IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: **CCT: 144/25**

In the matter between:

THE CITY OF CAPE TOWN	First Applicant
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Second Applicant
SOLIDARITY	Third 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	Nineth Respondent
THE SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Tenth Respondent
THE SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE	Eleventh Respondent

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THE SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE	Twelfth Respondent
THE SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE	Thirteenth Respondent

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FILING SHEET

DOCUMENTS FILED HEREWITH:

1. First Applicant's Heads of Argument; and
2. First Applicant's List of Authorities.

Dated at **STELLENBOSCH** on **20 FEBRUARY 2026.**

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CITY OF CAPE TOWN'S WRITTEN SUBMISSIONS

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I. INTRODUCTION

1 This application by the City of Cape Town (**the City**) challenges Parliament for having failed to fulfil its constitutional obligations to facilitate public involvement in passing the Public Procurement Act No 28 of 2024 (**the Procurement Act** or **the PPA**). It also challenges the lawfulness of final mandates that were purportedly conferred by seven Provinces.

2 In determining the merits of the City's public involvement challenge, this Court will be guided by a number of well- established principles,[1] including the following:

2.1 The importance of public participation in the law-making process "*cannot be understated*".[2]

2.2 The Constitution's vision of democracy includes representative and participatory elements.[3]

2.3 When people — particularly the disempowered — participate in the making of laws that affect them, as is their constitutional entitlement, this enhances their dignity.[4]

2.4 Before Parliament enacts legislation, it must take reasonable steps to facilitate public participation.[5]

[1] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) at par 2.
[2] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) at par 3.
[3] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) at par 2.
[4] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) at par 2.
[5] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) at par 2.

2.5 Affected persons must be afforded the opportunity to meaningfully participate in the legislative process. Public participation acts as a safeguard to prevent the interests of the marginalised being ignored or misrepresented. [6]

3 It is trite that Parliament has a discretion to determine the manner in which to fulfil the obligation to facilitate public involvement. It is also well-established that in determining whether Parliament's process was reasonable, this Court will engage with whether the Parliamentary process that was adopted: (a) ensured that a reasonable opportunity was offered to members of the public and all interested parties to know about the issues and to have an adequate say; and (b) provided the public with an opportunity that was capable of influencing the decision to be taken.[7]

4 Public participation assumes heightened significance in the context of the recently adopted Procurement Act. This is so because a constitutionally compliant procurement system is the mechanism through which the State, at all levels, contracts for goods and services that are central to the realisation of constitutional rights. This Court has recognised that public procurement "*plays a vital role in the delivery of goods and services"* and that "*large sums of money are poured into the process"*.[8]

5 More recently, this Court has reaffirmed that the constitutional scheme contemplates that the primary duties of municipalities are in relation to service delivery.[9] Consistent with this, the City invites tenders for a wide range of goods and services to meet its

[6] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) at par 3.
[7] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) at par 35.
[8] **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another** 2015 (5) SA 245 (CC) at par 1.
[9] **Govan Mbeki Local Municipality v Glencore Operations South Africa (Pty) Ltd and Others** 2025 (2) SA 238 (CC) at par 51.

constitutional obligations to its residents. These range from housing services, to feeding schemes that uplift communities, security and cleaning services, and infrastructure demands for a growing population. Legislation regulating public procurement is thus critical to the way in which the State fulfils its constitutional obligations.

6 The regulation of procurement is also necessary to combat fraud, corruption and bribery, which, as the SCA has observed, has "*become so ubiquitous in the field of public procurement"*.[10]

7 A constitutionally compliant statute governing procurement, adopted through a constitutionally compliant process is accordingly a constitutional necessity.

8 The City brings this challenge because the public participation process adopted by the National Assembly (**the NA**), the National Council of Provinces (**the NCOP**) and the Provincial Legislatures was deficient in seven material respects. We submit that the effect of any one or more of these deficiencies entitles the City to the relief sought in this application. Given the nature and seriousness of each ground of challenge in this matter, any single deficiency justifies the relief sought by the City.

II. JURISDICTION, STANDING AND DIRECT ACCESS

9 Parliament does not dispute that the City's challenge engages this Court's exclusive jurisdiction under section 167(4)(e) of the Constitution.[11] It also does not dispute the City's standing to bring this application.[12] Moreover, it accepts that the requirements for direct access are satisfied in the event that this Court's exclusive jurisdiction is not

[10] **State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd** 2017 (2) SA 63 (SCA).
[11] Parliament's AA vol (7) p 685 para 109.
[12] Parliament's AA vol (7) p 685 para 108.

engaged in relation to the City's challenge concerning non – compliance with the Mandating Procedures of Provinces Act No 52 of 2008 (**Mandates Act**).[13] In light of this, we shall briefly dispose of these issues.

JURISDICTION AND DIRECT ACCESS

10 It is well – established that public participation challenges engage this Court's exclusive jurisdiction under section 167(4)(e) of the Constitution.[14] Neither the High Court nor the Supreme Court of Appeal enjoy jurisdiction to determine whether Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in the law – making process.[15] As this Court recognised in **Doctors for Life**, determining whether Parliament has fulfilled its obligations in relation to public participation" *intrude*[s] *into the domain of a principal legislative organ. Under our Constitution, this intrusion is reserved for this Court only".*[16]

11 The City recognises that it is arguably the case that its challenge concerning compliance with the Mandates Act by the Provincial Legislatures (**the Mandates challenge**) does not fall within this Court's exclusive jurisdiction because: (a) the failure of Parliament to comply with a constitutional obligation under section 167(4)(e) does not include a failure by the Provincial Legislatures[17]; and/or (b) the Provincial Legislatures failed to comply

[13] Parliament's AA vol (7) p 685 para 110.
[14] **Doctors for Life International v Speaker of the National Assembly** 2006 (6) SA 416 (CC) paras 24 and 26; **Land Access Movement v Chairperson of the National Council of Provinces** 2016 (5) SA 635 (CC) para 6 (**LAMOSA**)*;* **Mogale and Others v Speaker of the National Assembly and Others** 2023 (6) SA 58 (CC) para 14; **SA Veterinary Association v Speaker of the National Assembly and Others (SAVA)** 2019 (3) SA 62 (CC) para 15.
[15] **King and Others v Attorneys Fidelity Fund Board of Control and Another** 2006 (1) SA 474 (SCA) paras 24 – 25.
[16] **Doctors for Life International v Speaker of the National Assembly** 2006 (6) SA 416 (CC) para 26.
[17] Parliament is defined in section 42 of the Constitution as the NA and the NCOP.

with a statutory obligation under section 6 of the Mandates Act, and not a constitutional obligation.

12 The City has accordingly sought direct access to this Court in terms of section 167(6)(a) on the limited issue of the Mandates challenge in that: (a) it forms part of a broader complaint of a defective process; (b) the issues are narrow, largely common cause and concern matters of law; and (c) it is not in the interests of justice for piecemeal litigation to be pursued in different Courts on this limited issue.

STANDING

13 The City brings this application in its own interest under section 38(a) of the Constitution and in the public interest under section 38(d). [18]

14 As an organ of State that procures goods and services on a daily basis, the City has a direct and substantial interest in whether the Procurement Act was lawfully enacted. This challenge directly engages the City's interest in light of the obligations imposed on it by the Procurement Act.[19]

15 This Court has recognised that public participation challenges cannot be raised opportunistically by parties who did not participate in the law – making process.[20] The City participated throughout the legislative process by making submissions to the NA's Portfolio Committee on Finance on 16 October 2023,[21] and the NCOP's Select Committee on 12 February 2024.[22] Even after Parliament enacted the Procurement Act,

[18] City's FA vol (1) p 13 para 20.
[19] **Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others** 2013 (3) BCLR 251 (CC) at par 37.
[20] **Mogale and Others v Speaker of the National Assembly and Others** 2023 (6) SA 58 (CC) at par 20.
[21] City's FA vol (1) p 14 para 24.2.
[22] City's FA vol (1) p 15 para 24.3.

the City wrote to the President to request him to exercise his powers under section 79(1) of the Constitution, and refer the Bill back to the NA because of its constitutional defects.[23] None of this is disputed by Parliament, which does not take issue with the City's standing in this matter.[24]

16 The interests of the public, and in particular, the residents of the City, are clearly affected by this application given the key role of the Procurement Act in service delivery.

III. THERE IS NO INTERGOVERMENTAL DISPUTE

17 Parliament argues that in bringing this application, the City has acted in "*flagrant breach of its own constitutional and statutory duties".*[25] It says that the City had an obligation under section 41 of the Constitution to engage in the mechanisms necessary to resolve an intergovernmental dispute before instituting this application, and that its failure to do so "*is fatal to its application for relief".* [26]

18 Parliament's complaint is manifestly without merit and may be briefly disposed of.

19 In Parliament's answering affidavit, the Speaker quotes extensively from sections 40, 41(1), 41(3) and 41(4) of the Constitution.[27] Yet, she omits any reference to the subsection that is dispositive of Parliament's objection—that is, section 41(2) of the Constitution.

20 Section 41(2) of the Constitution requires that an Act of Parliament must:(a) establish or provide for structures and institutions to promote and facilitate intergovernmental

[23] City's FA vol (1) p 15 para 24.4.
[24] Parliament's AA vol (7) p 685 para 108.
[25] Parliament's AA vol (2) p 640 para 8.
[26] Parliament's AA vol (2) p 649 para 18.
[27] Parliament's AA vol (2) p 647 para 15.

relations; and (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. Parliament has complied and has adopted the Intergovernmental Relations Framework Act 13 of 2005 (**IGFRA).**

21 IGFRA's Long Title[28] and Preamble[29] make it clear that it was enacted to give effect to section 41(2) of the Constitution. Its provisions exclude the possibility of an intergovernmental dispute with Parliament in two ways:

21.1 First, section 2 of the IGFRA regulates its application by determining to whom it applies, and to whom it does not apply. It is clear from section 2(1) that it applies to: (a) the national government; (b) all provincial governments; and (c) all local governments. It is also clear from section 2(2) that it does not apply to, *inter alia*: (a) Parliament; (b) the Provincial Legislatures; and (c) the courts and judicial officers. Moreover, an organ of state may only participate in an intergovernmental structure contemplated in Chapter 2 if it is specifically referred to in that Chapter or is invited to participate. The legal position cannot be clearer: IGFRA does not apply to Parliament because it is excluded by section 2(2).

21.2 Second, the mechanisms necessary to resolve an intergovernmental dispute are only triggered where such dispute exists. IGFRA defines an "*intergovernmental dispute*" as a "*dispute between different governments or between organs of state*

[28] The Long Title reads –
"*to establish a framework for the national government, provincial governments, and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith".*
[29] The Preamble, in relevant part, provides:
"*AND WHERAS section 41(2) of the Constitution requires an Act of Parliament to –*
(a) to establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and,
(b) to provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes".

from different governments…". Parliament is not a government, nor is it an organ of State for purposes of IGFRA because section 1 defines an organ of state as "*an organ of state as defined in section 239 of the Constitution, excluding those listed in section 2(2)".* Parliament and the Provincial Legislatures are excluded from the purview of the IGFRA in terms of section 2(2). It follows that there cannot be an intergovernmental dispute with Parliament or the Provincial Legislatures.

22 Chapter 3 of the Constitution may not be read in isolation of IGFRA. The principle of subsidiarity precludes this.[30] The principle of subsidiarity requires "*that the more specific norm be preferred over the general norm when adjudicating a substantive dispute*".[31] In **Matatiele Municipality***,* this Court rejected the argument that the procedures for an intergovernmental dispute apply to Parliament because –

> *"Section 2(2) provides that the Framework Act does not apply to Parliament and the provincial legislatures. On its face, therefore, this statute excludes Parliament and provincial legislatures from its ambit. It follows that the submission relating to co-operative government must fail. We are not called upon, and we express no view on whether the Framework Act can constitutionally exclude from its ambit, Parliament and provincial legislatures. That is not the question before us."*[32]

23 In similar vein, whether IGFRA is constitutional is also not before this Court. Its unchallenged provisions are dispositive of Parliament's objection.

24 It is not without significance that the import of Parliament's argument is to have this Court disregard a clear statutory provision and to substitute, in its stead, the very anthesis

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[30] **My Vote Counts NPC v Speaker of the National Assembly and Others** 2016 (1) SA 132 (CC) at par 53; **Esofranki Properties (Pty) Ltd v Mopani District Municipality** 2023 (2) SA 31 (CC) at par 45; **South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another** 2022 (4) SA 1 (CC).

[31] **Commissioner, South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd** 2025 (5) SA 617 (CC) at par 130.

[32] **Matatiele Municipality v President of the Republic of South Africa and Others** 2006 (5) SA 47 (CC) at par 57.

of what the statute dealing specifically with co-operative governance, requires. This is plainly impermissible. It follows that Parliament's objection on this ground must fail.

IV. PARLIAMENT'S CONSTITUTIONAL DUTY TO FACILITATE PUBLIC PARTICIPATION

THE CONSTITUTIONAL THRESHOLD

25 The Constitution is clear: the NA, NCOP and Provincial Legislatures each have a constitutional obligation to facilitate public involvement in their legislative processes in terms of sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution. These are independent duties that must be separately complied with by each of these structures. Differently put, even if the NCOP conducted public participation, that does not absolve the NA from fulfilling its duty under section 59(1)(a) of the Constitution. [33]

26 This Court has held that: (a) legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted; and (b) the obligation to facilitate public participation is a material part of the lawmaking process, and that the failure to comply with this requirement renders the resulting legislation invalid.[34]

27 Our Constitution also requires the Legislature to ensure that –

> "*All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibility influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the*

[33] **SA Veterinary Association v Speaker of the NA** 2019 (3) SA 62 (CC) at par 33.
[34] **Doctors for Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 (CC) at par 209.

respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws".[35]

28 The discretion given to Parliament and the Provincial Legislatures to determine how best to fulfil their duty to facilitate public involvement applies both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. But, in spite of this leeway, "*the Courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution*".[36]

REASONABLENESS AND THIS COURT'S APPROACH TO IT

29 The test against which compliance with the duty to facilitate public involvement is assessed is one of reasonableness. As this Court has recognised that –

> "*regardless of the process Parliament chooses to adopt, it must ensure that a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. A reasonable opportunity to participate in legislative affairs must be an opportunity capable of influencing the decision to be taken. It is unreasonable if the content of a public hearing could not possibly affect Parliament's deliberations on the legislation. If the hearing is not effectively advertised or timeously advertised, if the people are unable to attend the hearing, or if the submissions made at the hearing are not transmitted or accurately transmitted to the legislature, then the hearing is not capable of influencing Parliament's deliberations.*
>
> (Own Emphasis)

30 On this subject, this Court has also held:

30.1 The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question of whether Parliament's conduct

[35] **Doctors for Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 (CC) at par 235.
[36] **Doctors for Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 (CC) at par 124.

was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament.[37]

30.2 The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.[38] This Court has found that the "*immense significance*" of the legislation, its impact on large numbers of South Africans, and the controversy and complexity of the legislation in question, to be relevant considerations.[39]

30.3 Relevant factors that Parliament ought to consider when determining how it will involve the public in its legislative process include: the rules it has adopted for this purpose; the nature of the legislation in question; and any need for its urgent adoption. These also bear relevance to the Courts' determination of the reasonableness of Parliament's conduct.[40]

30.4 Ultimately, the Legislature must take steps to afford the public a reasonable opportunity to participate effectively in the law-making process. There are at least two aspects to the duty to facilitate public involvement: (a) the duty to provide meaningful opportunities for public participation in the law-making process; and (b) the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, this Court has reasoned that

[37] **Land Access Movement of SA v Chairperson, NCOP** 2016 (5) SA 635 (CC) at par 60.
[38] **Land Access Movement of SA v Chairperson, NCOP** 2016 (5) SA 635 (CC) at par 60.
[39] **Mogale and Others v Speaker of the National Assembly and Others** 2023 (6) SA 58 (CC) at par 41.
[40] **Land Access Movement of SA v Chairperson, NCOP** 2016 (5) SA 635 (CC) at par 61.

public involvement may be seen as "*a continuum that ranges from providing information and building awareness, to partnering in decision-making*".[41]

30.5 Parliament has codified the level of public participation it deems reasonable in the Public Participation Framework (**Framework**) and the Practical Guide for Members of Parliament and Provincial Legislatures (**Practical Guide**).[42]

30.6 A reasonable opportunity to participate in legislative affairs does not mean that the Legislature must accommodate all demands arising in the public participation process, even if they are compelling. The public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public's views. Even if the lawmaker ultimately does not change its mind, it must approach the public-involvement process with a willingness to do so.[43]

ACCESS TO ACCURATE INFORMATION IS INDISPENSABLE TO A REASONABLE PUBLIC PARTICIPATION PROCESS

31 In the absence of accurate information, the public cannot reasonably or meaningfully exercise its rights of participation.[44] This is particularly so in respect of information that Parliament provides to the public in order to facilitate the public participation process – the Memorandum on the Objects of the Bill (**Memorandum**), in this case.

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[41] **Doctors for Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 (CC) at par 129.
[42] **Mogale and Others v Speaker of the National Assembly and Others** 2023 (6) SA 58 (CC) at par 39.
[43] **Mogale and Others v Speaker of the National Assembly and Others** 2023 (6) SA 58 (CC) at par 35.
[44] It is not without significance that section 195 of the Constitution provides that the public administration must be governed by a range of principles which include: (a) people's needs must be responded to, and the public must be encouraged to participate in policy-making; (b) public administration must be accountable; and (c) transparency must be fostered by providing the public with timely, accessible and accurate information.

32 The public cannot influence a decision if inaccurate information is being disseminated by Parliament.

HASTE AND COSTS MUST BE PROPERLY JUSTIFIED

33 As regards the adoption of legislation in terms of a hasty process, this Court has held that:

33.1 An allegation of urgency by Parliament so that it could finalise a Bill before the end of its term in order to avoid a lapsing, will not, without more, suffice.[45]

33.2 Cogent reasons must be given as to why the Bill could not lapse and be reinstated in the next Parliament.[46]

33.3 Complaints of a lack of resources are disingenuous in circumstances where it would not have been entirely dependent on resources for Parliament to: (a) correctly describe the Bill; (b) allow people to speak at hearings; (c) advertise hearing dates timeously; (d) accurately summarise submissions made at hearings; and (e) consider the completed public participation process when taking decisions.[47]

33.4 Although time and expense are factors to be considered, "*the saving of money and time in itself does not justify inadequate opportunities for public involvement".*[48]

[45] **Land Access Movement of SA v Chairperson, NCOP** 2016 (5) SA 635 (CC) at par 65 and 66.
[46] **Land Access Movement of SA v Chairperson, NCOP** 2016 (5) SA 635 (CC) at par 66.
[47] **Mogale and Others v Speaker of the National Assembly and Others** 2023 (6) SA 58 (CC) at par 49.
[48] **Doctors for Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 (CC) at par at par 128. See too: **Mogale and Others v Speaker of the National Assembly and Others** 2023 (6) SA 58 (CC) at par 34.

MATERIAL AMENDMENTS AND PUBLIC PARTICIPATION

34 Where the NA does not follow public participation in respect of a material amendment made at the Committee stage, this Court has held[49]:

34.1 The forms of facilitating an appropriate degree of participation in the law-making process are capable of infinite variation, but what matters is that, ultimately, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say.[50]

34.2 While the content of the standard of reasonableness varies from case to case, "*a complete failure to take any steps to involve the public in a material amendment to a Bill cannot be reasonable by any measure*". [51]

V. PARLIAMENT'S DEFECTIVE PUBLIC PARTICIPATION PROCESS

35 The reasonableness of Parliament's public participation process in respect of the Procurement Act must, in light of the principles established by this Court, be guided by the following:

35.1 First, there can be no serious dispute that procurement legislation is fundamentally important. We reiterate:

35.1.1 It affects every organ of State in every sphere of government in the country.[52] Its regulation of preferential procurement is a matter

[49] **SA Veterinary Association v Speaker of the NA** 2019 (3) SA 62 (CC) at par 32.
[50] **SA Veterinary Association v Speaker of the NA** 2019 (3) SA 62 (CC) at par 32.
[51] **SA Veterinary Association v Speaker of the NA** 2019 (3) SA 62 (CC) at par 32.
[52] Section 217(1) of the Constitution.

prescribed by the Constitution itself,[53] and it is an important mechanism through which the State achieves substantive equality.[54]

35.1.2 Procurement legislation fundamentally affects how organs of State fulfil their constitutional obligations to achieve service delivery and respect, protect, promote and fulfil the rights in the Bill of Rights.[55] It is also an indispensable measure to combat fraud, corruption and bribery.[56]

35.1.3 The extent of public input underscores the intense public interest that the Public Procurement Bill generated.

35.2 Second, Parliament's justification of time sensitivity[57] on account of the (then) forthcoming elections[58] does not advance its case. According to the Speaker, if the process was extended, Parliament "*would have dissolved and all of its business lapsed*". She explains, it would likely have resulted in the legislation standing over for the Seventh Parliament, and that new committees would have needed capacity building. This, she says, would 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".*[59] But, this Court has already held in **LAMOSA** that it is not uncommon for Bills to remain at the end of a Parliamentary

[53] Section 217(3) of the Constitution.
[54] **Minister of Finance v Afribusiness NPC** 2022 (4) SA 362 (CC) at par 99 and **All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SASSA** 2014 (1) SA 604 (CC) at par 47.
[55] **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another** 2015 (5) SA 245 (CC) at par 1.
[56] **State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd** 2017 (2) SA 63 (SCA).
[57] Speaker AA vol (7) p 695 para 149.
[58] Speaker AA vol (7) p 662 para 41.3.
[59] Speaker AA vol (7) p 662 para 41.3.

term. Successor Parliaments are entitled to revive these Bills.[60] Moreover, there was no urgency to the Procurement Act. It was not necessary to pass legislation in order to address a *lacuna* in the law. The Speaker's complaint about "*delaying the creation of a necessary unified procurement process"* is belied by the two – year delay in bringing the Act into operation.

35.3 Third, Parliament failed to comply with its own Framework and Practical Guide for public participation. It has provided no explanation as to why it was reasonable to depart from its self – imposed standards.

35.4 Fourth, the only cost implications identified during the legislative process, was the cost involved in translating the Bill into all official languages. There were no other cost implications identified. Cost considerations accordingly assume a limited role in the determination of this matter.

CHALLENGE 1: THE NA'S FAILURE TO CONSULT ON THE REVISED CHAPTER 4

36 The City's challenge on this score is founded on six key submissions:

36.1 First, it cannot be seriously contested that there are material differences between the initial Chapter 4 (as advertised for public comment) and the new Chapter 4 (which was not advertised for public comment).

36.2 Second, it is common cause that there was no public participation in respect of the new Chapter 4.[61]

[60] **Land Access Movement of SA v Chairperson, NCOP** 2016 (5) SA 635 (CC) at par 66.
[61] Speaker AA vol (7) p 677 para 84.

36.3 Third, it appears from Parliament's answering affidavit that these amendments were "*a direct response to submissions received from stakeholders*"[62] in spite of the fact that this occurred at a stage where only 20% of the public submissions had been considered.

36.4 Fourth, as we shall show, none of the reasons given by Parliament as to why a further public participation process in respect of the new Chapter 4 was not required, withstand scrutiny.

36.5 Fifth, it is undeniable that the City is directly affected by the material changes that have come about by the Procurement Act, and which have not been the subject of public participation.

36.6 Sixth, Chapter 4 was drafted, finalised and adopted in the absence of any public input from key persons and entities that are directly affected by it.

37 In response to the City's challenge, the Speaker states as follows:

> *"National Treasury presented a revised draft of Chapter 4 to the Standing Committee on 17 November 2023. Given the importance of preferential procurement provisions, the Chairperson of the Standing Committee requested that the revised draft be summarised 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"."*[63]
>
> ....
>
> *"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*

[62] Speaker AA vol (7) p 668, par 54.
[63] Speaker AA vol (7) p 668, par 54.

the provision on which the City seeks to place reliance), no new public comment process was required." [64]

(Own Emphasis)

38 At the outset, we make this point clear: our submission is not that a perfect public participation process was required; it is that a reasonable public participation process was required. In assessing reasonableness, it is not that a new public participation process was required where any amendment was effected. It is that: (a) extensive amendments to Chapter 4 were effected; (b) these amendments bear materially and directly on the City and other procuring institutions; (c) these amendments were adopted when only a small percentage of the public submissions had been considered; and (d) none of the City's input was sought or considered in respect of the new Chapter 4.

The Process

39 The key elements of the process followed in the NA may be summarised as follows:

39.1 The NA issued a call for public participation on 18 August 2023. The notice indicated that written submissions on the Bill will be accepted until Monday, 11 September 2023 at 12 noon. It also provided that those who wish to make oral submissions were required to request the opportunity to do so on 12 and 13 September 2023, via Zoom.[65]

39.2 The virtual public participation hearings took place on 12 and 13 September 2023. These two days provided the only opportunity for the public to influence the NA's

[64] Speaker AA vol (7) p 677 para 84.
[65] City FA 9 vol (2) p 154.

consideration of the Bill. It was limited to those who had requested a right to participate beforehand, and those with internet access and the Zoom application. [66]

39.3 Over the two days, the Standing Committee received 31 submissions from individuals and organisations ranging from NGOs, businesses, government departments and labour unions. The Bill attracted strong public interest.[67]

39.4 The next meeting of the Standing Committee was two months after the public participation hearings, on 17 November 2023. At that meeting, the Standing Committee was favoured with an entirely new version of Chapter 4 of the Bill for the very first time. The new Chapter 4 fundamentally altered the regulation of preferential procurement and imposed new obligations on organs of State:

39.4.1 The following aspects of the meeting of 17 November 2023 (as appears from the minutes) warrant reference[68]:

(a) The Chairperson informed the attendees that the primary purpose of the meeting was to receive a presentation on the response by National Treasury to submissions received during the public hearings on the Bill.

(b) Following the presentation, participants at the public hearing on 12 and 13 September 2023 were given the opportunity to comment.

[66] City's FA vol (1) p 29 para 58.
[67] City's FA vol (1) p 29 para 60.
[68] Speaker AA 13 vol (8) p 806.

(c) The Committee noted the short time participants had to meaningfully engage with the presentation as well as the fact that not all participants were responded to.

(d) The Chairperson informed members, participants and the Department that a follow up meeting would be scheduled where all participants would be responded to.

39.4.2 According to the PMG Note of the meeting of 17 November 2023[69]:

(a) It appears that as at that date, Treasury had only considered 20% of the comments that had been received at stage.[70]

(b) Various speakers expressed concern about the short time given for comment.

(c) It had been reported that National Treasury did not have the time to consider all 112 submissions.[71]

(d) Questions were asked as to how much time would be required to consider all the submissions.[72]

39.5 Barely a week later, a further meeting was held on 24 November 2023:

39.5.1 The following aspects of the meeting of 24 November 2023 warrant reference (as appears from the minutes)[73]:

[69] City FA 13 vol (3) p 219.
[70] City FA vol (1) p 31 para 66 read with City FA 13 vol (3) p 222.
[71] City FA 13 vol (3) p 220.
[72] City FA 13 vol (3) p 223.

(a) Following the presentation, participants at the public hearing of 12 and 13 September 2023 were given an opportunity to comment.

(b) The Committee noted the many submissions received and said that National Treasury cannot have endless submissions.

39.5.2 As appears from the PMG Note of the meeting of 24 November 2023[74]:

(a) Mr Masualle (ANC) said that National Treasury had indicated that they were unable to review all the submissions in the time available to them and that this created the impression that not all submissions were attended to. He requested that National Treasury respond to this.[75]

(b) Mr Mathebula replied that National Treasury had noted the comments from stakeholders and Members of the Committee to review all submissions received. He said: *"The last four days have been used to try and catch up on submissions that were not previously considered. Although progress was made, it was not possible to review all stakeholder comments due to the volume of the submissions. The Minister might want to appraise the Committee on the matter. Subsequent to last week's meeting*

[73] Speaker AA12 vol (8) p 806.
[74] City FA 13A vol (3) p 224.
[75] FA 13 vol (3) p 224.

additional written comments were received which further increased the number of submissions."[76]

(c) Mr Mathebula said that the pack of documents submitted to the Committee included an updated comment matrix with an updated report on public comments, a revised version of chapter 4, and the list of stakeholders. Importantly, "*he gave an account of proposed changes to some of the issues and others that remained unchanged*."[77]

39.6 The Standing Committee deliberated on the Bill over two days on 28 and 29 November 2023.[78]

Key Markers of where the Process Went Wrong

40 The following key deficiencies are apparent from the process described:

40.1 First, Treasury presented the new Chapter 4 to the meeting on 17 November 2023 in circumstances where it had considered barely 20% of the public comments that had been received. This disregarded the fact that those 20% of comments had to be considered together with all other comments that were received. Yet, the remaining 80% of the comments were entirely disregarded as at 17 November 2023.

[76] FA 13A vol (3) p 224.
[77] FA 13A vol (3) p 224.
[78] City's FA vol (1) p 35 para 73.

40.2 Second, Treasury presented revisions to the new Chapter 4 to the meeting on 24 November 2023 in circumstances where it had still not considered all of the public comments that had been received. In other words, revisions to the new Chapter 4 was based on only a very small number of the public comments that had been received as at 24 November 2023 and disregarded a large number of other comments.

40.3 Third, there is no indication from the contemporaneous documents that that all of the remaining public comments were considered in the period between the close of the meeting on Friday, 24 November 2023 and when the deliberations started on Tuesday, 28 November 2023. Given that 20% of the public comments had been considered over a two-month period, it is unlikely that the remainder would have been considered over one-working day and a weekend.

40.4 Fourth, there is no indication that the Committee was briefed on all of the public comments that had been received by the time that it met to deliberate on 28 November 2023.

40.5 Fifth, it follows that when the deliberations commenced on 28 November 2023, the Committee did not have before it (a) the public's comments on the Bill; and (b) Treasury's responses to those comments. The Speaker does not dispute that members of the Committee did not have the public's comments or Treasury's

incomplete responses before them, when deliberating on the Bill. She leaves this averment unanswered in Parliament's answering affidavit.[79]

41 The full import of the aforementioned deficiencies must be considered in light of the significant differences between the initial and new versions of Chapter 4.

The Initial Version of Chapter 4 (which was not the subject of public participation)

42 The initial version of Chapter 4 of the Bill (that had been the subject of the public participation process) consisted of only a single section (section 17):

42.1 It required organs of State, when implementing a procurement policy to: (a) provide for categories of preference in the allocation of contracts; and (b) the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination, in accordance with the Procurement Act and the Board Based Black Economic Empowerment Act No 53 of 2003 (**the BBBEE Act**) (section 17(1)).

42.2 It required that the Procurement Policy 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; and (c) measures to (i) set aside the awarding of bids to promote any of the aforesaid preference; (ii) to set subcontracting as a bid condition to promote any of the aforesaid preferences; (iii) to advance transformation, beneficiation, industrialisation, innovation, creation of jobs, intensification of labour absorption and economic development;

[79] Speaker's AA vol (7) p 699 para 124.

(iv) to balance the economic impacts of imported goods or services, unless the procuring institution is exempted by the Minister; and (v) to advance a sustainable environment (section 17(2)).

42.3 It provided that Regulations: (a) must be made regarding the application of the preference point systems and thresholds and measures for preference for goods that are produced in the Republic and services provided in the Republic (section 17(3)(a)); and (b) may be made regarding any other provision in Chapter 4 (section 17(3)(b)).

42.4 Without limiting its effect, it provided that the Procurement Policy must include preferences for citizens and permanent residents of South Africa as well as certain categories of small enterprises and enterprises located in certain areas (section 17(4)).

42.5 It provided that black people, women, people with disabilities and youth must be included (though not limited only to these) in the categories of preference for the purposes of certain provisions (section 17(5)).

42.6 It set out the process by which regulations had to be made for the purposes of Chapter 4 (sections 17(6) and 17(7)).

The New Version of Chapter 4 (which was not the subject of public participation)

43 The new version of Chapter 4 of the Bill received by the Standing Committee (that was not the subject of the public participation process) contained eight new detailed provisions regulating preferential procurement, imposing entirely new and different obligations[80]:

43.1 It provided that a procuring institution must implement 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, as envisaged in section 217 of the Constitution and in accordance with the objects of the Procurement Act and the framework of Chapter 4 (section 17).

43.2 Section 18 (consisting of eight subsections) provided that a procuring institution may **set aside** a bid for stipulated categories of persons.[81] More particularly:

43.2.1 It provided that a procuring institution "*may set aside a bid for a category of persons*" provided for in subsection 3 (i.e. small enterprises generally or small enterprises owned by black people, black women, women, black people with disabilities, people with disabilities, black people who are youth, youth, within a particular geographical area) (section 18(1) read with section 18(3)).

43.2.2 It provided for a peremptory method of evaluation of a bid that has been set aside (section 18(5)).

[80] City FA12 vol (3) p 210.
[81] City FA12 vol (3) p 210.

43.3 Section 19 (consisting of eleven subsections) provided for **pre-qualification** criteria to promote preferences in the allocation of contracts.[82] More particularly:

43.3.1 It provided that a procuring institution must, in accordance with the prescribed thresholds and conditions, apply prequalification criteria to promote preferences in the allocation of contracts, by advertising a bid with a specific bid condition that only one or more of stipulated categories of bidders (section 19(1) and 19(3)), of which a procuring institution may only select one preference (section 19(2)). It identified the categories for prequalification.

43.3.2 It required that a procuring institution must conduct market research and industry analysis to identify procurement opportunities, levels of transformation in a particular sector or commodity, supply market, and availability enterprises or co operatives or both and their BBBEE status level that may be eligible to bid in order to identify sectors and industries that are not transformed where any of the pre-qualification criteria referred to could be applied to assist in transforming those sectors and industries. Moreover, a procuring institution, subsequent to the aforesaid research and analysis, "*may only select one or more pre-qualification criteria if there are a prescribed minimum number of bidders to ensure competition.*" (section 19(4) and (5)).

43.3.3 It provided that a bidder that fails to meet any pre-qualification criteria stipulated in the bid documents is an unacceptable bid (section 19(6)).

[82] City FA12 vol (3) p 210-211.

43.4 It established a preference point system that must be applied in the stipulated manner to Chapter 4 (section 20).

43.5 Section 21 (consisting of 9 subsections) regulated subcontracting:

43.5.1 It provided for certain peremptory requirements in respect of subcontracting in instances where "*the procuring institution is of the view that [it] is feasible to subcontract for a contract above a prescribed amount*" (section 21(1)).

43.5.2 It provided in terms that a bidder that fails to meet any of the mandatory subcontracting criteria stipulated in the bid documents is an unacceptable bid (section 21(4)). It also provided for different stages of assessment (section 21(6)).[83]

43.5.3 It required that if a procuring institution is of the view that it is feasible to subcontract for a contract above a prescribed amount, the institution must apply subcontracting to advance certain persons or categories of persons as stipulated (section 21).

43.6 Section 22 (consisting of 12 subsections) provided, subject to certain conditions, for the Minister to provide for the designation of certain sectors for local production and content and provides for a detailed process to be adopted in this regard (section 22(2)).[84] It stipulated the process for the designation of sectors for local production and content (section 22).

[83] City FA12 vol (3) p 212.
[84] City FA12 vol (3) p 213.

43.7 Section 23 allowed for a procuring institution, in accordance with prescribed conditions, to provide for measures to advance sustainable development in procurement.[85]

43.8 Section 24 allowed for a procuring institution to provide for measures for preference as a condition of contract that the supplier must achieve at the end of the contract.[86]

43.9 Section 25 provided that when procuring, a procuring institution may, in accordance with conditions, provide for measures to advance the creation of jobs, intensification of labour absorption, beneficiation, innovation and the development of small enterprises within a particular geographical area.[87]

44 The differences between the initial and new versions of Chapter 4 of the Bill are accordingly significant and material.

45 Various stakeholders in the public participation process expressed their concerns about the extent and scale of these differences and indicated that more time was required to consider the changes and respond to them. Yet, despite this, stakeholders were given mere two minutes to respond to Treasury's presentation on the new version of the Bill[88] and no further public participation process was called for or followed.

The Procurement Act as Adopted

46 The Procurement Act as adopted:

[85] City FA12 vol (3) p 215.
[86] City FA12 vol (3) p 215.
[87] City FA12 vol (3) p 215.
[88] City FA vol (1) p 31 para 66.

46.1 First, reflects even more far-reaching amendments in section 16 (the previous section 17 in FA12) in that: it is peremptory for there to be set asides in terms of section 17 of the Procurement Act unless this is not possible, in which case pre-qualification in accordance with section 18 must occur. If procurement in accordance with section 17, 18 or 19 is not possible, the procuring institution must record and report the reasons to the Public Procurement Office and the relevant Treasury in the prescribed manner (sections 16(1) to (3)). Moreover, it provides for a peremptory ranking of the thresholds (section 16(4)).

46.2 Second, a procuring institution must set-aside a bid for a category of persons provided as identified in accordance with the prescribed thresholds and conditions (section 17(1) read with 17(3)).

46.3 Third, a procuring institution must, in accordance with the prescribed thresholds and conditions, apply certain stipulated prequalification criteria for a bid to promote preferences in the allocation of contracts, failing which the bid is rendered unacceptable bid and must be disqualified (section 18).

46.4 Fourth, where feasible, a procuring institution must subcontract a contract above the prescribed threshold, to advance persons or categories of persons in subsection (2) (a) to (j) in accordance with the prescribed criteria (section 19).

Parliament's Justification for Public Participation is Unreasonable and Inadequate

47 In an apparent recognition of the need for there to have been public participation, Parliament argues:

47.1 First, no new public comment process was required because the new Chapter 4 "*did not contain any concepts or preferential procurement measures that had not already been foreshadowed*".[89]

47.2 Second, the purpose of the new Chapter 4 was "*to unpack and elaborate upon the provisions that had initially been included in clause 17 of the Bill that had first been published for comment*". This was in "*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*".[90]

47.3 Third, clause 17 of the 2023 Procurement Bill "*includes all of the preferential procurement mechanisms now contained in Chapter 4 of the Procurement Act*" which includes: (a) set asides; (b) pre-qualification criteria and mandatory sub-contracting; and (c) local production and content. Stakeholders were thus afforded ample opportunity to comment on these proposed mechanisms through their submission of comments on the 2023 Procurement Bill.[91]

47.4 Fourth, the new Chapter 4 did not introduce materially new subject matter as "*is confirmed with reference to Rule 286(4)(b) of the Rules of the NA…*"[92]

47.5 Fifth, the new Chapter 4 is "*conceptually similar to the regulations that were promulgated in terms of the PPPFA*" which "*were subject to a public comment process in terms of section 5(2) of the PPPFA before they were finalised*".[93]

[89] Speaker AA vol (7) p 677 para 85.
[90] Speaker AA vol (7) p 677 para 85.
[91] Speaker AA vol (7) p 678 para 86 and 87.
[92] Speaker AA vol (7) p 678 para 88.
[93] Speaker AA vol (7) p 679 para 90.

48 None of these reasons withstand scrutiny:

48.1 As to Parliament's second point: it matters not where the amendments to Chapter 4 arose from or what their purpose was. The principle (as established by this Court) is that where there are material amendments, they must be subjected to a public participation process. Moreover, based on the minutes and PMG Notes referred to, it is clear that at the time that the new Chapter 4 was presented, only 20% of the public comment had been considered.

48.2 As to Parliament's first and third points: simply because there is an overlap of certain principles or because *"concepts or preferential procurement measures" were "foreshadowed"* does not obviate the need for a public participation process in respect of the new Chapter 4. We emphasise:

48.2.1 The initial Chapter 4 provided a non-exhaustive list of categories of preference for set asides whereas the new Chapter 4 provides for an exhaustive list of persons to whom the preference for set asides may apply.

48.2.2 The initial Chapter 4 did not provide for pre-qualification criteria whereas the new Chapter 4 provides for an exhaustive list of persons to whom prequalification criteria apply; and provided that a bid that failed to meet any prequalification criteria stipulated in the bid document renders the bid unacceptable.

48.2.3 The initial Chapter 4 provided no obligation on procuring institutions to conduct market research and industry analysis, whereas the new

Chapter 4 places extensive obligations on procuring institutions in this regard.

48.2.4 The initial Chapter 4 did not contain a preference point system, whereas the new Chapter 4 provides for a detailed application of the preference points with much that is to be prescribed in Regulations.

48.2.5 The initial Chapter 4 dealt with subcontracting in relatively general terms whereas the new Chapter 4 provides that if the procuring institution is of the view that it is feasible to subcontract for a contract above a prescribed amount, it "*must apply subcontracting to advance persons or categories of persons*" in terms that are expressly and exhaustively identified. The new Chapter 4 also provides that a failure to meet any mandatory subcontracting criteria stipulated in the bid documents is an unacceptable bid.

48.2.6 The failure to consult on the new Chapter 4 meant that the City was unable to explain whether this form of regulation is appropriate for municipalities or to suggest alternative mechanisms for regulation.[94] The City could also not address potential challenges of implementation that it could face.[95]

48.3 As to Parliament's fourth point: Rule 286(4)(b) does not advance Parliament's case. Indeed, Rule 286(6)(c) recognises that there may be instances where it is

[94] City RA vol (14) p 1377 para 24.1.
[95] City RA vol (14) p 1377 para 24.1.

necessary to "*invite further public comment and submissions on the substance of the Bill…".* This was clearly one such instance, but the NA failed to do so.

48.4 As to Parliament's fifth point: reliance on Regulations adopted pursuant to the PPPFA is of no assistance because:

48.4.1 These Regulations were adopted at least five years earlier. The consultation process that was followed was accordingly outdated.

48.4.2 Parliament provides no evidence as to the reasonableness of that public participation process or exactly what occurred.

48.4.3 Parliament provides no evidence as to the draft Regulations that were the subject of public participation.

48.4.4 In order for there to be meaningful public participation, the public must be appraised of all of the proposed amendments in order to engage with the Bill holistically and meaningfully. Reliance on piecemeal Regulations (adopted some years earlier) does not allow for this.

48.4.5 Section 59(1)(a) of the Constitution places an obligation on the NA to facilitate public involvement in the law – making process. This obligation is discharged by the NA (or its Committees) alone. The conduct of the executive arm of government is not a substitute for the NA fulfilling its constitutional obligations. The NA cannot abdicate its responsibility because of a process by the executive, some years ago,

in respect of Regulations that no longer apply, and are materially different to the law enacted by Parliament.

48.4.6 Curiously, even if it were permissible for Parliament to rely on a public participation process conducted by the executive, to justify the curtailment of its own process, it is not clear why Parliament may rely on a public participation process for the 2017 PPPFA regulations, but not the 2022 regulations. The Minister also conducted public participation hearings for the 2022 Regulations[96] – these are more recent than the 2016 hearings for the 2017 Regulations. Importantly, the later Regulations provide a flexible and permissive regime.[97]

48.4.7 The 2017 Regulations[98] differ in material respects from the new Chapter 4. By way of example: (a) under the 2017 Regulations an organ of state must determine whether pre-qualification criteria are applicable to the tender as envisaged in Regulation 4 (Regulation 3(b) and Regulation 4); (b) under the 2017 Regulations if feasible to subcontract for a contract above R 30 million, an organ of state must apply subcontracting to advance designated groups (Regulation 9).

49 Accordingly, Parliament's attempt to justify its process is unsatisfactory. It was manifestly unreasonable not to conduct further public participation on the revised Chapter 4.

[96] Publication of Draft Preferential Procurement Regulations, 2022 for Public Comment GNR 1851 GG 46026, 10 March 2022.
[97] City RA vol (14) p 1379 para 29.
[98] Speaker AA56 vol (7) p 1305.

Conclusion on Chapter 4

50 Chapter 4 is central to the entire operation of the Procurement Act. The deficiencies in the public participation process, pursuant to which it was adopted are serious. The consequence of these deficiencies must be to invalidate the Procurement Act as a whole.

CHALLENGE 2: THE MEMORANDUM TO THE BILL CONTAINED FACTUALLY INCORRECT INFORMATION

51 The Memorandum accompanying a Bill serves two key purposes:

51.1 It informs members of Parliament and the public about the content of a proposed law. It explains what the law seeks to achieve, and how it seeks to achieve it, ahead of the legislative process, which includes public participation hearings.

51.2 It assists in identifying the purpose of a statute or an amendment to a statute, particularly in the context of subsequent litigation.[99]

52 Given the important dual purpose served by the explanatory memoranda, its content must be accurate. There can be no serious dispute about this. For the public participation process to be meaningful, members of the public must be able to understand what the issues are.[100] If the information conveyed to the public about the legislation is incorrect, then their ability to understand and comment on the issues is stymied.

53 The Memorandum to the Procurement Bill represented that the legislation will not have substantial financial implications.[101] This was wrong:

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[99] **Thistle Trust v Commissioner South African Revenue Service** 2025 (1) SA 70 (CC) para 66. **Coronation Investment Management SA (Pty) Ltd v Commissioner, South African Revenue Service** 2024 (6) SA 310 (CC) at par 48.
[100] **Mogale and Others v Speaker of the National Assembly and Others** 2023 (6) SA 58 (CC) at para 35.
[101] City's FA vol (1) p 55 para 121 read with Vol 2 p 152.

53.1 The Procurement Act establishes two new institutions: the Public Procurement Office **(the PPO)** and the Public Procurement Tribunal (**the Tribunal**).

53.2 The PPO is given extensive powers to ensure compliance with the Procurement Act by procuring institutions.[102] The Tribunal is established for the purpose of hearing reviews against the decision taken by a procuring institution.[103] The Tribunal sits in panels.[104] The Minister of Finance must appoint as many persons as is necessary to staff Tribunal Panels.

53.3 Operationalising the PPO and Tribunal is not something that has "*no substantial financial implications for the State".* It has considerable financial implications because the vast number of procurement disputes across the country will require several panels to be established.

53.4 Treasury (albeit reluctantly) accepted that it was wrong to represent that the Bill involves no substantial financial implications.[105] It amended the Memorandum long after the public participation process was concluded to reflect that there are financial implications to the Bill.[106] The amendment was effected on the day that the Procurement Act received assent (16 May 2024).[107] Yet, Parliament denies that the Memorandum included any factually incorrect information was provided.[108]

53.5 In addition, the new Chapter 4 makes it peremptory for market research and industry analyses to be conducted. Despite this, neither the City nor any other

[102] Section 5 of the Procurement Act.
[103] Section 36 of the Procurement Act.
[104] Section 45 of the Procurement Act.
[105] City FA vol (1) p 56 para 124.
[106] City FA vol (1) p 57 para 125 and AA, p 697, par 157.
[107] City FA vol (1) p 67 para 125.
[108] Speaker AA vol (7) p 696, par 157.

organ of state which is a procuring institution, was afforded an opportunity to provide input on issues of costs arising from this or the workability, affordability and impact thereof for procuring institutions.

54 There can be no doubt that the Memorandum influenced the manner in which Provincial Legislatures deliberated on the Bill. The Gauteng Provincial Legislature, for example, recorded in its report accompanying the negotiating mandate that "*it was noted that no substantial financial implications are envisaged for the State".*[109]

55 Parliament glibly contends that "*the Select Committee did not consider its request concerning financial costing to be a prohibitive concern".*[110] This misses the point. The public are entitled to know whether a proposed law will incur substantial cost. It is the public who, after all, fund the enforcement of Parliament's laws. So too, procuring institutions are entitled to know what the cost implications of a law is for them. When Parliament provides incorrect information about the costs involved, it prevents the public and organs of state from engaging meaningfully with the Bill.

56 The inaccuracy in the Memorandum in respect of financial implications was serious. It prevented engagement with the Bill on the basis of correct facts, it skewed the nature of the inputs that were received, and it ultimately tainted the fairness and reasonableness of the public participation process.

[109] Speaker AA33 vol (11) p 1072 para 3.5.
[110] Speaker AA vol (7) p 697 para 158.

CHALLENGE 3: THE NA DID NOT CONSIDER ALL PUBLIC COMMENTS

57 The essence of public participation is the consideration of the public's views. It entails, at a minimum, being heard.[111]

58 The City has alleged that even when the proceedings of the NA's Standing Committee were concluded, Treasury had still not completely considered all of the public's comments. According to the objections, Parliament was only able to consider 36% of the comments.[112]

59 The Speaker has responded to this challenge by contending that the NA did in fact consider all of the comments, and that it "*was not practical to provide detailed responses to each individual stakeholder's comments.*" [113] This response is not borne out by the facts. It is also a distraction from the real issues and the correct facts:

59.1 First, the Speaker mischaracterises the City's argument. She says, "*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 comments were simply ignored.*"[114] That is not the City's argument. We refer to what we have submitted in relation to what Treasury conveyed to the Standing Committee. Again, we emphasise the following which emerges from the source documents that we have referred to: (a) as at 17 November 2023 it was clear that Treasury had not been able to consider all of the public comments and various statements were made that Treasury had only considered 20% of the comments received as at that date;

[111] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) para 35.
[112] City FA vol (1) p 58.
[113] Speaker AA vol (7) p 680 para 94.
[114] Speaker AA vol (7) p 680 para 94.

(b) as at 24 November 2023 Treasury reported that although progress was made, it was not possible to review all stakeholder comments due to the volume of the submissions – this notwithstanding, further amendments were made to Chapter 4; (c) the Committee deliberation took place on 28 and 29 November 2023. There is no indication from the documents that all comments had been considered as at this date.

59.2 Second, it was Treasury that told the NA's Standing Committee that it either responded to comments substantively or, where no substantive response was deemed necessary, the comment was merely "noted".[115] It was also Treasury that told the Standing Committee that "*the comments that the review team were able to consider, were responded to on the comments matrix".* The City's comments did not receive a substantive response; nor were they noted. As Treasury has said, it only responded to comments (whether substantively or by noting) that were considered by their team. The City's comments were clearly not considered.

59.3 Third, according to the Report on Public Comments Submitted to Parliament:[116]

59.3.1 A total of 112 Stakeholders submitted approximately a total of 2200 excel rows of comments classified from chapter 1 to 7, including general comments.

59.3.2 "*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*

[115] City FA vol (1) p 30 para 63.
[116] City FA11 vol (2) p 197.

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 simple noted. ..."[117]

59.4 What is quite remarkable is that in spite of: (a) concerns raised at the meetings of 17 and 24 November 2023, about not all comments having been considered, no explanation is given as to how the remaining comments were considered in the period between the meeting of 24 and 28 November 2023. This is an important issue which Parliament does not address.

59.5 Fourth, aside from the Speaker's evidence not being sourced in the minutes or PMG Notes referred to, it also amounts to inadmissible hearsay evidence.[118] The Speaker was not a member of the NA's Standing Committee. No member of the Committee has deposed to an affidavit stating that all public participation comments were considered. Nor, has any official from Treasury who was present at the meeting of 17 November 2023, given any evidence.[119] The Speaker cannot account for what the Standing Committee considered because it is not a matter that falls within her personal knowledge. It is well – established that one person cannot account for what another person read, considered or thought.[120] Importantly, the

[117] City FA 11, vol (2) p 197 para 3.1.
[118] City RA vol (14) p 1395 para 73. **President of the Republic of South Africa v SARFU** 2000 (1) SA 1 (CC) at par 105.
[119] City RA vol (14) p 1399 para 90.1.
[120] **Drift Supersand (Pty) Ltd v Mogale City Local Municipality [2017] 4 All SA 624 (SCA) para 31; Madikizela v Public Protector** [2023] ZAECBHC 4 (10 February 2023) para 20.

Speaker, correctly, does not refute the City's evidence[121] that the Standing Committee did not have before it, the comments from the public participation process, when it deliberated on the Bill at its meeting of 27 and 28 November 2023.[122]

CHALLENGE 4: INADEQUATE NOTICE PERIOD FOR PUBLIC PARTICIPATION BY THE NA AND THE NCOP

60 In **Mogale***,* this Court said Parliament's Framework and Practical Guide had codified the level of public participation it deems reasonable. In terms of the Framework, invitations must be sent at least five weeks before the public hearings and, in terms of the Practical Guide, Provincial Legislatures must give at least seven days' notice of a hearing.[123]

61 In Parliament's answering affidavit, the Speaker contends that the Practical Guide is not binding.[124]

62 Self – evidently, both the NA and the NCOP did not comply with the 5 – week requirement that Parliament has set for itself. In both instances, invitations for public participation were sent out 3 weeks before the hearings. Worse still, there is no explanation as to *why* Parliament did not comply. The Speaker has not told this Court why another two weeks could simply not be accommodated or why it was necessary for Parliament to depart from the standard it has set for itself.

[121] City FA vol (1) p 35 para 73.
[122] Speaker AA vol (7) p 688 para 124.
[123] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) at par 39.
[124] Speaker AA vol (7) p 661 para 40 (including subparagraphs).

CHALLENGE 5: THE PROVINCIAL LEGISLATURES PROVIDED INADEQUATE NOTICE FOR PUBLIC PARTICIPATION

63 The Speaker argues that the Practical Guide, which imposes the obligation on Provincial Legislatures to issue invitations for public comment 7 working days before the hearings,[125] is not binding on the Provincial Legislatures. No explanation is given as to why a departure from the guidelines were necessary.

64 Weekends excluded (as required by the Practical Guide): (a) the Western Cape gave 1 days' notice[126]; (b) the Northern Cape gave 3 days' notice[127]; (c) the North – West gave 1 days' notice[128]; (d) Limpopo gave 3 days' notice.[129] There is no evidence that the Mpumalanga Province gave any notice at all. This severely tainted the reasonableness of the public participation process. [130]

65 These notice periods, without justification or explanation, we submit are unreasonable and thereby tainted the public participation process.

CHALLENGE 6: THE REPORTS ACCOMPANYING THE NEGOTIATING MANDATES WERE INADEQUATE AND CONTAINED FACTUALLY INCORRECT INFORMATION

66 In the NCOP process, Gauteng, Mpumalanga and the Northern Cape failed to adequately set out the input received during the public participation process.

[125] City FA37 vol (6) p 531 bullet 5.
[126] City FA vol (1) p 43 paras 85.9.1.
[127] City FA vol (1) p 41 paras 85.7.2.
[128] Speaker AA43 vol (12) p 1178.
[129] Speaker AA37 vol (12) p 1148.
[130] **Mogale v Speaker, NA** 2023 (6) SA 58 (CC) at par 63.

66.1 Gauteng's report refers generally and vaguely to broad themes discussed during the public participation. It is unclear what views were expressed at the hearings. The report does not meaningfully assist the deliberation process.[131]

66.2 Mpumalanga's report indicates in vague terms that "*the Bill must address the challenges faced by subcontractors"* without detailing what those concerns are.[132]

66.3 The Northern Cape's report indicates that "*there were no inputs made by stakeholders"* but also concludes that "*the majority of stakeholders voted in support of the Bill on condition that their inputs were considered".*[133] Even assuming that these two paragraphs are not mutually self – destructive, if there was stakeholder input, the report failed to set this out.

67 The effect of these inadequate reports resulted, as this Court held in **LAMOSA**, in –

> "*the remaining provinces* [being] *oblivious to the public consultation process in these ... provinces. It was an absolute impossibility for the NCOP Select Committee Members to achieve a uniform understanding of public concerns across the country. This – in turn – must have limited their ability to enrich the deliberations of the NCOP".*[134]

68 Equally concerning is the fact that the reports of Mpumalanga and the North – West contained inaccurate information. Mpumalanga represented that it had sent out an invitation for public comment on its social media accounts, whereas no such notice was published.[135] The North – West indicated that it published its invitation for public

[131] Annexure AA33 vol (11) p 1071 para 3.6.
[132] City FA vol (1) p 61 para 142.
[133] City FA vol (1) p 62 para 144.
[134] **Land Access Movement v Chairperson of the National Council of Provinces** 2016 (5) SA 635 (CC) at par 49.
[135] City FA vol (1) p 40 para 85.6.1.

comment in three local newspapers, when it did not do so.[136] There is no explanation by these Provincial Legislatures as to why inaccurate facts were contained in their reports accompanying the negotiating mandates.

69 These were serious deficiencies in the process.

CHALLENGE 7: THE PUBLIC PARTICIPATION HEARINGS WERE INADEQUATE

70 The inadequate notice period by most Provinces bears on the reasonableness and effectiveness of the public participation hearings itself. As this Court has already recognised, a short notice period means that members of the public will not be able to prepare to travel to the hearings.[137]

71 Quite apart from the challenges arising from the short notice, the hearings had several other shortcomings. It is of some significance that Parliament baldly denies the allegations made by the City in this respect and contents itself with a statement that "*sufficient time for public participation was provided*".[138]

71.1 Four provinces had inadequate hearings. .

71.1.1 Gauteng had a single hearing which was held on a single day. It is the most populus Province in the country. It consists of three metropolitan municipalities, 2 district municipalities and 6 local municipalities, all of whom are affected by the Procurement Act.[139] There is no explanation as to why a single hearing was deemed sufficient for the most populus Province in the country.

[136] City FA vol (1) p 41 para 85.8.1.
[137] **Land Access Movement v Chairperson of the National Council of Provinces** 2016 (5) SA 635 (CC) at par 43.
[138] Speaker AA vol (7) p 699 para 171.
[139] City FA vol (1) p 62 para 148.

71.1.2 Limpopo Province had 1 hearing in Capricorn District. There are 25 municipalities in Limpopo Province. Here too, there is no explanation as to why a single hearing was deemed sufficient or appropriate.[140]

71.1.3 The North – West did not conduct a public participation hearing in the Bojanala District.[141] No attempt was made to engage with this community at a later stage.

71.1.4 It is unclear whether a public participation hearing took place in the Northern Cape. It had a single hearing that conducted virtually. No effort was made to ensure that the public could access to devices for the meeting or, the internet. The Speaker's evidence is that there "*no oral submissions were made at the public hearings"*.[142] The Northern Cape Provincial Legislature and the Speaker had a duty to place evidence before this Court about the hearing in the Northern Cape – whether it occurred, how many people attended, and how it came to be that there "*were no oral submissions"*.

71.1.5 The approach of the Northen Cape Provincial Legislature in this case, accords with the conduct that this Court deprecated the Provincial Legislatures for in **SAVA***:*

> *"SAVA has placed evidence before the court regarding the public hearings that were held in the various provinces. The Provincial Legislatures have been less than forthcoming with information about the processes that were followed. All of the respondents are*

[140] City FA vol (1) p 63 para 150.
[141] City FA vol (1) p 63 para 151.
[142] Speaker AA vol (7) p 692 para 138.

abiding this court's decision and have offered no counter – arguments or facts.[143]

71.2 Another significant shortcoming in the public participation process is the failure to translate the Bill into the official languages. There is no evidence that the Bill was translated from its English text to any other language. The Speaker states that the Bill was "*adequately translated"* but fails to set out any facts to support this conclusion.[144]

VI. SEVEN FINAL MANDATES ARE UNLAWFUL

72 Seven of the Final Mandates are unlawful because they do not comply with section 6 of the Mandates Act.[145] Section 6 requires that Provincial Legislatures confer authority on their delegations. This requires that they deliberate on their final mandates before conferring authority on their delegations to the NCOP.

73 A final mandate issued without any deliberation treats the outcome of the legislative process as a foregone conclusion. The Provincial Legislatures are not concerned with whether their proposed amendments were rejected or accepted. These considerations will only be taken into account if there is deliberation, as contemplated by section 6.

74 It is not disputed in this application that only two Provinces, KwaZulu Natal and the North West deliberated on their final mandates.[146] The remaining Provinces did not. The

[143] **SA Veterinary Association v Speaker of the National Assembly and Others (SAVA)** 2019 (3) SA 62 (CC) at par 35.
[144] Speaker AA vol (7) p 699 para 171.
[145] Section 6 provides that "*A provincial legislature must confer authority on its provincial delegation to the NCOP to cast a vote when the relevant NCOP select committee considers a Bill prior to voting thereon in the NCOP plenary."*
[146] City FA vol (1) p 65 para162.

Speaker's response contends that the Provinces are permitted, in terms of their rules[147], to ratify a final mandate after the fact where their rules so permit.[148] There are two reasons why this argument is without merit.

74.1 First, there is no evidence of ratification by all of the 7 Provinces. The only evidence of ratification in this case was adduced by the City in relation to the Limpopo Provincial Legislature.[149] The Speaker has not placed other evidence of ratification before the Court. On this basis alone, the final mandates of at least 6 Provinces are unlawful.

74.2 Second, even if the rules of Provincial Legislatures permit ratification, those rules do not take precedence over the Mandates Act. In the event of a conflict, the Mandates Act prevails. The Mandates Act requires the Provincial Legislatures to confer authority on their delegation to the NCOP when the Select Committee considers the Bill, and before the NCOP votes on the Bill at plenary. Where a conflict exists, the Act of Parliament will prevail, and it is not necessary to strike down the subordinate rule. As this Court recognised in **FEDSAS** –

> *"It must be added that national legislation may enjoy supremacy over provincial law only in accordance with the test laid down in sections 146(2) and (3) of the Constitution and in terms of section 148 if section 146 does not apply. However, the trumped provincial or national legislation is not to be struck down. It simply becomes inoperative for as long as the conflict remains".*[150]

[147] Speaker AA vol (7) p 700 para 173 and 174.
[148] Speaker AA vol (7) p 700 para 174.
[149] City FA vol (1) p 66 para 164.
[150] **FEDSAS v MEC for Education, Gauteng** 2016 (4) SA 546 (CC) para 28.

VII. CONCLUSION, REMEDY AND COSTS

75 The catalogue of errors made by the NA, the NCOP and the Provincial Legislatures, both individually and cumulatively, evidence a failure to facilitate public involvement in the law – making of the Procurement Act. These errors show that Parliament and the Provincial Legislatures did not conduct a reasonable public participation process.

76 As the Procurement Act has not been brought into operation, it is not necessary for this Court to suspend the declaration of invalidity. In the circumstances, the City asks for an Order in accordance with the Notice of Motion.

KARRISHA PILLAY SC

KESSLER PERUMALSAMY

Counsel for the City

Cape Town

20 February 2026

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. 144/25

In the matter between:

THE CITY OF CAPE TOWN	First Applicant
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Second Applicant
SOLIDARITY	Third 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 PROVINCE	Nineth Respondent
THE SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Tenth Respondent
THE SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURES	Eleventh Respondents
THE SPEAKER OF THE NORTH – WEST PROVINCIAL LEGISLATURE	Twelfth Respondent
THE SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE	Thirteenth Respondent

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CITY OF CAPE TOWN'S LIST OF AUTHORITIES

LEGISLATION

1. Board Based Black Economic Empowerment Act No 53 of 2003

2. Intergovernmental Relations Framework Act 13 of 2005

3. Mandating Procedures of Provinces Act No 52 of 2008

4. Public Procurement Act No 28 of 2024

GUIDELINES AND SUBORDINATE LEGISLATION

5. Publication of Draft Preferential Procurement Regulations, 2022 for Public Comment GNR 1851 GG 46026, 10 March 2022.

CASE LAW

6. All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SASSA 2014 (1) SA 604 (CC)

7. Commissioner, South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd 2025 (5) SA 617 (CC)

8. Coronation Investment Management SA (Pty) Ltd v Commissioner, South African Revenue Service 2024 (6) SA 310 (CC)

9. Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC)

10. Drift Supersand (Pty) Ltd v Mogale City Local Municipality [2017] 4 All SA 624 (SCA)

11. Esofranki Properties (Pty) Ltd v Mopani District Municipality 2023 (2) SA 31 (CC)

12. FEDSAS v MEC for Education, Gauteng 2016 (4) SA 546 (CC)

13. Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC)

14. Govan Mbeki Local Municipality v Glencore Operations South Africa (Pty) Ltd and Others 2025 (2) SA 238 (CC)

15. King and Others v Attorneys Fidelity Fund Board of Control and Another 2006 (1) SA 474 (SCA)

16. Land Access Movement of SA v Chairperson, NCOP 2016 (5) SA 635 (CC)

17. Madikizela v Public Protector [2023] ZAECBHC 4 (10 February 2023)

18. Matatiele Municipality v President of the Republic of South Africa and Others 2006 (5) SA 47 (CC)

19. Minister of Finance v Afribusiness NPC 2022 (4) SA 362 (CC)

20. Mogale and Others v Speaker of the National Assembly and Others 2023 (6) SA 58 (CC)

21. My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC)

22. President of the Republic of South Africa v SARFU 2000 (1) SA 1 (CC)

23. SA Veterinary Association v Speaker of the NA 2019 (3) SA 62 (CC)

24. South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another 2022 (4) SA 1 (CC)

25. State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2017 (2) SA 63 (SCA)

26. Thistle Trust v Commissioner South African Revenue Service 2025 (1) SA 70 (CC) (2024 (12) BCLR 1563; [2024] ZACC 19)

27. Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another 2015 (5) SA 245 (CC)