

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: 103/25**

In the matter between:

**PREMIER OF THE WESTERN CAPE GOVERNMENT**

Applicant

and

**SPEAKER OF THE NATIONAL ASSEMBLY**

First Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF  
PROVINCES**

Second Respondent

**MINISTER OF FINANCE**

Third Respondent

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**FIRST AND SECOND RESPONDENTS' ANSWERING AFFIDAVIT**

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*18 A.7*

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*SP A. T.*

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 second respondent in this matter.
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, 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 my legal representatives, which I believe to be correct.
3. I have read the founding affidavit deposed to by Deidré Baartman on behalf of the applicant. I respond to its contents herein.
4. In this affidavit, I make use of the following terms:
  - 4.1. **“Constitution”** means the Constitution of the Republic of South Africa, 1996;
  - 4.2. **“MFMA”** means the Local Government: Municipal Finance Management Act 56 of 2003;
  - 4.3. **“Minister”** means the Minister of Finance;



- 4.4. **“NA”** means the National Assembly, as defined in section 42 of the Constitution;
- 4.5. **“NCOP”** means the National Council of Provinces;
- 4.6. **“Parliament”** means the NA and the NCOP, collectively, unless otherwise indicated;
- 4.7. **“PFMA”** means the Public Finance Management Act 1 of 1999;
- 4.8. **“PPFA”** means the Preferential Procurement Policy Framework Act 5 of 2000;
- 4.9. **“Premier”** means the Premier of the Western Cape Government, the applicant in these proceedings;
- 4.10. **“Procurement Act”** means the Public Procurement Act 28 of 2024;
- 4.11. **“Select Committee”** means the Select Committee on Finance in the NCOP;
- 4.12. **“Standing Committee”** means the Standing Committee on Finance in the NA;
- 4.13. **“Treasury Regulations”** means the Treasury Regulations made in terms of the PFMA, published under GN R225 in GG 27388 of 15 March 2005; and
- 4.14. **“2023 Procurement Bill”** means Bill B18-2023, which was published for comment on 18 August 2023.

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## INTRODUCTION AND OVERVIEW

5. In his application, the Premier seeks an order, *inter alia*, granting the following substantive relief:

5.1. Declaring that Parliament failed to comply with its constitutional obligation to facilitate public involvement, as contemplated in section 59(1)(a) of the Constitution, before passing the Procurement Act; and

5.2. Declaring that the Procurement Act was adopted in a manner that is inconsistent with the Constitution and that it is accordingly invalid.

6. The grounds on which the Premier contends that an order granting this relief is alleged to be justified are twofold:

6.1. First, the Premier contends that the NA, having made substantial and material amendments to 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, despite the Premier's contention that the NA was duty-bound by the Constitution to do so. The amendments in question relate to the inclusion in Chapter 4 of provisions relating to preferential procurement.

6.2. Second, the Premier contends that the NA failed lawfully to discharge its obligation to facilitate public involvement, because it did not consider,

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or did not properly consider, all of the submissions solicited and received from the public, in relation to the 2023 Procurement Bill, despite the Premier's contention that the NA was duty-bound by the Constitution to do so.

7. A glaring irony which I am advised emerges from the contentions advanced by the Premier in this application is that the Premier – while he purports to raise complaints concerning Parliament's alleged breach of its constitutional duties to facilitate public involvement – is that, in launching his application before this Court, he simultaneously places himself in flagrant breach of his own constitutional duties. I am advised and submit that by launching his application in circumstances where he has failed in any way to engage any of the first to third respondents before doing so, the Premier has placed himself in breach of the explicit provisions of section 41 of the Constitution;
8. I am advised and shall submit that each of these two failures on the Premier's part are fatal to his application, with the result that this Court need not detain itself with a consideration of the application's merits.
9. Notwithstanding these fatal infirmities, I shall address the merits of the application, out of caution. In summary, Parliament submits that the grounds the Premier advances in his attempt to justify the relief sought have no merit, for three reasons:
  - 9.1. First, the suggestion 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.

9.2. 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).

9.2.1. 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.

9.2.2. The content of Chapter 4 of the Procurement Act is substantially similar to the content of the regulations under the PPPFA. The manner in which preferential procurement is now regulated had therefore already been through a comprehensive consultation process.

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9.2.3. 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.

9.2.4. 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), all the applicable requirements of the Constitution and of international law were met or exceeded.

9.2.5. 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 Premier's challenge to the validity of the Procurement Act carries no force.

9.3. Third:

9.3.1. 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

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public does not support the Premier'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.

9.3.2. What this Court has held is 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 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. I am advised in the circumstances that the Premier'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:

10.1. I firstly set out an overview of the Procurement Act and its intended objectives.

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- 10.2. 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.
- 10.3. I then set out the legislative procedure which was followed, in fact, in enacting the Procurement Act.
- 10.4. 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.
- 10.5. Next, I address the challenge regarding the introduction of the preferential procurement provisions, and I explain why I am advised that it lacks merit.
- 10.6. In the following section, I explain why the Premier's challenge regarding the consideration of comments received is equally without merit.
- 10.7. In the penultimate section of this affidavit, I list the responses to the Premier's 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).
- 10.8. In the final section, I address the issue of condonation for the late filing of this affidavit.

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11. I am advised that this affidavit will be filed together with a confirmatory affidavit deposed to by 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.

#### **PRELIMINARY POINTS: FATAL NON-COMPLIANCE WITH THE CONSTITUTION**

12. In his application, the Premier has cited the following three respondents, in the following terms:
- 12.1. At paragraph 9 of the founding affidavit, “*the Speaker of the NA*” is cited as the first respondent. She is cited “*in her official capacity as the senior parliamentary official responsible for the business of the NA and the passing of legislation in the NA*”
- 12.2. At paragraph 10 of the founding affidavit, the “*Chairperson of the [NCOP]*” is cited as the second respondent. She is cited “*in her official capacity as the senior parliamentary official responsible for the business of the NCOP and the passing of legislation in the NCOP*”.
- 12.3. At paragraph 11 of the founding affidavit, the Minister is cited as the third respondent. He is cited “*in his capacity as the member of the*

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*national executive who is responsible for financial matters and who is responsible for the implementation of the Procurement Act”.*

13. Each of the respondents in this application has therefore been cited in their official capacity, as the organ of state responsible for the discharge of constitutional obligations.
14. As a matter of pleading, and, also, as a matter of substantive law, I am advised and submit that the Premier must meet the requirements of Chapter 3 of the Constitution, failing which, this Court need not detain itself with the merits of his application:

14.1. 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).

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

*[a]ll 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; ... co-ordinating their actions and legislation with one*

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*another; ... adhering to agreed procedures; and ... avoiding legal proceedings against one another.*

(Emphasis added).

14.3. 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).

14.4. I am advised and submit that the legal status of each of the parties to this application meets the requirements for the application of Chapter 3 of the Constitution. Moreover, I am advised and submit that the Premier does not adequately plead, and, accordingly, cannot meet, any of the requirements I have set out immediately above.

15. For these reasons, I am advised and submit that the Premier's failures to meet the requirements of Chapter 3 of the Constitution are fatal to his application for relief. These failures are sufficient for this Court to dismiss the Premier's application, without reaching its merits.

16. I address the merits of the application in the following sections of this affidavit below, out of caution.

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## OVERVIEW OF THE PROCUREMENT ACT AND ITS OBJECTIVES

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

17.1. 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.*

17.2. 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*”.

17.3. Section 217 of the Constitution, which provides that:

(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 good 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.*

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(3) *National legislation must provide a framework within which the policy referred to in subsection (2) must be implemented.*

17.4. 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.*

17.5. 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:

17.5.1. A high standard of professional ethics;

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

17.5.3. Development-orientation, accountability and transparency.

17.6. Section 237 of the Constitution, which requires that “[a]ll constitutional obligations must be performed diligently and without delay”.

18. 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.

19. This fragmentation created risks of inconsistency between different statutory provisions and confusion among those bound by them, as well as the possibility



that certain aspects of procurement would fall between the proverbial cracks and remain unregulated, undermining the Constitution's imperatives.

20. 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:

20.1. 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

20.2. To determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution.

21. The Procurement Act seeks to achieve these objectives through, *inter alia* –

21.1. The establishment of a central Public Procurement Office within the National Treasury and its functions (sections 4 and 5);

21.2. Clarity as to the functions of the provincial treasuries and procuring institutions (sections 6, 7 and 8);

21.3. Measures to preserve the integrity of the procurement process (sections 9 to 15);

21.4. A framework for preferential procurement (sections 16 to 23);



- 21.5. General requirements applicable to the procurement of goods and services by organs of state (sections 24 to 34);
- 21.6. Mechanisms for dispute resolution (sections 35 to 53); and
- 21.7. Delegation of power to the Minister to make regulations, including regulations as to different methods of procurement and requirements for specific types of procurement in particular circumstances (section 63).
22. The functions of the Public Procurement Office as set out in section 5 of the Procurement Act are as follows:
- (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 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.*
23. One aspect of the Procurement Act that has attracted substantial attention (and is the subject of one of the Premier's challenges to the Procurement Act) is Chapter 4, which regulates preferential procurement through, *inter alia*, the following measures:



- 23.1. The setting aside of bids for prescribed categories of persons in accordance with targets prescribed by the Minister (section 17);
  - 23.2. 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);
  - 23.3. Mandatory sub-contracting of a prescribed portion of a bid to identified persons or categories of persons (section 19);
  - 23.4. The designation of particular sectors for local production and content (section 20); and
  - 23.5. 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).
24. The scheme of Chapter 4 is such that these provisions will be implemented in a staggered manner. In this regard:
- 24.1. 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.

24.2. 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 transformation 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 on two levels:

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

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

24.3. 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.

25. 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.

26. 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-*

*(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-*

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- (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.*

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

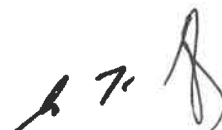
## **THE SCOPE OF THIS COURT'S POWERS TO PRONOUNCE ON PUBLIC PARTICIPATION**

28. That Parliament bears a duty to facilitate public involvement is not disputed:

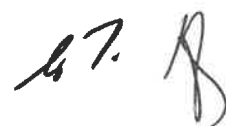
28.1. Section 59(1)(a) of the Constitution provides that the NA must "*facilitate public involvement in the legislative and other processes of the Assembly and its committees*".

28.2. 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.

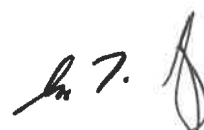
29. However, while the Constitution imposes these obligations on Parliament, it does not prescribe the method of public involvement in the law-making process. I am advised that this Court has held that the choice not to do so was deliberate: the doctrine of separation of powers requires Parliament and 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.
30. 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.
31. 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.
32. I am advised that the following factors are relevant in making this determination:
- 32.1. The nature and importance of the legislation and the intensity of its impact;

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- 32.2. Practical considerations such as time, expense and the efficiency of the law-making process; and
- 32.3. What Parliament itself considers to be adequate public involvement.
33. Moreover:
- 33.1. 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.
- 33.2. 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.
34. 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:
- 34.1. The need for a unified public procurement process was identified as far back as 2014, and stakeholders including National Treasury have since that date been debating and discussing what that legal framework should be.

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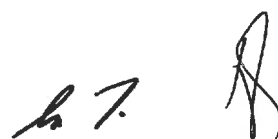
- 34.2. During this process, there was extensive engagement with organs of state at all levels of government as well as experts in the field of, *inter alia*, finance and procurement.
- 34.3. There was a general election held in 2024, as a consequence of which the Parliament that had been constituted 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 be 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.
- 34.4. 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.

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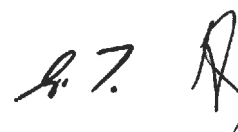
- 34.5. Chapter 4 and the preferential procurement measures contained therein are not new concepts introduced for the first time in the Public Procurement Bill. The preferential procurement provisions contained in Chapter 4 are conceptually similar to those contained in the regulations under the PPPFA, 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 received.
35. 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 or exceeds the threshold of reasonableness.

#### **THE LEGISLATIVE PROCEDURE FOLLOWED IN ENACTING THE PROCUREMENT ACT**

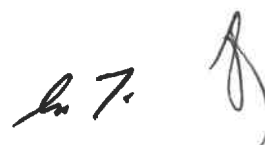
36. On 10 May 2023, and as per annexure “**AA1**” hereto, Cabinet approved the Public Procurement Bill for introduction in Parliament. It was introduced in Parliament on 30 June 2023, as per the Announcement, Tabling and Committee Report attached as annexure “**AA2**”.
37. The nature of the Bill was such that the consultation process in the NA would be run by the Standing Committee.



38. National Treasury provided an informal briefing to the Standing Committee on 23 May 2023, followed by a formal briefing on 5 September 2023. The minutes of the formal briefing session are attached as “AA3”.
39. In the intervening period, a call for public comments was issued in all the official languages in both print media and Parliament’s website on 18 August 2023. Copies of these publications are attached as “AA4” and “AA5”. 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.
40. 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.*
- (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.*

41. 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 “AA6” and “AA7”. 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.
42. 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.
43. 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 “AA8”.

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44. 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 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.
45. 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 "**AA9**".
46. 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 "**AA10**". The list was informed by the submissions received from members of the public, as well as the Standing Committee's own consequential deliberations. This resulted in the provisions in Chapter 4.
47. The Standing Committee then met again on 1 and 4 December 2023 to adopt its report. Minutes of the relevant meetings are attached as "**AA11**" and "**AA12**". The Standing Committee's report, adopted on 4 December 2023, is attached as "**AA13**". Notably, its comments and recommendations in respect of the preferential procurement provisions were as follows:

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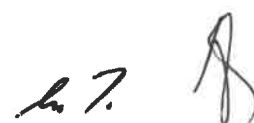
5.14 *The inclusion of a preferential procurement framework aligns with constitutional provisions found in section 217 and aims to address the persistent historical economic disparities. The chapter on preferential procurement triggered substantial feedback, resulting in comprehensive revisions. It also 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).

48. 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 “AA14”.
49. 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.
50. Upon receipt of the Bill from the NA, the Select Committee invited the provincial Select 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 “AA15”.
51. As per the Select Committee’s report adopted on 7 May 2024, a copy of which is attached as “AA16”, the Select Committee held public hearings on

- 23 February 2024 and received a total of 33 submissions, including 12 oral submissions and 21 written submissions.
52. The National Treasury responded to these submissions at a meeting held on 19 March 2024, and stakeholders were in turn afforded an opportunity to reply to the National Treasury's responses. A copy of the minutes of this meeting is attached as "**AA17**". The National Treasury's report on this process is attached as "**AA18**".
53. 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 accordingly held further stakeholder meetings between 8 and 10 April 2024, and the National Treasury reported on these to the Select Committee on 17 April 2024. A copy of the minutes of that meeting is attached as "**AA19**".
54. On 23, 25 and 26 April 2024 the Select Committee considered the public submissions received and responses from National Treasury. Copies of the minutes of these meetings are attached as "**AA20**" to "**AA22**" respectively.
55. The Select Committee's permanent delegates briefed their respective Committees of the provincial legislatures on the Bill between February and April 2024. The Select Committee discussed the provincial negotiating mandates on 30 April 2024 and on 2 May 2024, the Select Committee convened to deliberate on the Bill, clause-by-clause. Copies of the minutes of these meetings are attached as "**AA23**" and "**AA24**" respectively. Copies of the provinces'

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negotiating mandates are attached as “**AA25**”, and the final mandates are attached as “**AA26**”.

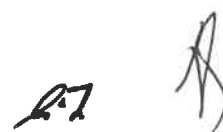
56. On 7 May 2024, the Select Committee adopted its report.
57. Significantly, given the depth and scope of the issues raised, the Select Committee applied for and was granted an extension of time for the processing of the Procurement Bill beyond the usual eight-week cycle to process Bills. It was thus afforded an additional five to six weeks for its deliberations.
58. 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.
59. The outcome of that process was that the Bill received the support of all provinces other than the Western Cape. A copy of the C-version of the Bill adopted by the NCOP is attached as “**AA27**”.
60. 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 “**AA28**”, indicates that the Standing Committee was satisfied with the C-version of the Bill. The amendments set out in the C-version of the Bill were incorporated into the D-version (annexure “**AA29**”), 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.

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61. The President subsequently assented to the Bill and published the Procurement Act in the Government Gazette on 23 July 2024, as per the attached media statement marked “AA30”.

## CURRENT STATUS OF THE PROCUREMENT ACT AND REGULATIONS

62. 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.
63. 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 “AA31”. In it, the Minister confirmed that the draft regulations will be ready for inter-governmental consultation by the end of August 2025.
64. 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 terms of section 63(4) of the Procurement Act.
65. 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

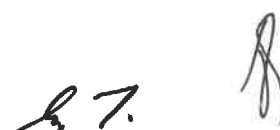


with the commencement of the regulations. This will likely occur in the first quarter of the 2026/27 financial year.

66. 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 be persuaded by the merits of the application. I am advised in this regard that, should the need arise, this issue will be addressed in argument.

#### **RELEVANT PREFERENTIAL PROCUREMENT PROVISIONS**

67. The Premier 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 did not invite further submissions from members of the public.
68. 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 43 above. I am advised and submit, however, that, in terms of section 59(1)(a) of the Constitution (being the provision on which the Premier seeks to place reliance), no new public comment process was required.
69. The revised draft of Chapter 4 did not contain any concepts or preferential procurement measures that had not already been foreshadowed. On the

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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 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 received from stakeholders that this was necessary in order to meaningfully advance the objectives of transformation and empowerment.

70. 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:


70.1. Set-asides (clause 17(2)(c)(i));

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

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

71. 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.

72. 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 “AA32”. 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

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

73. 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.



74. Chapter 4 is further conceptually similar to the regulations 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 “**AA33**”. They made provision for –

74.1. Pre-qualification criteria to advance certain designated groups (regulation 4);

74.2. Mandatory sub-contracting (regulation 9); and

74.3. Local production and content (regulation 8).

75. 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).



76. 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 Premier's challenge fatally ignores (among other things) the extensive consultation on the substance of Chapter 4 which was followed through other legitimate avenues.

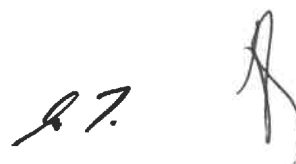
### **CONSIDERATION OF THE PUBLIC COMMENTS RECEIVED**

77. In support of the assertion that the NA did not see to it that all public comments were considered as part of the legislative process, the Premier relies on isolated comments made during the legislative process, which comments have been taken out of context.

78. While the Premier is correct in the assertion that it was not practical to provide detailed responses to each individual stakeholder's comments, the suggestion that certain stakeholders or certain comments were simply ignored as a result is incorrect.

79. 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.

80. This is reflected in annexure "FA8" to the founding affidavit, in which the following is recorded:

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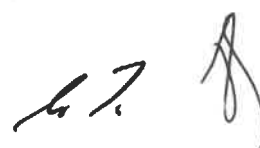
*A total of 112 Stakeholders submitted approximately a total of 2200 excel rows of comments classified from chapter 1 to 7, including general comments. Due to time constraints, we could not complete responding to all comments received, however, we were able to consider the principal concerns including 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).

81. 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.
82. 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 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.

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83. I am advised that it is important to highlight that, although the Premier alleges (at paragraph 43 of the founding affidavit) that the submission by the Western Cape government was effectively ignored, the founding affidavit contains no particularity as to specific issues identified by the Western Cape government to which the Premier contends that the National Treasury unlawfully failed to respond. I reiterate that the primary issues raised by stakeholders, including by the Western Cape government, were all considered and addressed in line with the relevant provisions of the Constitution. In accordance with trite principles concerning disputes of fact in motion proceedings, I am advised and submit that Parliament's allegations stand to be accepted, and the Premier's allegations to the contrary fall to be rejected.
84. It also bears emphasizing that 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. The failure to amend draft legislation in line with comments submitted by members of the public therefore does not support the conclusion that stakeholders did not have an adequate opportunity to submit their comments.
85. 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.

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**PARAGRAPH-BY-PARAGRAPH RESPONSES**

86. 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 where it is inconsistent with what is stated elsewhere in this affidavit or in the affidavit deposed to on behalf of the first and fourth respondents, that allegation is denied.

**Ad paras 1 – 2**

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

**Ad paras 3 – 4**

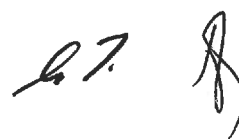
88. I do not deny the stated purpose of the application or the purported grounds on which the applicant relies. For the reasons set out above, I deny that there is merit to any of these grounds.

**Ad para 5**

89. I admit that the Procurement Act has not yet been brought into effect. I also admit that there will be a thorough consultation process before the regulations are promulgated. Until such time as the Procurement Act and the regulations are brought into effect, the PPPFA and the regulations in terms thereof will remain in force.

**Ad para 6 – 13**

90. In the paragraphs under reply, the Premier, among other things, sets out the purported reasons why he has elected to cite the parties to this application

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which he has elected to cite. What the Premier fails to do is to explain why he should be exempted from the requirements of Chapter 3 of the Constitution.

91. I reiterate my prior submissions that the application does not leave the proverbial gate, due to the Premier's non-compliance with the latter constitutional and statutory provisions.

92. Save as aforesaid, I admit the content of these paragraphs.

**Ad paras 14 – 17**

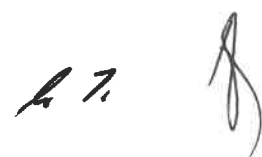
93. The content of these paragraphs is admitted.

**Ad paras 18 – 21**

94. As I have addressed above, one of the main objectives of the Procurement Act is to do away with the fragmented regulation of public procurement and the resultant risks associated with this. The Procurement Act provides a single cohesive framework for the procurement of goods and services across the public sector.

**Ad paras 22 – 26**

95. I have addressed the nature of the obligation to facilitate public involvement above. Ultimately, the question is whether Parliament acted reasonably in facilitating public involvement in its legislative processes. I am advised that this will be addressed further in due course, or, to the extent that it is legally permissible to do so, they will be addressed in argument.



**Ad para 27**

96. For the reasons set out above, I deny that Parliament failed to discharge its constitutional obligations in the process leading up to the enactment of the Procurement Act.

**Ad paras 28 – 32**

97. The content of these paragraphs is admitted.

**Ad para 33**

98. The content of this paragraph is admitted. As I have stated above, however, the Chairperson of the Standing Committee took a decision that further written submissions from stakeholders would be permitted.



**Ad paras 34 – 57**

99. I deny that the new Chapter 4 introduced material changes that had not previously been canvassed in any way.

100. I further deny that National Treasury failed to consider the vast majority of the comments received. As I have addressed above, the National Treasury considered and responded to the principal concerns raised by stakeholders. This is evident, *inter alia*, from amendments made to the 2023 Procurement Bill following the receipt of public comments. This includes amendments to the provisions governing preferential procurement.

**Ad paras 58 – 67**

101. For the reasons set out above, I deny that clause 17 of the 2023 Procurement Bill was replaced wholesale by Chapter 4 of the Procurement Act, or that there were material changes warranting a further public comment process.



**Ad para 68**

102. To the extent that the Premier suggests that any amendment that is not merely semantic, grammatical or technical, is to be considered as material, this is denied. Materiality, I am advised and submit, is to be considered on the specific facts of each case and will, in some circumstances, exclude certain amendments that are not "*merely semantic, grammatical or technical*".

103. I further deny, for the reasons set out above, that Chapter 4 introduced a "*completely new ball game*".

**Ad paras 69 – 70**

104. I acknowledge that there was no further public participation process following the amendments to the 2023 Procurement Bill. I deny, for the reasons set out further above, that any additional public participation was necessary.

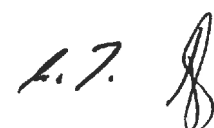
**Ad paras 71 – 74**

105. I admit that when the NCOP sent the Bill back to the NA, the NA did not provide a further opportunity for public participation. The reason for this is that the Constitution does not make provision for this, nor does it require it.

106. Section 76 of the Constitution provides that once the NCOP refers an amended Bill back to the NA, the NA may only –

106.1. Pass the amended Bill and refer it to the President for assent in terms of section 76(1)(c) of the Constitution; or

106.2. Reject the amended Bill, in which case it will be referred to the Mediation Committee in terms of section 76(1)(d) of the Constitution.



107. There is no provision or requirement in the Constitution for the NA at that stage to invite further submissions from members of the public and/or make any further amendments to the Bill.

**Ad para 75**

108. The content of this paragraph is denied for the reasons set out above.

**Ad paras 76 – 79**

109. The content of these paragraphs is denied. I submit, for the reasons set out above, that the NA discharged its constitutional obligation to ensure that stakeholders were afforded an adequate opportunity to submit their comments.

110. I therefore deny the assertion that the Procurement Act is unconstitutional and invalid.

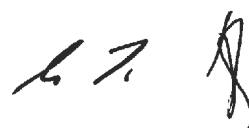
**Ad para 80**

111. The content of this paragraph is admitted.

**Ad paras 81 – 85**

112. I have addressed above the assertion that the NA and National Treasury did not consider all of the submissions received from members of the public, and I have explained why I respectfully submit that the assertion should be rejected by this Court.

113. In particular, I have demonstrated that all of the primary issues arising from those submissions were indeed considered in a lawful manner (i.e., with a willingness on the part of the lawmaker to change its mind). So much so that,



where appropriate, the submissions were incorporated as amendments to the 2023 Procurement Bill.

114. The content of these paragraphs is accordingly denied.

**Ad paras 86 – 94**

115. I have addressed above the current status of the Procurement Act and the draft regulations to be promulgated in terms thereof. It is anticipated that the Procurement Act will come into operation in the first quarter of the 2026/27 financial year. The consultation process in respect of the draft regulations is ongoing.

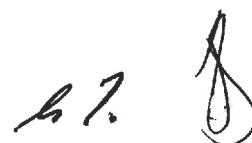
**Ad paras 95 – 97**

116. I deny that the Procurement Act is "*patently unconstitutional and invalid*" as alleged.

117. I confirm that Parliament will abide by any directions issued by the Court in relation to the hearing of this application, should be Court see fit to set the matter down for hearing. I am advised that, depending on the date of the hearing of the application (if any), the question of remedy, and particularly whether any order of invalidity ought to be suspended, will be addressed in argument.

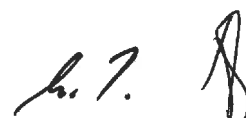
**Ad para 98**

118. For the reasons set out above, I deny that the applicant has made out a case for the relief sought.

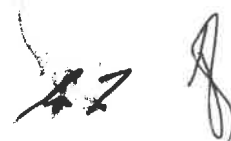
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## CONDONATION

119. 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. This affidavit will be filed two court days later, on 12 August 2025. I express my sincere apologies to the Court and to the Premier 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 Premier, but was rather caused by the circumstances outlined below.
120. 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:
- 120.1. The extent of the delay;
- 120.2. The reasons for the delay;
- 120.3. Any prejudice arising from the delay; and
- 120.4. The respondents' prospects of success in the main application.
121. I submit that a consideration of these factors favours condonation being granted.

A handwritten signature in black ink, appearing to be 'A. P.' followed by a stylized flourish.

122. In addition to this application, in which the Premier challenges the constitutional validity of the Procurement Act, Solidarity has approached the High Court with a similar challenge to the Procurement Act, on both substantive and procedural grounds. The answering affidavits in Solidarity's application have been delivered, following comprehensive consultation with the respondents' legal representatives to enable full instructions to be taken. The State Attorney briefed three Counsel for this purpose.
123. Given the substantial overlap in the issues raised in this application and Solidarity's application, it was decided that the respondents would brief the same Counsel in both matters.
124. At the time that the State Attorney approached Counsel to ascertain their availability for these proceedings, all three Counsel agreed to act for the respondents in this application, on condition that their outstanding invoices in respect of the Solidarity matter, the payment of which was overdue, be settled. It was agreed that they would commence drafting the application upon receipt of their overdue fees.
125. While the fees owed to two of the Counsel were settled at the beginning of July 2025, an unexpected issue arose in respect of the third Counsel's fees. In particular, the Office of the State Attorney had used the incorrect bank account details, with the result that the payment was not successful. I refer to the confirmatory affidavit of Ms Colleen Bailey, who is the respondents' attorney of record in these proceedings.

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126. When Ms Bailey identified the reason for the delay, she liaised with Counsel and with her office to expedite payment. The outstanding fees were reflected in Counsel's bank account on 30 July 2025.
127. Upon receipt of payment, Counsel immediately attended to the drafting of the answering affidavit for input from the other members of the Counsel team. The delay in the commencement of this process unfortunately caused a delay in the finalisation of the answering affidavit for signature.
128. While the Counsel team did their utmost to finalise the answering affidavit before the deadline of 8 August 2025, this was unfortunately not possible in the very limited time available. As a result, this affidavit has been filed two Court days out of time.
129. I submit that the Premier 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.
130. On the other hand, if condonation is refused, Parliament would not be able to put its case before the Court, despite the substantial impact that any relief granted by this Court may have.

*Ms. T.*



131. In addition, a refusal of condonation would not only cause prejudice to Parliament, but it would also have a negative impact on the Court's ability to assess the process followed by Parliament 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.

132. I further submit, for the reasons set out above, that Parliament has good prospects of success in opposing the application.

133. Arising from the above, I submit that Parliament has 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 and second respondents pray for an order dismissing the application with costs, including the costs of three counsel.

*A. T. [Signature]*  
DEPONENT

SIGNED AND SWORN TO BEFORE ME AT *Cape Town* ON THIS *12* DAY OF *August* 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, COMPLYING WITH THE OATH, HAVING BEEN COMPLIED WITH.

**SOUTH AFRICAN POLICE SERVICE**  
UNIT COMMANDER PARLIAMENT  
PROTECTION AND SECURITY SERVICES  
WESTERN CAPE  
  
2025 -08- 12  
  
PRIVATE BAG X1 STALPLEIN 8015  
CAPE TOWN  
**SOUTH AFRICAN POLICE SERVICE**

*[Signature]*  
*02141832.5*  
*JWS Smuts*  
COMMISSIONER OF OATHS

<b>SOUTH AFRICAN POLICE SERVICE</b>
UNIT COMMANDER PARLIAMENT PROTECTION AND SECURITY SERVICES WESTERN CAPE
2025 -08- 12
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<b>SOUTH AFRICAN POLICE SERVICE</b>

CAPACITY: *Warrant Officer*  
FULL NAMES: *James Wilkie Steyn Smuts*  
PHYSICAL ADDRESS: *Good Hope Building  
Cape Town*

*8 h 7*