENTH,
ELEVENTH AND TWELFTH RESPONDENTS**

A. F. B.

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I, the undersigned

ANGELA THOKOZILE DIDIZA

hereby state under oath:

1. I am an adult female. I am the Speaker of the National Assembly of the Republic of South Africa, the first respondent in this matter. I am duly authorized to depose to this answering affidavit on behalf of the first, second, fifth, sixth, tenth, eleventh and twelfth respondents. For the sake of convenience, where I refer to these respondents collectively, I will refer to them as “**the respondents**”.
2. Unless the context indicates otherwise, the facts to which I depose fall within my personal knowledge or are obtained from official records of Parliament and the provincial legislatures, and, to the best of my belief, are both true and correct. The statements of law that I make in this affidavit are made on the advice of the respondents' legal representatives, which I believe to be correct.
3. I have read the founding affidavit deposed to by Lungelo Mbandazayo on behalf of the applicant. I respond to its contents below.
4. In this affidavit, where there is use of the following terms, the meaning I ascribe to each of them is as follows:
 - 4.1. “**City**” means the City of Cape Town, the applicant in these proceedings;
 - 4.2. “**Constitution**” means the Constitution of the Republic of South Africa, 1996;

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- 4.3. **“Mandating Procedure of Provinces Act”** means the Mandating Procedure of Provinces Act 52 of 2008;
- 4.4. **“MFMA”** means the Local Government: Municipal Finance Management Act 56 of 2003;
- 4.5. **“Minister”** means the Minister of Finance;
- 4.6. **“NA”** means the National Assembly, as defined in section 42 of the Constitution;
- 4.7. **“NCOP”** means the National Council of Provinces;
- 4.8. **“Parliament”** means the NA and the NCOP, collectively, unless otherwise indicated;
- 4.9. **“PFMA”** means the Public Finance Management Act 1 of 1999;
- 4.10. **“PPPFA”** means the Preferential Procurement Policy Framework Act 5 of 2000;
- 4.11. **“Procurement Act”** means the Public Procurement Act 28 of 2024;
- 4.12. **“Select Committee”** means the Select Committee on Finance in the NCOP;
- 4.13. **“Standing Committee”** means the Standing Committee on Finance in the NA;



- 4.14. **“Treasury Regulations”** means the Treasury Regulations made in terms of the PFMA, published under GN R225 in GG 27388 of 15 March 2005; and
- 4.15. **“2023 Procurement Bill”** means Bill B18-2023, which was published for comment on 18 August 2023.

INTRODUCTION AND OVERVIEW

5. In this application, the City seeks an order, *inter alia*, granting the following substantive relief:
- 5.1. 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 Procurement Act; and
- 5.2. Declaring that, as a result, the Procurement Act was adopted in a manner that is inconsistent with the Constitution and is accordingly invalid.
6. The grounds on which the City contends that an order granting this relief is alleged to be justified (which have no merit, in respectful submission) are summarised as follows:
- 6.1. In respect of the process followed by the NA:

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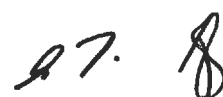
- 6.1.1. The City contends that the NA, having made substantial and material amendments to Chapter 4 of the 2023 Procurement Bill as a result of public comments received, did not afford members of the public the opportunity to comment on these amendments before they were passed into law. The amendments in question relate to the inclusion in Chapter 4 of provisions relating to preferential procurement;
 - 6.1.2. The City contends that the NA did not follow its Rule 276, in that the notice of introduction of the 2023 Procurement Bill in Parliament did not address the issue of submission of written representations to me, as the Speaker of the NA;
 - 6.1.3. The City contends that the explanatory memorandum accompanying the 2023 Procurement Bill erroneously recorded that there were no financial implications arising from the Bill; and
 - 6.1.4. The City contends that the NA did not consider all of the public comments received; and
- 6.2. In respect of the process followed by the NCOP and provincial legislatures:
- 6.2.1. The City contends that the provinces gave inadequate notice of their public participation processes (albeit that there is no individual member of the public that has raised a complaint of prejudice in this regard, in these proceedings);

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- 6.2.2. The City contends that the reports accompanying the provinces' negotiating mandates contained inadequate and incorrect information;
- 6.2.3. The City contends that the timeframe for public participation was inadequate, National Treasury did not attend all of the public hearings and the 2023 Procurement Bill was not widely translated; and
- 6.2.4. The City contends that seven out of the nine provinces did not have the lawful and final mandates necessary in order for them to be permitted lawfully to proceed in the way that they did.
7. On these purported grounds, the City contends that the respondents followed "*a woefully inadequate public participation process*", so much so that, on the basis of this "*single and fundamental issue*", the City contends that the Procurement Act falls to be invalidated by this Court, in its entirety.
8. A glaring irony which I am advised emerges from the contentions advanced by the City in this is that, in launching its application before this Court, it simultaneously places itself in flagrant breach of his own constitutional and statutory duties. Indeed, I am advised and submit that the City's decision to launch this application in circumstances where it has failed in any way to engage any of the respondents before doing so, the City is in breach of the explicit and mandatory provisions of section 41 of the Constitution.

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9. I am advised and shall submit this failure on the City's part is fatal to its application, with the result that this Court need not detain itself with a consideration of the application's merits.
10. Notwithstanding these fatal infirmities, I shall address the merits of the application, out of caution. In summary, Parliament submits that the grounds the City advances in its attempt to justify the relief sought have no merit, for six main reasons, namely:
- 10.1. First, the allegation that preferential procurement was introduced for the first time through amendments to the 2023 Procurement Bill is factually incorrect. The mechanisms of preferential procurement provided for in Chapter 4 of the Act were all foreshadowed in clause 17 of the 2023 Procurement Bill. The effect of the amendment to clause 17 was to unpack and elaborate on those mechanisms, and to strengthen the preferential procurement provisions in order to better-advance the objects of the Bill.
- 10.2. Second, Chapter 4 of the Procurement Act contains concepts which are fundamentally similar to those previously contained in the regulations promulgated pursuant to the PPPFA (and, therefore, constitute "*national legislation*", within the meaning of section 239 of the Constitution).
- 10.2.1. The latter regulations were the product of an extensive research and consultation process. The National Treasury solicited the involvement of the public, and it analysed the



comments received from members of the public and dealt appropriately with all of the primary issues raised. These primary issues were distilled from a review of the submissions received and an identification of common themes therein.

10.2.2. The content of Chapter 4 of the Procurement Act is substantively similar to the content of the regulations promulgated in terms of the provisions of the PPPFA. The manner in which preferential procurement is now regulated had therefore already been through a comprehensive consultation process.

10.2.3. Albeit that the regulations were ultimately set aside by this Court, in its majority decision in *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC), the *ratio* for the majority's decision was completely unrelated to the content of the regulations, or to their legal validity, whether as a matter of substance or procedure.

10.2.4. As such, considered cumulatively with the comprehensive process of public involvement which preceded the 2023 Procurement Bill (as I am advised the law requires the Procurement Act to be assessed), I am advised and submit that all the applicable requirements of the Constitution and of international law were met or exceeded.

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10.2.5. When the latter holistic assessment is considered together with the forthcoming anticipated public involvement – which is set to occur prior to the date on which the Procurement Act (together with its anticipated regulations) becomes “*national legislation*” in terms of section 239 of the Constitution – I am advised and shall respectfully submit that the City’s challenge to the validity of the Procurement Act carries no force.

10.3. Third:


10.3.1. The fact that Parliament may not have made amendments to the 2023 Procurement Bill accommodating each and every one of the submissions received from members of the public does not support the City’s allegation that the submissions were unconstitutionally and unlawfully ignored. To the contrary – and aside from the fact that this would have been an impossible standard with which to comply – doing so would have constituted an unlawful abdication of Parliament’s constitutionally enshrined function.

10.3.2. What this Court has held as important is whether stakeholders were afforded a reasonable opportunity to contribute to the legislative process in a way that was “*capable of influencing the decision to be taken*”, and that, “*even if the lawmaker ultimately does not change its mind, it ... approached the public involvement process with a*

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willingness to do so" (Mogale and Others v Speaker of the National Assembly and Others 2023 (6) SA 58 (CC) at para 35). The facts demonstrate that this is precisely what occurred.

- 10.4. Fourth, the assertion that there were financial implications arising from the 2023 Procurement Bill that were not considered is erroneous. The Procurement Act brings together elements that already exist into one composite and integrated procurement framework; it does not establish new institutions with new functions.
 - 10.5. Fifth, the City's allegation that the 2023 Procurement Bill is fatally tainted by fatal procedural irregularities misconstrues the rules and procedures pertaining to the NA's and the NCOP's processes. On a proper understanding of these rules and procedures, the NA and the NCOP complied with their obligations.
 - 10.6. Sixth and finally, there is no legal obligation for National Treasury to attend public hearings; National Treasury attends such hearings at the behest of the Provincial Legislatures.
11. I am advised in the circumstances that the City's application stands to be dismissed, with costs, including the costs of three counsel. In support of this outcome, I address the following topics below, in sequence:
- 11.1. I firstly summarise the reasons why I am advised and submit that the City's application falls to be dismissed on a preliminary basis, without reaching the merits of the application.

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- 11.2. Next, I set out an overview of the Procurement Act and its intended objectives.
- 11.3. Thereafter, I summarise what I am advised is the scope of this Court's powers to pronounce on the public participation process followed by Parliament.
- 11.4. I then set out the legislative procedure which was followed, in fact, in enacting the Procurement Act.
- 11.5. Set against the backdrop of the latter three sections, I proceed to summarise what I am advised is the current status of the Procurement Act and the draft regulations thereunder, inclusive of the intention to solicit further public involvement, over and above the public involvement which has already occurred.
- 11.6. Next, I address the challenge regarding the introduction of the preferential procurement provisions in Chapter 4 of the Procurement Act, and I explain why I am advised that it lacks merit.
- 11.7. In the following section, I explain why the City's challenge regarding the consideration of comments received is equally without merit.
- 11.8. In the penultimate section of this affidavit, I list the responses to the founding affidavit, on a paragraph-by-paragraph basis (to the extent it remains necessary to do so, given what I shall by then have already stated).

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- 11.9. I address the issue of condonation for the late filing of this affidavit in the final section.
12. I am advised that this affidavit will be filed together with confirmatory affidavits deposed to by –
- 12.1. Ms Refilwe Maria Mtshweni-Tsipane, who is the Chairperson of the NCOP and the second respondent in this application;
- 12.2. Mr Duncan Pieterse (“Mr Pieterse”), who is the Director-General of the National Treasury, on the third respondent’s behalf. The third respondent has not opposed this application. Confirmation of the content of this answering affidavit on the third respondent’s behalf is, however, necessary for the full ventilation of the issues before this Court, given the important role played by the National Treasury in the process leading to the enactment of the Procurement Act; and
- 12.3. The speakers of the Eastern Cape, Free State, Mpumalanga, Northern Cape and North West Provincial Legislatures, being the fifth, sixth, tenth, eleventh and twelfth respondents, respectively,

PRELIMINARY POINT: THE CITY’S FATAL NON-COMPLIANCE WITH CHAPTER 3 OF THE CONSTITUTION

13. At paragraph 14 of its founding affidavit, the City describes itself as “a *metropolitan municipality established in terms of s 151 of the Constitution read with the Local Government: Municipal Structures Act of 1998*”. On the basis of

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the City's own description of itself, I am advised and submit that it falls within the Constitution's definition of a "*sphere of government*" and an "*organ of state*".

14. In the paragraphs immediately following paragraph 14 of the City's founding affidavit, the City describes the legal nature and status of each of the thirteen respondents which the City has chosen to cite as parties to its application. On the basis of the City's own description, all the respondents similarly fall within either or both of the Constitution's definitions of a "*sphere of government*" or an "*organ of state*".
15. The fact that all the parties to this application are either "*sphere[s] of government*" or "*organ[s] of state*" means that the following requirements of Chapter 3 of the Constitution are engaged:

15.1. Section 40 of the Constitution provides as follows:

- (1) *In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.*
- (2) *All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.*

(Emphasis added).

15.2. Section 41(1) of the Constitution provides in relevant part that –

All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by ... assisting and supporting one another; ... informing one another of, and consulting one another on, matters of common interest; ...

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co-ordinating their actions and legislation with one another; ... adhering to agreed procedures; and ... avoiding legal proceedings against one another.

(Emphasis added).

15.3. In terms, sections 41(3) and 41(4) of the Constitution provide as follows:

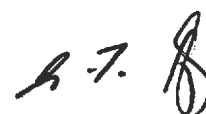
(3) *An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.*

(4) *If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.*

(Emphasis added).

16. As a matter of pleading, and also as a matter of substantive law, I am advised and submit that, before the City's application will be permitted to leave the proverbial gate, the City will be required to show it has discharged the requirements of sections 40 and 41 of the Constitution, failing which, this Court need not detain itself with the merits of his application. A consequence of failing to do so is that the City's application will be dismissed on a preliminary basis.

17. I am advised and submit that the City does not adequately plead, and, accordingly, cannot meet, any of the requirements I have set out immediately above. Having cited the respondents in its founding affidavit in way that the City has done, I am advised and submit that it is too late for the City to plead anything



further to add, or attempt to repair the way in which the City has elected to plead the alleged identities and functions of the respondents it has cited as parties to this application.

18. For these reasons, I am advised and submit that the City's failures to meet the requirements of Chapter 3 of the Constitution are fatal to its application for relief.
19. I address the merits of the application in the following sections of this affidavit below solely out of caution.

OVERVIEW OF THE PROCUREMENT ACT AND ITS OBJECTIVES

20. The Procurement Act seeks to give effect to the constitutional imperatives governing state procurement and expenditure. Most notably:

- 20.1. Section 9(2) of the Constitution, which enshrines the right to substantive equality in South Africa, in the following terms:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- 20.2. Section 7(2) of the Constitution, which requires "[t]he state" among other things to take positive steps to "*promote and fulfil the rights in the Bill of Rights*".

- 20.3. Section 217 of the Constitution, which provides that:

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- (1) *When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*
- (2) *Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –*
 - (a) *categories of preference in the allocation of contracts; and*
 - (b) *the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
- (3) *National legislation must provide a framework within which the policy referred to in subsection (2) must be implemented.*

20.4. Section 216(1) of the Constitution, which provides as follows:

National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing –

- (a) *generally recognised accounting practice;*
- (b) *uniform expenditure classifications; and*
- (c) *uniform treasury norms and standards.*

20.5. Section 195(1) and (3) of the Constitution, which provides that national legislation must ensure the promotion in the public administration of, *inter alia*, the following principles:

20.5.1. A high standard of professional ethics;

20.5.2. Efficient, economic and effective use of resources; and

20.5.3. Development-orientation, accountability and transparency.

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- 20.6. Section 237 of the Constitution, which requires that “[a]ll constitutional obligations must be performed diligently and without delay”.
21. The procedure followed by the respondents, including the process of public involvement, was cumulatively informed by each of the constitutional duties I have summarised above.
22. Prior to the enactment of the Procurement Act, the regulation of procurement by organs of state in line with these constitutional provisions was fragmented, with different aspects being regulated through different pieces of legislation. These include the PFMA, the PPPFA and the MFMA.
23. This fragmentation created risks of inconsistency between different statutory provisions, as well as a risk of understandable confusion among those bound by them. It also inadvertently raised the risk that certain aspects of government procurement would fall between the proverbial cracks and remain unregulated, consequentially frustrating legitimate governmental objectives and undermining the Constitution's imperatives.
24. The Procurement Act seeks to address this fragmentation through the creation of a single cohesive framework for procurement in the public sector. To this end, the objects of the Procurement Act as set out in section 2 thereof include the following:
- 24.1. The introduction of uniform treasury norms and standards, for all procuring institutions, to implement their procurement systems as envisaged in section 217(1), read with section 216(1), of the Constitution; and

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- 24.2. The establishment of a preferential procurement framework for all procuring institutions within which to implement their procurement policies, as envisaged in sections 217(2) and (3) of the Constitution.
25. The Procurement Act seeks to achieve these objectives through, *inter alia*:
- 25.1. The establishment of a central Public Procurement Office within the National Treasury and its functions (sections 4 and 5);
- 25.2. Clarity as to the functions of the provincial treasuries and procuring institutions (sections 6, 7 and 8);
- 25.3. Measures to preserve the integrity of the procurement process (sections 9 to 15);
- 25.4. A framework for preferential procurement (sections 16 to 23);
- 25.5. General requirements applicable to the procurement of goods and services by organs of state (sections 24 to 34);
- 25.6. Mechanisms for dispute resolution (sections 35 to 53); and
- 25.7. Delegation of power to the Minister to make regulations, including regulations as to different methods of procurement and tailored requirements for specific types of procurement, in particular circumstances (section 63).
26. The functions of the Public Procurement Office as set out in section 5 of the Procurement Act are as follows:

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- (1) *The Public Procurement Office must, in accordance with this Act-*
- (a) *promote compliance with this Act by procuring institutions;*
 - (b) *develop, and support the implementation of, necessary measures to maintain the integrity of procurement;*
 - (c) *guide and support officials and procuring institutions to ensure compliance with this Act and in doing so-*
 - (i) *provide advice and assistance to procuring institutions; and*
 - (ii) *ensure the professional development and training of officials involved in procurement;*
 - (d) *develop, and support the implementation of, measures to ensure transparency in procurement;*
 - (e) *promote standardisation in procurement;*
 - (f) *promote the use of technology and innovation and learning towards modernisation of the public procurement system;*
 - (g) *monitor and oversee the implementation of this Act;*
 - (h) *intervene by taking appropriate steps to address a material breach of this Act by a procuring institution as may be prescribed;*
 - (i) *create, maintain and publish one or more databases to facilitate the implementation of this Act; and*
 - (j) *perform any other duties imposed by this Act.*
- (2) *The Public Procurement Office may, in accordance with this Act-*
- (a) *in relation to procuring institutions, except municipalities and municipal entities, issue, by notice in the Gazette, binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act;*
 - (b) *in relation to municipalities and municipal entities, issue non-binding circulars, on the subject of an instruction, provided for in this Act, and any other matter for the effective implementation of this Act;*
 - (c) *issue guidelines to assist procuring institutions with the implementation of this Act and any other procurement related matter;*
 - (d) *after consultation with the relevant category of procuring institutions, determine a model procurement policy for different categories of procuring institutions and different categories of procurement, which*

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a procuring institution may adopt, with or without amendments, or not adopt; and

(e) exercise other powers conferred by this Act.

(3) The Public Procurement Office may issue different instructions in terms of subsection (2) for-

(a) different categories of procuring institutions; and

(b) different categories of procurement.

(4) A circular referred to in subsection (2) (b) will be binding on-

(a) a municipality, if adopted by its council; or

(b) a municipal entity, if adopted by the council of the entity's parent municipality.

27. One aspect of the Procurement Act that has attracted substantial attention (and is the subject of one of the City's challenges to the Procurement Act) is Chapter 4, which regulates preferential procurement through, *inter alia*, the following measures:

27.1. The setting aside of bids for prescribed categories of persons in accordance with targets prescribed by the Minister (section 17);


27.2. Pre-qualification criteria for preferential procurement, which criteria include minimum sub-contracting requirements and procurement by a bidder from enterprises owned and managed by black people (section 18);

27.3. Mandatory sub-contracting of a prescribed portion of a bid to identified persons or categories of persons (section 19);

27.4. The designation of particular sectors for local production and content (section 20); and

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- 27.5. In addition to the above, procuring institutions are empowered to formulate their own measures for sustainable development in procurement (section 21), as well as measures to advance the creation of jobs, intensification of labour absorption, beneficiation, innovation and the development of small enterprises within particular geographical areas (section 22).
28. The scheme of Chapter 4 is such that these provisions will be implemented in a staggered manner. In this regard:
- 28.1. Section 17 is directed at the achievement of representation of the economically active population by providing those disadvantaged by unfair discrimination in the past with an entry point into the economy. It contemplates a threshold to be prescribed by the Minister, so as to facilitate ease of entry through lower-value contracts without disproportionately skewing the market.
- 28.2. Section 18 seeks to encourage previously advantaged and empowered bidders, who have already established themselves in the market, to partner with government to achieve its transformational objectives. It does so by providing for sub-contracting to certain identified groups, or requirements for bidders to procure their own goods and services from those identified groups. The preferential procurement contemplated in this section, which applies to mid-level contracts, therefore operates at two levels:

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28.2.1. It affords a preference to bidders who meet the prequalification criteria and in doing so empowering those previously disadvantaged by unfair discrimination; and

28.2.2. It affords opportunities to entities previously disadvantaged by unfair discrimination to participate in projects as subcontractors.

28.3. Section 19 is applicable to complex and high-value tenders, and it facilitates the exposure of those previously disadvantaged by unfair discrimination to bids on this level. Where it is feasible to do so, section 19 provides for sub-contracting in order to advance the persons or categories of persons listed in that section.

29. With the Procurement Act providing a framework according to which state procurement and expenditure are to be conducted, the Minister is obliged and empowered to make regulations that will provide the detail necessary for the effective implementation of the Procurement Act in a manner that advances its objectives.

30. The Procurement Act principally provides for these powers and duties in section 63, in the following relevant terms:

(1) The Minister, by notice in the Gazette-

(a) must make regulations regarding-

...

(b) may make regulations-

...

(2) The Minister must, before complying with subsection (3), consult-

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- (a) *the relevant Minister on a draft regulation affecting the portfolio of that Minister; and*
 - (b) *organised local government on a draft regulation affecting municipalities or municipal entities.*
- (3) *Before making a regulation, the Minister must publish-*
- (a) *a draft of the regulation;*
 - (b) *a statement explaining the need for and the intended operation of the regulation;*
 - (c) *a statement of the expected impact of the regulation; and*
 - (d) *a notice inviting submissions in relation to the regulation and stating where, how and by when submissions are to be made.*
- (4) *The Minister must submit regulations to be made to Parliament for parliamentary scrutiny at least 30 days before their promulgation.*
- (5) *A regulation takes effect-*
- (a) *on the date that it is published in the Gazette; or*
 - (b) *if the regulation provides that it takes effect on a later date, on the later date.*
- (6)
- (a) *With each regulation, the Minister must publish a consultation report.*
 - (b) *A consultation report must include-*
 - (i) *a general account of the issues raised in the submissions made during the consultation; and*
 - (ii) *a response to the issues raised in the submissions.*
- (7) *The Minister-*
- (a) *may make different regulations for-*
 - (i) *different categories of procuring institutions; and*
 - (ii) *different categories of procurement; and*
 - (b) *must make regulations regarding the procurement of-*
 - (i) *infrastructure and capital assets; and*
 - (ii) *goods or services related to infrastructure and capital assets.*

31. I am advised that the City's challenge to the procedure according to which the Procurement Act was passed will be considered in the light of these provisions.

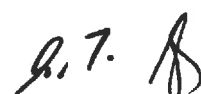
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THE SCOPE OF THIS COURT'S POWERS TO PRONOUNCE ON PUBLIC PARTICIPATION

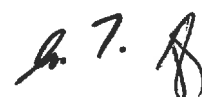
32. That Parliament bears a duty to facilitate public involvement is not disputed:
- 32.1. Section 59(1)(a) of the Constitution provides that the NA must “*facilitate public involvement in the legislative and other processes of the Assembly and its committees*”.
- 32.2. Section 72(1)(a) of the Constitution similarly provides that the NCOP must “*facilitate public involvement in the legislative and other processes of the Council and its committees*”, and section 118(1)(a) of the Constitution places the same obligation on provincial legislatures, in identical terms.
33. However, while the Constitution imposes these obligations on Parliament, it does not prescribe the method of public involvement in the law-making process. I am advised that this Court has held that the choice not to do so was deliberate: the doctrine of separation of powers requires Parliament and the provincial legislatures to be given “*significant leeway*” in exercising their discretion to determine how best to facilitate public involvement. This is one of Parliament’s core responsibilities as the legislative arm of government, with its constitutional mandate expressed in practice through the work of the democratically-elected representatives of the public with whom they are to consult.

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34. This Court has also recognised (correctly, in respectful submission) that what is required of Parliament to meet its obligations will vary according to the specific facts and circumstances of each case.
35. Ultimately, the question for determination is not whether the public involvement procedure followed by Parliament is the one that would have been adopted by the Court, but rather whether Parliament provided a reasonable opportunity to members of the public and all interested parties to know about the issues being legislated and to have an adequate say in them. The standard according to which Parliament's conduct is evaluated is therefore one of reasonableness.
36. I am advised that the following factors are relevant in making this determination:
- 36.1. The nature and importance of the legislation and the intensity of its impact;
 - 36.2. Practical considerations such as time, expense and the efficiency of the law-making process; and
 - 36.3. What Parliament itself considers to be adequate public involvement.
37. Moreover:
- 37.1. In determining whether Parliament has complied with its constitutional obligations, I am advised and submit that it is necessary to consider the public involvement process adopted by Parliament holistically, rather than viewing and weighing each step of the process, in isolation.

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- 37.2. Consistently with the latter principle, the various obligations in the Constitution which pertain to the duty to facilitate public involvement will not be assessed by a Court as being independent of one another. In other words, a failure to comply with one of the express obligations will not necessarily lead to the conclusion that Parliament is divested of its legislative authority due to a failure to discharge the duty of public involvement.
38. The City places reliance in its founding affidavit on the Practical Guide for Members of Parliament and Provincial Legislatures, asserting that the NA, NCOP and provincial legislatures failed to comply with the procedural requirements set out therein. This document is attached as "FA37" to the founding affidavit.
39. Parliament is bound by the following in discharging its obligations:
- 39.1. The Constitution, which confers on both the NA and the NCOP the power to determine their own rules and processes;
- 39.2. The Rules of the National Assembly (which bind the NA) and the Rules of the National Council of Provinces (which bind the NCOP);
- 39.3. The Joint Rules of Parliament, which bind both the NA and the NCOP;
and
- 39.4. The Public Participation Model, which has been formally adopted by the NA and the NCOP and binds Parliament as well as the nine provincial legislatures. A copy of the Public Participation Model is attached as



“AA1”. The minutes of Parliament’s Joint Rules Committee meetings at which this Public Participation Model was discussed and adopted, are attached as “AA2”.

40. The Practical Guide for Members of Parliament and Provincial Legislatures, referred to and relied on by the City in its founding affidavit, has not been formally adopted by Parliament. As such:

40.1. Although the Practical Guide for Members of Parliament and Provincial Legislatures provides a guideline for both Parliament and the provincial legislatures in respect of the discharge of their public participation obligations, it does not bind them.

40.2. Indeed, Parliament and the provincial legislatures would fall into error were they to treat the Practical Guide for Members of Parliament and Provincial Legislatures as binding, and they would run the risk of unduly fettering their discretionary powers were they to do so.

40.3. Accordingly, the City’s reliance on the Practical Guide for Members of Parliament and Provincial Legislatures on the basis that it is a binding standard is incorrect and misplaced.

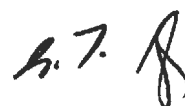
41. I am advised and submit that the specific facts concerning the public involvement process, which I address in more detail below, stand to be considered against the following backdrop:

41.1. The need for a unified public procurement process was identified as far back as 2014, and stakeholders, including National Treasury, have,

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since that date, been engaged in debating and discussing what that legal framework should be.

- 41.2. During this process, there was extensive engagement with organs of state at all levels of government as well as experts in the field of, *inter alia*, finance and procurement.
- 41.3. There was a general election held in 2024, as a consequence of which the Parliament that had been constituted in 2019 would have dissolved and all of its business lapsed. Had the Procurement Act not been passed before the dissolution of the NA, it would have been necessary for either the newly elected NA or the newly appointed NCOP to revive the Bill, depending where the Bill was when the elections commenced. That in itself is a political decision. It does not follow that the public involvement process would have to start afresh, but, certainly, the new committees would have needed capacity-building to take place prior to being placed in a position to consider and report on the Public Procurement Bill without delay. This would obviously have had a substantial impact on the state's financial and other resources, as well as significantly delaying the creation of a necessary unified procurement process.
- 41.4. As is confirmed in the accompanying affidavit of Mr Pieterse, on behalf of the Minister, the framework constructed in the Procurement Act will be supplemented by regulations, which will provide the detail necessary for the effective implementation of the Procurement Act. Those regulations will go through a rigorous consultation process before

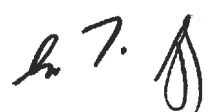


promulgation. At that time, there will be ample further opportunity for members of the public to be further involved in the regulation-making process.

- 41.5. Chapter 4 and the preferential procurement measures contained therein are not new concepts which the Public Procurement Bill introduced for the first time. The preferential procurement provisions contained in Chapter 4 are conceptually similar to those contained in the regulations under the PPPFA, which regulations were made following an extensive research and consultation process. The manner in which preferential procurement will be regulated has therefore been through a process of public participation, and the Procurement Act was drafted with the benefit of public input already solicited and received.
42. When the legislative process outlined in the following section of this affidavit is considered in the context of my summary above, I am advised and respectfully submit that the process meets – and indeed exceeds – the threshold of reasonableness.

THE LEGISLATIVE PROCESS FOLLOWED BY PARLIAMENT

43. On 10 May 2023, and as per annexure “AA3” hereto, Cabinet approved the Public Procurement Bill for introduction in Parliament.
44. The introduction of a bill in the NA is governed, *inter alia*, by Rule 276(5) of the Rules of the NA, which provides in relevant part as follows:



Prior notice and publication of draft legislation

(1) A Bill may be introduced in the Assembly only if –

(a) a copy of the draft legislation has been submitted to the Speaker in terms of Rule 271, if it is a Bill initiated by the national executive and that rule is applicable;

(b) prior notice of its introduction has been given in the Gazette; and

(c) an explanatory summary of the Bill, or the draft Bill as it is to be introduced, has been published in the Gazette.

(2) . . .

(3) . . .

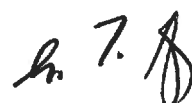
(4) If the Bill as it is to be introduced is published, the notice referred to in Subrule (1)(b) must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Speaker within a specified period.

(5) If the draft Bill itself is published, a memorandum setting out the objects of the Bill must also be published.

45. A copy of the relevant extract of the Rules of the NA is attached as “**AA4**”.
46. The notice contemplated in Rule 276(1)(b), published on 22 May 2023, is attached as “**AA5**”. The notice provided an explanatory summary of the Bill. The City contends that this notice is inadequate, and that the notice ought to have included an invitation to make written representations to me as the Speaker of the NA. Such an invitation, however, would only have been necessary if the Bill as it is to be introduced or the draft Bill itself was published. That was not the case here. In submission, therefore, the City’s assertion that the requirements of Rule 276 were not met is not correct.

The process before the NA

47. The nature of the Bill was such that the consultation process in the NA would be run by the Standing Committee.
48. National Treasury provided an informal briefing to the Standing Committee on 23 May 2023. The 2023 Procurement Bill itself was introduced in Parliament on 30 June 2023, as per the Announcement, Tabling and Committee Report attached as annexure **“AA6”**.
49. The Department conducted a formal briefing on 5 September 2023. The minutes of the formal briefing session are attached as **“AA7”**.
50. In the intervening period, a call for public comments was issued – in all the official languages, in both print media and on Parliament’s website – on 18 August 2023. Copies of these publications are attached as **“AA8”** and **“AA9”**. As per these advertisements, the deadline for public comments in respect of the 2023 Procurement Bill was 11 September 2023. Those who requested extensions were, however, granted more time.
51. At that stage, clause 17, dealing with preferential procurement, read as follows:
- (1) *When implementing a procurement policy providing for—*
(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination,
a procuring institution must do so in accordance with the objects of this Act, this Chapter and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)."
- (2) *The policy envisaged in subsection (1) must include –*



- (a) *one or more preference point systems and thresholds;*
 - (b) *measures regarding preference for—*
 - (i) *a category or categories of persons or enterprises or a sector;*
 - (ii) *goods that are produced in the Republic; and*
 - (iii) *services provided in the Republic;*
 - (c) *measures—*
 - (i) *to set aside the awarding of bids to promote any of the preferences referred to in paragraph (b);*
 - (ii) *to set subcontracting as a bid condition to promote any of the preferences referred to in paragraph (b);*
 - (iii) *for subcontracting by suppliers awarded bids that promote any of the preferences referred to in paragraph (b);*
 - (iv) *to advance transformation, beneficiation, industrialisation, innovation, creation of jobs, intensification of labour absorption and economic development;*
 - (v) *to balance the economic impacts of imported goods or services, unless the procuring institution is exempted by the Minister; and*
 - (vi) *to advance a sustainable environment.*
- (3) *Regulations—*
- (a) *must be made regarding the application of subsection (2)(a) and (b)(ii) and (iii); and*
 - (b) *may be made regarding any other provision of this Chapter.*
- (4) *Without limiting the generality of subsection (1)(b), the policy must include preferences for—*
- (a) *citizens and permanent residents of the Republic;*
 - (b) *small enterprises, as defined in section 1 of the National Small Enterprise Act, 1996 (Act. No. 102 of 1996);*
 - (c) *enterprises based in townships, rural or underdeveloped areas or in a particular province or municipality.*

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- (5) *Persons referred to in subsections (1)(b) and (2)(b)(i) include, but are not limited to—*
- (a) black people, as defined in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);*
 - (b) women;*
 - (c) people with disabilities, as defined in the Employment Equity Act, 1998 (Act No. 55 of 1998); and*
 - (d) youth, as defined in section 1 of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008).*
- (6) *Before making a regulation under this Chapter, the Minister must consult with the Ministers responsible for trade, industry and competition, small business, women, people with disabilities and youth and any other relevant Minister whose portfolio is affected by the draft regulation.*
- (7) *Any Minister, referred to in subsection (6), may submit a request to the Minister of Finance to make regulations under this Chapter regarding a matter pertaining to the portfolio of the relevant Minister.*

52. On 12 and 13 September 2023, the Standing Committee held public hearings and received written and oral submissions from a range of stakeholders. Copies of the minutes of these public hearings are attached as “AA10” and “AA11”. During these hearings, a number of stakeholders recorded their concern that the Bill in its published form did not go far enough in advancing the transformative objectives of preferential procurement.
53. The Chairperson of the Standing Committee also took a decision at that stage that, although the public hearings had been completed, stakeholders would still be permitted to make written submissions.

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54. National Treasury presented a revised draft of Chapter 4 to the Standing Committee on 17 November 2023. Given the importance of the preferential procurement provisions, the Chairperson of the Standing Committee requested that the revised draft be summarized orally for the benefit of all stakeholders, and to enable them to comment. I confirm that a number of additional written submissions were made. A copy of the minutes of this meeting is attached as **“AA12”**.
55. The revised draft of Chapter 4 did not contain any concepts or preferential procurement measures that had not already been foreshadowed. On the contrary, the purpose of the revised draft was to unpack and elaborate upon the provisions that had initially been included in clause 17 of the 2023 Procurement Bill, which had previously been published for comment. The unpacking and elaboration were a direct response to submissions received from stakeholders that this was necessary in order to meaningfully advance the objectives of transformation and empowerment.
56. On 24 November 2023, National Treasury provided responses to the submissions made to the Standing Committee on 12 and 13 September 2023, following which stakeholders were afforded an opportunity to reply to National Treasury’s responses. A copy of the minutes of this meeting is attached as **“AA13”**.
57. The Standing Committee held deliberations on 28 and 29 November 2023, following which they adopted a list of amendments to the Bill. This ‘A-list’ of amendments is attached as **“AA14”**. The list was informed by the submissions received from members of the public, as well as the Standing Committee’s own

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consequential deliberations. It was this process of public involvement which resulted in the provisions in Chapter 4, which, even at that time, still remained provisional in nature. There would be further facilitation of public involvement which would occur later, prior to the finalisation of Chapter 4's provisions, as I explain further below.

58. Following the production of the A-list of amendments, the Standing Committee then met again, on 1 and 4 December 2023, in order to adopt its report. Minutes of the relevant meetings are attached as “AA15” and “AA16”. The Standing Committee’s report, adopted on 4 December 2023, is attached as “AA17”. Notably, the comments and recommendations of the Standing Committee in respect of the preferential procurement provisions were as follows:

5.14 *The inclusion of a preferential procurement framework aligns with constitutional provisions found in section 217 and aims to address the persistent historical economic disparities. The chapter on preferential procurement triggered substantial feedback, resulting in comprehensive revisions. It also necessitated the refinement of certain definitions such as “transformation” in Clause 1 of the Bill and the introduction of new terms, including “economically active population” and “BBBEE status level contributor,” among.*

5.15 *The Preferential Procurement framework in this Bill shifts away from assessing bids solely on price, incorporating additional complementary objectives for procurement. This progressive step aims to empower individuals and entities historically disadvantaged, countering the perverse outcomes associated with the PPPFA framework.*


(Emphasis added).

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59. The Bill incorporating the amendments was then reported as the B-version of the Bill (B18B-2023). A copy of the B-version is attached as “**AA18**”.
60. On 6 December 2023, the NA held a second reading of the Bill. It transmitted the B-version of the Bill, so adopted, for concurrence, to the NCOP. The Bill was accordingly referred to the Select Committee.

The process before the NCOP

61. Upon receipt of the Bill from the NA, the Select Committee invited the provincial Portfolio Committees on Finance to the briefing on the Bill by National Treasury, on 6 February 2024, as well as to all other meetings. A copy of the minutes of the briefing session is attached as “**AA19**”.
62. The Select Committee published a call for submissions and comments on its website, on 30 January 2024. The latter notice, which was published in each of the official languages, advised members of the public that they would be permitted to send their written submissions by 22 February 2024. Members of the public were further invited to attend the public hearing scheduled for 23 February 2024, over Zoom. Copies of these notices are attached as “**AA20**”.
63. As per the Select Committee’s report adopted on 8 May 2024, a copy of which is attached as “**AA21**”, the Select Committee received a total of 33 submissions, including 12 oral submissions and 21 written submissions.
64. The National Treasury responded to these submissions at a meeting held on 19 March 2024, and stakeholders were afforded an opportunity to reply to the

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National Treasury's responses. A copy of the minutes of this meeting is attached as "**AA22**". The National Treasury's report on this process is attached as "**AA23**".

65. The minutes of the meeting of 19 March 2024 record that the Select Committee held concerns about the National Treasury's responses to stakeholders. The Select Committee therefore requested the National Treasury to hold further meetings with stakeholders to discuss critical aspects of the Bill. The National Treasury did so: it held further stakeholder meetings, between 8 and 10 April 2024. Thereafter, the National Treasury reported on these meetings to the Select Committee on 17 April 2024. A copy of the minutes of the latter meeting is attached as "**AA24**".
66. On 23, 25 and 26 April 2024 the Select Committee considered the public submissions received, together with the responses from National Treasury. Copies of the minutes of these meetings are attached as "**AA25**" to "**AA27**" respectively.
67. In addition to the public hearing conducted by the NCOP and the subsequent deliberations in the NCOP, each of the provincial legislatures conducted their own public hearings as follows:
- 67.1. The Eastern Cape Provincial Legislature gave notice on 15 February 2024 of public hearings to be held between 27 February 2024 and 1 March 2024. A copy of the negotiating mandate report prepared by the Eastern Cape Provincial Legislature is attached as "**AA28**". A copy of the final mandate report is attached as "**AA29**".

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- 67.2. The Free State Provincial Legislature gave notice on 8 February 2024 of public hearings to be held on 15, 21 and 22 February 2024. A copy of the notice dated 8 February 2024 is attached as “**AA30**”. Copies of the negotiating mandate and final mandate reports are attached as “**AA31**” and “**AA32**”, respectively.
- 67.3. The Gauteng Provincial Legislature published notices of public hearings, to be held on 29 February 2024, on three occasions. It firstly did so on 8 February 2024, on its official website and on social media. Secondly, on 14 February 2024, it published a notice of the public hearings to be held in the Star newspaper. It thirdly published a notice in the Sunday Times, on 18 February 2024. Copies of the negotiating mandate and final mandate reports are attached as “**AA33**” and “**AA34**”, respectively.
- 67.4. The KwaZulu-Natal Provincial Legislature gave notice on 6 February 2024 of public hearings to be held on 15 and 22 February and 1 March 2024. A copy of the report prepared by the KwaZulu-Natal Provincial Legislature pertaining to the public consultation process is attached as “**AA35**”. The KwaZulu-Natal Provincial Legislature’s final mandate report is attached as “**AA36**”.
- 67.5. The Limpopo Provincial Legislature gave notice on 11 March 2024 of public hearings to be held on 15 March 2024. A copy of the notice dated 11 March 2024 is attached as “**AA37**”. Copies of the negotiating

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mandate and final mandate reports are attached as “**AA38**” and “**AA39**”, respectively.

- 67.6. The Mpumalanga Provincial Legislature gave notice on 14 and 23 February 2024 of public hearings to be held on 22 and 29 February and 1 March 2024. A copy of the report prepared by the Mpumalanga Provincial Legislature is attached as “**AA40**”.
- 67.7. The Northern Cape Provincial Legislature gave notice on 27 February 2024 of public hearings to be held on 4 March 2024. Copies of the negotiating mandate and final mandate reports are attached as “**AA41**” and “**AA42**”, respectively.
- 67.8. The North West Provincial Legislature gave notice 4 March 2024 of public hearings to be held on 6 March 2024. Copies of these notices are attached as “**AA43**”. A copy of the final mandate report prepared by the North West Provincial Legislature is attached as “**AA44**”.
- 67.9. The Western Cape Provincial Legislature gave notice on 1 March 2024 of public hearings to be held on 4 March 2024. A copy of the final mandate report prepared by the Western Cape Provincial Legislature is attached as “**AA45**”.
68. The purpose of these public hearings was to enable each provincial legislature, having received input from members of the public, to confer authority on its delegation to the NCOP for the negotiation of, and ultimately the casting of votes for or against, the adoption of the 2023 Procurement Bill.

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69. Following each provincial legislature's public participation process, therefore, each province provided its delegate with a negotiating mandate as contemplated in the Mandating Procedures of Provinces Act. In this regard, it is important to highlight that –
- 69.1. each provincial legislature is bound by its own set of rules applicable to the voting that precedes the negotiating and final mandates conferred on the delegations to the NCOP; and
- 69.2. once that voting has been conducted in accordance with each provincial legislature's own rules, the formal requirements with which the negotiating and final mandates conferred by each province must comply are prescribed by the Mandating Procedure of Provinces Act.
70. Copies of the negotiating mandates conferred on the delegates from each province are attached as "**AA46**". The Select Committee discussed these negotiating mandates between 30 April 2024 and 2 May 2024, as per the attached minutes, marked "**AA47**".
71. On 2 May 2024, the Select Committee convened to deliberate on the Bill, clause-by-clause. The minutes of that meeting are attached as "**AA48**".
72. Significantly, given the depth and scope of the issues raised, the Select Committee applied for and was granted an extension of time for the processing of the Procurement Bill beyond the usual eight-week cycle to process Bills. It was thus afforded an additional five to six weeks for its deliberations.

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73. The report adopted by the Select Committee details the concerns raised in respect of the Bill, as well as the responses to those concerns by the National Treasury. Ultimately, and specifically in relation to the preferential procurement provisions, the concerns raised in respect of Chapter 4 were addressed through amendments to the Bill.
74. The outcome of that process was that the Bill received the support of every province in South Africa other than the Western Cape. Copies of the provinces' final mandates in this regard are attached as "**AA49**". A copy of the C-version of the Bill, adopted by the NCOP in accordance with these final mandates, is attached as "**AA50**".

Referral of the Bill back to the NA

75. The C-version of the Bill was subsequently returned to the NA and referred to the Standing Committee. The Standing Committee's report of 13 May 2024, a copy of which is attached as "**AA51**", indicates that the Standing Committee was satisfied with the C-version of the Bill.
76. The amendments set out in the C-version of the Bill were incorporated into the D-version (annexure "**AA52**"), which was passed by the NCOP and returned to the NA. The NA referred the D-version of the Bill to the Standing Committee, where the amendments to the Bill were accepted and the Bill passed.

Assent by the President

77. After the completion of the various procedural steps I have summarised above, the Bill was duly placed before the President, for his consideration. The

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President assented to the Bill and published the Procurement Act in the Government Gazette on 23 July 2024, as per the attached media statement marked “**AA53**”.

CURRENT STATUS OF THE PROCUREMENT ACT AND REGULATIONS

78. The Procurement Act has not yet come into effect. I am advised that the date of its commencement will be proclaimed upon the finalisation of the necessary regulations that will set out the detail necessary for the effective implementation of the Procurement Act.
79. I refer the Court to the budget speech for the vote of National Treasury, delivered by the Minister of Finance, on 8 July 2025. A copy of the budget speech is attached as “**AA54**”. In it, the Minister confirmed that the draft regulations would be ready for inter-governmental consultation by the end of August 2025.
80. Following the inter-governmental consultation process (which is the process contemplated in section 63(2) of the Procurement Act), the draft regulations will be published for comment as contemplated in section 63(3). They will then be submitted to Parliament for parliamentary scrutiny, in accordance with the requirements of section 63(4) of the Procurement Act.
81. It is anticipated that the final regulations will be promulgated towards the end of the 2025/26 financial year. Given the interaction between the Procurement Act and the regulations in terms thereof, the commencement of the Act will coincide with the commencement of the regulations. This will likely occur in the first quarter of the 2026/27 financial year.

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82. I am not able to predict the date of the hearing of this application (should it be set down for hearing, at all). Whether or not the Procurement Act has come into operation on the date of any such hearing will have an impact on the appropriate remedy, should the Court reach the merits of the application (which I have denied it was required to do), and should the Court ultimately be persuaded by the case which the City advances (despite my submissions in this affidavit). I am advised in this regard that, should the need arise, this issue will be addressed in argument.

RELEVANT PREFERENTIAL PROCUREMENT PROVISIONS

83. The City contends that, following the public participation process in respect of the 2023 Procurement Bill, Parliament introduced an entirely new framework governing preferential procurement through the introduction of a new Chapter 4, and it did not invite further submissions from members of the public.

84. I admit that there was no new public comment process following the formulation of Chapter 4 of the Procurement Act in its current form, although members of the public were afforded an opportunity to comment on the new draft during the meeting of 17 November 2023 as indicated in paragraph 54 above. I am advised and submit, however, that, in terms of section 59(1)(a) of the Constitution (being the provision on which the City seeks to place reliance), no new public comment process was required.

85. The revised draft of Chapter 4 did not contain any concepts or preferential procurement measures that had not already been adequately foreshadowed. On the contrary, the purpose of the revised draft was to unpack and elaborate

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upon the provisions that had initially been included in clause 17 of the Bill that had first been published for comment. The unpacking and elaboration of the principles set out in clause 17 were a direct response to submissions solicited and received from stakeholders that doing so was necessary in order to meaningfully advance the objectives of transformation and empowerment.

86. Clause 17 of the 2023 Procurement Bill as set out above includes all of the preferential procurement mechanisms now contained in Chapter 4 of the Procurement Act, including –

86.1. set-asides (clause 17(2)(c)(i));

86.2. pre-qualification criteria and mandatory sub-contracting (clause 17(2)(c)(ii) and (iii)); and

86.3. local production and content (clause 17(2)(c)(v)).

87. Stakeholders were thus afforded ample opportunity to comment on these proposed mechanisms through their submission of comments on the 2023 Procurement Bill. No new mechanisms were introduced without a public participation process, and I respectfully reiterate my submission that the public participation process followed was sufficient.

88. That the inclusion of Chapter 4 in the Procurement Act did not introduce materially new subject matter is confirmed with reference to Rule 286(4)(b) of the Rules of the NA, the relevant extract of which is attached as “AA55”. This Rule permits the Standing Committee to seek the permission of the NA to inquire into extending the subject of a Bill under consideration. It would have

been open to the Standing Committee, according to this Rule, to include additional substantive provisions not included in earlier drafts.

89. No such permission was sought in respect of the 2023 Procurement Bill. The reason for this is that Chapter 4, while it may have changed the scope of the subject matter of the 2023 Procurement Bill, did not extend the subject of the Bill by introducing new provisions that had not already been foreshadowed.
90. Additionally, and as I have already stated, Chapter 4 is conceptually similar to the regulations which were promulgated in terms of the PPPFA. Those regulations, which were subject to a public comment process in terms of section 5(2) of the PPPFA before they were finalised, are attached as “AA56”. They made provision for –
- 90.1. pre-qualification criteria to advance certain designated groups (regulation 4);
 - 90.2. mandatory sub-contracting (regulation 9); and
 - 90.3. local production and content (regulation 8).
91. I acknowledge that the regulations under the PPPFA were set aside by this Court, in *Minister of Finance v Afribusines NPC* 2022 (4) SA 362 (CC). I am advised, however, that they were set aside on the basis of the doctrine of legality, and that the Court made no findings to impugn their substance. Accordingly, Chapter 4 incorporates provisions regulating preferential procurement that had already been in place under the existing statutory framework (prior to being set aside on grounds not relevant to this application).

 87.

92. To suggest that the contents of Chapter 4 were introduced without the benefit of public participation is therefore incorrect. I am advised and submit that the City's challenge fatally ignores (among other things) the extensive consultation on the substance of Chapter 4 which was followed through other legitimate avenues.

CONSIDERATION OF THE PUBLIC COMMENTS RECEIVED

93. The City asserts that the NA did not see to it that all public comments were considered as part of the legislative process. This assertion is denied.
94. I accept that it was not practical to provide detailed responses to each individual stakeholder's comments, particularly in the light of the number of comments received. However, the City's suggestion that, as a result of the absence of detailed responses to each comment, it is legitimate to draw an inference that certain stakeholders or certain comments were simply ignored, is both factually incorrect and legally unjustified.
95. The reasons the City's contention is factually incorrect are as follows:
- 95.1. There were several submissions received in the course of the consultation process that overlapped with each other. A review of those submissions enabled National Treasury to identify thematic issues that emerged, and to address these, either by proposing amendments to the 2023 Procurement Bill or by recording that no such amendments are proposed.

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- 95.2. This is reflected in annexure “FA10” to the founding affidavit, in which the following is recorded:

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.

(Emphasis added).

- 95.3. This approach enabled the National Treasury to provide comprehensive responses to principal concerns that emerged as common themes across the submissions received. In this way, the consultation process could be handled pragmatically and efficiently, in the discharge of the obligation to facilitate public involvement and to do so diligently and without undue delay.
- 95.4. One of the major themes that emerged during this process was that of preferential procurement, which, as I have addressed above, was the subject of widespread criticism by stakeholders who argued that the preferential procurement provisions in the 2023 Procurement Bill did

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not go far enough. The process adopted as outlined above allowed for the identification of the concerns raised and the manner in which these could be addressed.

96. The reasons why I am advised and submit that the City's proposed adverse inference is legally unjustified include the following:

96.1. In our law, the principle that all public acts are deemed to have been performed lawfully unless the contrary is proved by the asserter (*omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*), is well established, and it has been uniformly applied by our courts both pre-constitutionally and post-constitutionally. Particularly when viewed against the facts I have set out in this affidavit, the City has failed to advance facts which approach or meet the applicable onus of proof.

96.2. Particularly when viewed against the facts I have set out in this affidavit:

96.2.1. The City fails adequately to plead, and fails to adduce adequate evidence to meet, the legal requirements applicable to reasonable inferences. These include the City's failure to demonstrate that the inference sought to be drawn is more probable than any other reasonable inference. Indeed, it is submitted that the only reasonable inference to be drawn in the circumstances is directly opposite to the one asserted by the City.

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96.2.2. The City fails adequately to plead, and fails to adduce adequate evidence to meet, the legal requirements applicable to adverse inferences which may be made as against the respondents.

96.3. Under the Constitution, the duty to facilitate public involvement is not a duty to amend draft legislation to incorporate all public comments received; it is a duty to ensure that members of the public are afforded a reasonable opportunity to influence the outcome of the legislative process, while recognizing that Parliament need not – and will not, in fact – be persuaded by each and every comment received. In accordance with this principle, a parliamentary election not to amend draft legislation in line with each or any comments submitted by members of the public lends no support to a conclusion that stakeholders did not have an adequate opportunity to submit their comments, whatsoever.

97. In the circumstances, I submit that there is no basis on which to conclude that the submissions received from members of the public were not properly considered.

PARAGRAPH-BY-PARAGRAPH RESPONSES

98. I now turn to respond *ad seriatim* to the content of the founding affidavit. In doing so, I have done my utmost to respond to each and every allegation made by the applicant. Where I have not responded to a particular allegation, and

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where it is inconsistent with what is stated elsewhere in this affidavit, that allegation is denied.

Ad paras 1 – 4

99. Save to deny that the content of the founding affidavit is true and correct, the content of these paragraphs is admitted.

Ad para 5

100. For the reasons set out above, I deny that the public participation process preceding the adoption of the Procurement Act was inadequate.

Ad para 6

101. I admit the content of this paragraph.


Ad paras 7 – 10

102. For the reasons set out above, I deny that Parliament has failed to meet its public participation obligations. The process followed was reasonable, and afforded members of the public ample opportunity to participate and make their views known.

Ad para 11

103. I have addressed above the rationale behind the time frames for the public participation process. I have also confirmed that there will be further public participation processes prior to the promulgation of regulations, which regulations will deal with important substantive issues.

104. I therefore deny that there was anything unnecessary or unconstitutional about the time frames adopted.

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Ad para 12

105. The contents of this paragraph are denied for the reasons set out above.

Ad para 13

106. The content of this paragraph is admitted.

Ad paras 14 – 19

107. The content of these paragraphs is admitted.

Ad paras 20 – 29

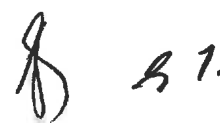
108. The content of these paragraphs is admitted. The respondents do not take issue with the City's standing to bring this application. The respondents do, however, deny that there were any defects or deficiencies in the public participation process followed.

Ad paras 30 – 33

109. The content of these paragraphs is admitted. The respondents accept that this Court has exclusive jurisdiction over the issues raised in this application. The respondents do, however, deny that there was any failure in the discharge of their constitutional obligations.

Ad paras 34 – 41

110. The content of these paragraphs is admitted. The respondents do not take issue with direct access being granted in respect of the Mandating Procedures of Provinces Act.

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111. The factual allegations in these paragraphs are, however, denied. for the reasons set out further above, I specifically deny that any of the provincial legislatures failed to comply with the procedures that bind them.

Ad paras 42 – 43

112. I have outlined above the process that was followed by Parliament. I deny, for the reasons set out above, that Parliament failed to comply with any of the Rules or guidelines referred to in this paragraph.

113. On the contrary, I reiterate my submission that the respondents met their obligation to facilitate public participation, as contemplated in the Constitution.

Ad paras 44 – 46

114. I deny that the notice referred to in these paragraphs was non-compliant with Rule 276. An invitation to submit comments is required only if the Bill as it is to be introduced or the draft of the Bill itself is to be published. I reiterate my prior submission that this requirement was inapplicable to the facts.


Ad paras 47 – 51

115. I admit that there was an initial meeting on 23 May 2023, prior to the introduction of the draft 2023 Procurement Bill itself. I deny that there are any negative inferences to be drawn from this. As I have addressed above, the draft Bill was introduced on 30 June 2023 and a formal briefing held on 5 September 2023.

Ad paras 52 – 54

116. The content of these paragraphs is admitted.

Ad paras 55 – 58

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117. The content of these paragraphs is admitted.

Ad para 59

118. The content of this paragraph is denied. I have outlined above the opportunities for public participation on the 2023 Procurement Bill.

Ad paras 60 – 64

119. The content of these paragraphs is admitted.

Ad para 65

120. I admit that the NA did not respond in detail to each comment received. I deny, however, that this suggests a failure to consider all of the comments. As I have addressed above, the NA was able to, and did in fact, consider and respond to all of the thematic issues raised.

Ad para 66

121. I have dealt above with the erroneous assertion that the preferential procurement provisions contained in Chapter 4 of the Procurement Act did not go through a public comment process. The content of this paragraph is accordingly denied.

Ad para 67

122. For the reasons set out further above, I deny that there was insufficient time for members of the public to make submissions in respect of the 2023 Procurement Bill.

Ad paras 68 – 72

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123. I admit that the NA did not respond in detail to each comment received. I deny, however, that this suggests a failure to consider all of the comments. As I have addressed above, the NA was able to and did in fact consider and respond to all of the thematic issues raised.

Ad paras 73 – 74

124. As I have stated above, the amendments discussed during the course of these deliberations were informed by the submissions received from members of the public, as well as the Standing Committee's own consequential deliberations. I therefore deny the allegation that the Standing Committee did not consider the contributions made by the public.

Ad para 75

125. The content of this paragraph is admitted.

Ad paras 76 – 79

126. The content of these paragraphs is admitted. I deny that any of the issues addressed in these paragraphs renders the process adopted by the NCOP unreasonable or in any way unlawful.

Ad para 80

127. I confirm that members of the Finance Portfolio Committee of the KwaZulu-Natal Provincial Legislature were briefed by National Treasury on 6 February 2024.

Ad para 81

128. I have set out the details of the public hearings held by each of the provincial legislatures above. To the extent that the content of this paragraph is inconsistent with what is set out above, it is denied.

Ad paras 82 – 84

129. The content of these paragraphs is admitted. As I have addressed above, the concerns raised in relation to the public participation process were addressed through, *inter alia*, conducting further stakeholder meetings.

Ad para 85.1

130. The content of this paragraph is denied. As per annexures “AA28” and “AA29”, referred to above, the public hearings were held between 27 February and 1 March 2024, and the negotiating mandate adopted on 14 March 2024 after the public hearings had been concluded. I refer in particular to paragraph 5 of annexure “AA29”, which reports on the public hearings held in the Alfred Nzo and OR Tambo District Municipalities, which municipalities include Mt Frere and Lusikisiki, respectively.

Ad para 85.2

131. A copy of the notice of the public hearings held in the Free State is attached and referred to above as “AA30”. The notice clearly sets out the dates of the public hearings conducted as well as the venue for each hearing.

Ad para 85.3

132. For reasons I set out further above, I deny that the Gauteng Provincial Legislature published its call for public participation on its Facebook page on 9 February 2024.

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133. I also deny the suggestion that the Gauteng Provincial Legislature lacked the requisite negotiating mandate. The correct facts in this regard are summarised as follows:

133.1. After receipt of referral of the Public Procurement Bill from the Chairperson of the NCOP, the Speaker duly referred the Procurement Bill to the Gauteng Provincial Finance Portfolio Committee, for formal consideration, in accordance with Rule 245(1) of the Gauteng Provincial Legislature Standing Rules.

133.2. Further above, I described the notice and public hearing processes followed by the Gauteng Provincial Legislature which followed thereafter. Once this public-participation process was concluded, the Gauteng Provincial Finance Portfolio Committee convened in order to formulate its negotiating position. It elected to support the passing of the Public Procurement Bill, with no amendments. This election is recorded in the Gauteng Provincial Finance Portfolio Committee's report, compiled in terms of Rule 163 of the Gauteng Provincial Legislature Standing Rules ("**the Rule 163 Report**"), as well as in the relevant negotiating mandate. I have already attached a copy of the negotiating mandate, further above. A copy of the Rule 163 Report is attached to this affidavit, marked "**AA57**". A copy of the Gauteng Provincial Legislature Standing Rules is attached marked "**AA58**".

133.3. After the completion of the Rule 163 Report, a negotiation mandate was duly conferred on Gauteng's delegation to the NCOP, in terms of

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section 5 of the Mandating Procedure of Provinces Act. On 2 April 2024, the negotiating mandate, as well as the Rule 163 Report, were forwarded to the permanent delegate of the NCOP, for tabling before the NCOP Select Committee.

133.4. Subsequent to the conclusion of the NCOP Select Committee's deliberations, the final version of the Public Procurement Bill was referred to each of the provinces, for purposes of the conferral of final mandates, as required by section 6 of the Mandating Procedure of Provinces Act.

133.5. After the C version and the D version of the Public Procurement Bill were referred to the Gauteng Provincial Legislature by the NCOP Select Committee on Finance, they were duly considered and deliberated on by the Gauteng Provincial Finance Portfolio Committee for the purpose of furnishing the NCOP with a final mandate.

133.6. On 7 May 2024, and in accordance with Rule 36(1) of the Gauteng Provincial Legislature Standing Rules, the Speaker of the Gauteng Provincial Legislature conferred the requisite final mandate.

134. Save as aforesaid, the content of the paragraphs under reply is admitted.

Ad para 85.4

135. The content of this paragraph is admitted.

Ad para 85.5

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136. The process followed by the Limpopo Provincial Legislature is described in annexures "AA38" and "AA39" hereto. The content of that report is consistent with the allegations in this paragraph.

Ad para 85.6

137. The process followed by the Mpumalanga Provincial Legislature is described in "AA40" hereto. The content of that report is consistent with the allegations in this paragraph.

Ad para 85.7.1

138. A copy of the Northern Cape Provincial Legislature's negotiating mandate report is attached above as "AA41". As per this report, one written submission was received, and no oral submissions were made at the public hearings. The reference to the stakeholder who provided input is a reference to the author of the written submission referred to in paragraph 3 of annexure "AA41".

Ad para 85.7.2

139. The content of this paragraph is admitted.

Ad para 85.8

140. I have attached annexure "AA44" above, which is a copy of the report prepared by the Mpumalanga Provincial Legislature. A copy of the notice of public hearings, recording the date of the hearings and the venue for each, is also attached as "AA43".

141. I admit that the notice was not published in the newspapers referred to in the paragraph under reply. The notice was, however, contained in print publications available across all four districts in the North West Province. Notice of the public

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hearings was, in addition, given on national and local radio stations. For these reasons, I submit that compliance or alternatively substantial compliance with the applicable obligations was achieved.

Ad para 85.9

142. The content of this paragraph is admitted.

142.1. There was a delay in the finalization of the logistics for the public hearings in the Western Cape, due to a problem with the availability of venues;

142.2. Once venues had been secured, it would have been too late to place advertisements for the public hearings in newspapers. It was therefore necessary to focus on direct community outreach.

142.3. The invitation was distributed through social media, and distributed directly to the Parliamentary Monitoring Group's subscribers and the stakeholders on the Provincial Treasury's supplier database. The Provincial Treasury further placed the advertisement on their social media pages. The Department of Economic Development and Tourism was also requested to send the Bill and the public hearing information to stakeholders. The invitation was also sent to all municipalities and business chambers. Municipalities were requested to send the invitations to all of their councillors, Local Economic Development Units and any registered small businesses in their regions.

Ad paras 86 – 88

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143. The content of these paragraphs is admitted.

Ad para 89

144. The content of this paragraph is denied. The Select Committee's consideration spanned a number of days. The Eastern Cape Provincial Legislature's negotiating mandate, which was considered, first, by the Select Committee, was considered on 30 April 2024. The Select Committee did not conclude its deliberations on 30 April 2024, but continued these deliberations on 2 May 2024. I refer to the attached agendas of the Select Committee meetings dated 30 April 2024 and 2 May 2024, attached as "AA59" and "AA60" respectively.

Ad paras 90 – 91

145. The content of these paragraphs is denied. Each of the provincial legislatures has adopted its own standing rules, and acted in accordance with these rules. This is evidenced by the reports prepared by each provincial legislature and referred to above.

Ad para 92

146. The content of this paragraph is not denied.

Ad paras 93 – 96

147. I admit the content of these paragraphs. I submit that, based on what is set out above, Parliament met, and indeed exceeded, the threshold for reasonable public participation.

Ad paras 97 – 98

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148. The content of these paragraphs is denied. I have explained the non-binding nature of the Practical Guide for Members of Parliament and the Provincial Legislatures above.

Ad para 99

149. I have addressed above the time-sensitivities that existed at the time that the public participation process was underway. I deny that the process was truncated. Rather, I submit that the respondents conducted themselves consistently with their obligations in terms of section 237 of the Constitution.

150. I deny that the time periods allowed for public participation were unreasonable in the circumstances.

Ad paras 100 – 104

151. I admit receipt of the correspondence referred to in these paragraphs. For the reasons set out above, I deny the allegations made in the correspondence and repeated in the founding affidavit.

Ad para 105

152. The content of this paragraph is admitted. For the reasons set out above, I respectfully agree with the conclusion that the public participation process was not flawed.

Ad para 106

153. The content of this paragraph is admitted.

Ad para 107

154. The content of this paragraph is admitted.

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Ad paras 108 – 114

155. The content of these paragraphs is denied. As I have addressed above, the preferential procurement provisions do not include new concepts that have never been the subject of public participation. The rationale behind the preferential procurement measures reflects that underlying the regulations in terms of the PPPFA, which regulations were subjected to a rigorous public comment process. Parliament was not required to embark on a wholly new public participation process.

Ad paras 115 – 118

156. The content of these paragraphs is denied. As I have addressed above, the invitation to make submissions is required only where the Bill as it is to be introduced or the draft Bill itself is published. In this case, the notice of 22 May 2023 contained only an explanatory memorandum.

Ad paras 119 – 127

157. I deny that there was any factually incorrect information provided. I refer the Court to the report of the Select Committee dated 7 May 2024 (annexure “AA19”), which records as follows:

Many stakeholders cautioned that skills and resources are key in the implementation of the Bill. There will be set-up and transitional costs; Increased operational costs; And an increased cost on procurement itself, especially to provinces and municipalities. The cost implications of Chapter 4 have not been specified in the Bill, and this exposes the provinces and municipalities to the risk of unfunded mandates and hidden costs. It is unacceptable that NT cannot project or estimate the financial implications of the Bill on all affected parties. NT's response

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was that the elements of the procurement systems mentioned in clause 25 are existing elements which may have to be made part of the procurement system. NT further said that most of these are not new functions for institutions but are elevated to primary legislation, and that the enforcement function for PTs is also not new. PTs already have an enforcement role in respect of provincial departments in section 18(2)(b) of the PFMA. While NT's view is that shifting functions within the institutions should result in limited costs, it proposed to remove the enforcement role for PTs in respect of municipalities. NT acknowledged that the establishment of the Tribunal will result in additional costs. Clause 68 of the Bill provides for the provisions of the Act to be brought into operation on different dates and also 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 date of provisions.

(Emphasis added).

158. The Select Committee's response, recorded at paragraph 6.12 of its report, was to request that the National Treasury provide a financial cost within six months. The Select Committee did not consider its request concerning financial costing to be a prohibitive concern. In other words, none of the concerns raised were of a kind that should inhibit or delay the passage of the Act.
159. It also bears noting that the right to public participation is not a right to make submissions on a memorandum. I am advised and submit that the right applies only to the Bill whose provisions are discussed in the explanatory memorandum.

Ad paras 128 – 131

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160. The content of these paragraphs is denied. As I have addressed above, it would not have been practical to provide direct and detailed responses to each stakeholder. There was, however, adequate consideration given to all of the themes that emerged from the submissions received.

Ad paras 132 – 134

161. The content of these paragraphs is denied for the reasons outlined above.

Ad paras 135 – 138

162. I deny that there exists a strict requirement of a seven-day notice period. I am advised and submit that this Court has held that the reasonableness of the notice period will depend on the circumstances of each case. In the circumstances of the present case, I submit that the notice afforded to members of the public was indeed reasonable.

Ad para 139

163. The content of this paragraph is admitted.

Ad paras 140 – 141

164. The content of these paragraphs is denied.

165. As per annexures “AA28” and “AA29” hereto, the public hearings in the Eastern Cape were held between 27 February and 1 March 2024.

166. The Mount Frere community, which is part of the Alfred Nzo District Municipality, was included in the hearings conducted in Mount Ayliff (EmaXesibeni) on 28 February 2024. The Lusikisiki Community was included in the public hearing held on 29 February 2024 at the St Elizabeth Hospital Auditorium in Lusikisiki.

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167. I have also addressed above the fact that the Select Committee considered the Eastern Cape Provincial Legislature's negotiating mandate on 30 April 2024, and that it concluded its consideration of the negotiating mandates of all of the provincial legislatures on 2 May 2024.

Ad paras 142 – 143

168. The content of these paragraphs is denied. The report prepared by the Mpumalanga Provincial Legislature provides a comprehensive account of the issues raised, each of which was thoroughly considered by the Select Committee.

Ad paras 144 – 145

169. The content of these paragraphs is denied. As I have explained above, the reference to inputs received is a reference to the written submission made by one stakeholder in the Northern Cape. No oral inputs were received.

Ad para 146

170. I have addressed these allegations above. Although the North West Provincial Legislature gave notice of its public hearings in a publication other than those specified in its report, the notice was published in a newspaper available to all four districts in the province. The public hearings were also advertised on radio.

Ad paras 147 – 157

171. The content of these paragraphs is denied. The respondents maintain that sufficient time for public participation was provided. The Bill was also adequately translated into the official languages spoken in each province.

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Ad paras 158 – 159

172. To the extent that the City has accurately quoted the relevant provisions of the Mandating Procedures of Provinces Act, the content of these paragraphs is admitted. Save as aforesaid, the content of these paragraphs is denied.

Ad paras 160 – 161

173. As I have addressed above, the Mandating Procedures of Provinces Act applies only once the provincial legislatures have voted on the mandates to be conferred on their delegates to the NCOP. Until that time, the process is governed by each provincial legislature's specific rules.

174. Where the rules of the relevant provincial legislature permit the ratification of final mandates after the fact, the provincial legislatures are fully entitled to follow this course of action.

175. By way of example, Rule 20 of the Rules and Orders of the Mpumalanga Legislature (attached hereto as "**AA61**") provides in relevant part as follows:

(6) If the Legislature is not sitting when a final or voting mandate is required, the Speaker may confer such mandate as recommended by the committee.

(7) The Legislature must ratify the Speaker's conferral of the mandate at the sitting of the House.

176. The fact that the final mandate was ratified after the time that it was conferred can therefore not be faulted.

177. A further example of this is Rule 236 of the Standing Rules of the Limpopo Provincial Legislature (attached hereto as "**AA62**"), which provides that

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“mandates conferred by the Speaker when the house is not in session must be ratified by resolution of the house in its next sitting.” I attach as “AA63” a copy of the minutes of the house sitting on 17 May 2024, which confirm that the mandate conferred by the Speaker was subsequently ratified. This is in line with the Standing Rules and similarly cannot be faulted.

Ad paras 166 – 167

178. I note the relief sought by the City. I deny that a case has been made out for such relief for the reasons set out above.

CONDONATION

179. On 14 July 2025, this Court issued directions in terms of which the respondents were to file their answering affidavits, if any, by 8 August 2025. The Court issued further directions on 2 October 2025, providing, *inter alia*, that the respondents must file their answering affidavits in this application by 13 November 2025, together with an application for condonation for the failure to comply with the directions dated 14 July 2025.

180. This affidavit will be filed 67 court days late, on 11 November 2025. I express my sincere apologies to the Court and to the City for this delay and any inconvenience that may have arisen as a result thereof. The delay did not arise from any wilful disrespect for this Court or the City, but was rather caused by the circumstances outlined below.

181. I am advised and submit that the overriding consideration in considering an application for condonation is the interests of justice, which is informed by the following factors:

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- 181.1. The extent of the delay;
 - 181.2. The reasons for the delay;
 - 181.3. Any prejudice arising from the delay; and
 - 181.4. The respondents' prospects of success in the main application.
182. I submit that a consideration of these factors favours condonation being granted.
183. I refer the Court to the confirmatory affidavit deposed to by Mr Leon Manuel of the Office of the State Attorney, Cape Town, the respondents' attorneys of record in these proceedings. Mr Manuel confirms that –
- 183.1. He is the attorney responsible for this matter from the Office of the State Attorney;
 - 183.2. He was on leave from 4 July 2025 to 14 July 2025;
 - 183.3. Upon his return to the office, there were almost 400 new unread e-mails in his inbox, all of which required his attention;
 - 183.4. One of these was the e-mail containing the directions of this Court, which was sent to Mr Manuel on 14 July 2025. A copy of these directions, reflecting Mr Manuel's e-mail address, is attached as **“AA64”**;
 - 183.5. Mr Manuel erroneously believed that he had forwarded the Court's directions to the other members of the respondents' legal team,

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together with the necessary instructions to draft the answering affidavit. However, he inadvertently omitted to do so;

183.6. Mr Manuel was the only person from the Office of the State Attorney to whom the directions were sent. Although he is working on this matter together with Ms Colleen Bailey, Ms Bailey did not receive the directions via e-mail. I refer the Court to the confirmatory affidavit deposed to by Ms Bailey, which will be attached;

183.7. Mr Manuel became aware of his oversight only on the evening of 11 August 2025, upon receipt of a letter from the City's attorneys enquiring about the answering affidavit. A copy of that letter is attached as "AA65";

183.8. Mr Manuel could not, at that stage, recall having received the directions. After he checked his e-mails on 12 August 2025, he ascertained that the directions were in fact sent to him on 14 July 2025. He also confirmed that he had not distributed these to the other members of the respondents' legal team.

183.9. Mr Manuel informed the other parties' legal representatives of the circumstances and the reason why the answering affidavit was not delivered by 8 August 2025 as per the Court's directions. He further informed them that the respondents intended to file an answering affidavit. A copy of this correspondence is attached as "AA66".

183.10. Mr Manuel then instructed the respondents' counsel to attend to the drafting of the answering affidavit.

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184. It was necessary for the respondents' counsel to take detailed instructions for the purpose of the answering affidavit, and in doing so to collate the instructions and documents received from the NA, the NCOP and each of the provincial legislatures. This was a lengthy process, given the number of people required to provide instructions and the number of documents required from each of them.
185. This affidavit will be filed as soon as reasonably possible, taking the above considerations into account.
186. I submit that the City cannot meaningfully claim any prejudice if the application for condonation is successful. The Procurement Act has not yet been brought into operation, nor is its commencement imminent. Any alleged prejudice arising from the Procurement Act, while denied, will in any event not have arisen.
187. The delay will moreover not delay any hearing of this application. In this regard, I am advised that, as per the directions issued by this Court on 2 October 2025, further affidavits are to be filed by amaBhungane Centre for Investigative Journalism NPC and Solidarity, both of whom have been granted leave to intervene in this application. Once those affidavits have been filed, the respondents are afforded an opportunity to file answering affidavits in response thereto.
188. On the other hand, if condonation is refused, the respondents would not be able to put their case before the Court, despite the substantial impact that any relief granted by this Court may have.

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189. In addition, a refusal of condonation would not only cause prejudice to the respondents, but it would also have a negative impact on the Court's ability to assess the process followed by them in enacting the Procurement Act. I am advised and submit that this is a particularly relevant factor when Courts are faced with constitutional challenges to legislation.

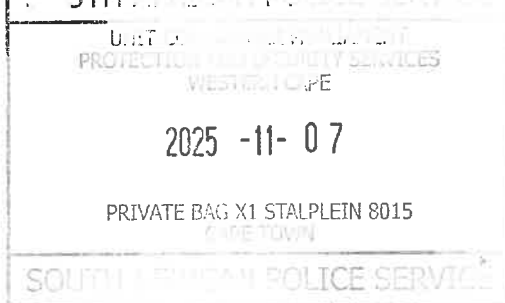
190. I further submit, for the reasons set out above, that the respondents have good prospects of success in opposing the application.

191. Arising from the above, I submit that the respondents have demonstrated that the interests of justice warrant condonation for the late filing of the answering affidavit. The delay, while regrettable, was not a result of any wilful non-compliance with the Rules of this Court.

WHEREFORE the first, second, fifth, sixth, tenth, eleventh and twelfth respondents pray for an order dismissing the application with costs, including the costs of three counsel.

A. J. ...
DEPONENT

SIGNED AND SWORN TO BEFORE ME AT *Cape Town* ON THIS *7* DAY OF *November* 2025, THE DEPONENT HAVING ACKNOWLEDGED IN MY PRESENCE THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THE PROVISIONS OF GOVERNMENT GAZETTE R1478 OF 11 JULY 1980 AS AMENDED BY GOVERNMENT GAZETTE R774 OF 20 APRIL 1982, CONCERNING THE TAKING OF THE OATH, HAVING BEEN COMPLIED WITH.



J.W.S. Smuts
COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
UNIT COMMANDER
PROTECTION AND SECURITY SERVICES
WESTERN CAPE
2025 -11- 07
PRIVATE BAG X1 STALPLEIN 8015
CAPE TOWN
SOUTH AFRICAN POLICE SERVICE

CAPACITY: Warrant Officer
FULL NAMES: James Wallace Skigh Smoi
PHYSICAL ADDRESS: Parliament, Cape Town

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